Unenumerated Rights Under Popular Constitutionalism

UNENUMERATED RIGHTS UNDER POPULAR CONSTITUTIONALISM

Frank I. Michelman[*]

I. INTRODUCTION

A. Popular Constitutionalism

In a world of popular constitutionalism, would it occur to anyone to notice or to mention any difference between enumerated and unenumerated constitutional rights? Would the distinction matter in any way, to anyone? If so, to whom, how, and why? That is my question.

A world of popular constitutionalism is not, as I conceive it, a world void of constitutional rights. (If it were, my question would be moot.) In the world I have in mind and ask you to envision, there is no lack of commitment to a constitutional law that imposes limits and requirements on political actors, some of them correlating with rights held by individuals and groups. To the contrary, this is a world where claims of constitutional rights are taken seriously and are widely believed to make a difference, sometimes, both for what public officials decide to do and for how citizens respond to what they do. What distinguishes this world from our world is that the claiming takes place outside the courts, in venues to which the people at large have as full and continuous an access as our system of representative government ever affords. In a world of popular constitutionalism, constitutional-rights talk is a fixture in the political culture, but with no expectation that courts will set aside, ignore, or nullify procedurally regular legislative enactments, or other acts of government, on grounds of substantive unconstitutionality. In this world, there are (at any rate, there can be) constitutional rights but there is no sign of government by judiciary.

It is controversial—needless to say—whether such a combination makes much practical sense or will work to a country's advantage, moral or prudential. (Some may deny that it is even conceptually vi-

[*] Robert Walmsley University Professor, Harvard University. I am indebted for excellent comments—including some to which I could not do justice within the bounds of this article—to John Manning, to other participants in this Symposium, and to participants in the Constitutional Theory Conference held at the University of Pennsylvania Law School, April 7–8, 2006.

able.) Such controversy is beside the point of my undertaking here. I come neither to praise nor to bury popular constitutionalism; popular constitutionalism is not my target, it is my foil. I use the idea to help me stage an inquiry into a different debate, the one that breaks out from time to time over the category of unenumerated constitutional rights. I seek clarification of the stakes in that debate. Specifically, I want to know whether anything might be at stake beyond the separation-of-powers concerns that classically spring up when *courts* brandish unenumerated rights to justify their interventions into political affairs. My strategy is to sidetrack those concerns by assuming constitutional-rights talk in the absence of judicial review, and asking whether there then remains any imaginable reason for differentiating constitutional rights into "enumerated" and "unenumerated" classes, or for looking at one or the other class with a jaundiced eye. If we notice any such reason or reasons, using vision thus disencumbered of separation-of-powers worries, then those might still be real concerns after plugging judicial review back into the picture.

B. Which Debate?

I said my aim was to clarify the stakes in the "unenumerated rights" debate, but which debate is that exactly? As papers in this symposium make evident, talk of unenumerated rights can set off a number of different debates, and I need to specify which one of these I have in mind.

We can start with the "unwritten-constitution" debate, so to name it. Let us use "Constitution of the United States" as a proper name for a certain body of enacted laws that we all know how to identify (assuming any professed uncertainties about the 27th Amendment have by now been settled).[1] We can call this positive-legal object "CUS" for short. Then we can ask: Is CUS the only constitution Americans have, or do we also have alongside it an "unwritten" constitution, an additional body of norms to which anyone pressing or deciding a claim of constitutional right can properly have recourse? That is the unwritten-constitution debate, and it occurs on the terrains of analytical jurisprudence, moral theory, and legal sociology (to which his-

[1] *See* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 478–81 (2006) (describing and examining doubts regarding the Twenty-Seventh Amendment).

tory, obviously, is not irrelevant).[2] It is a question, at bottom, about the content of the rule of recognition in the American legal system.[3]

Then we have what I shall call the "correct-readings" debates. Suppose it is settled that CUS is the only constitution we have. CUS contains prohibitions against state-authored deprivations of life, liberty, and property without due process of law.[4] Are these prohibitions, or are they not, correctly taken to impose substantive limits on government?[5] And what of the Reconstruction era privileges-or-immunities clause[6] and the Ninth Amendment? They certainly are parts of CUS. Are they or are they not correctly read, separately or together, to incorporate by reference a substantive content comparable to what some authorities might attribute to an unwritten constitution?[7] Those are the correct-readings debates. They occur on the terrain of dispute over modes of exegesis for CUS and possibly also, depending on what mode one endorses, on the terrains of history and moral theory.

The unenumerated-rights debate that I have in mind is distinct from both the unwritten-constitution and the correct-readings debates. Appeals to unenumerated constitutional rights instigate a further debate, which resolutions of the others do not resolve. To see this, all you need do is assume—and as someone tuned in to American constitutional-legal discourse you will not find this a mind-stretching assumption—that CUS is indeed the only constitution we have, but also that the Due Process Clauses do throw some sort of protective mantle around people's interests in life, liberty, and property, of a kind that does impose substantive restraints on legislative and other governmental choices. The unenumerated-rights debate that I am trying to isolate for inspection is the one that arises even after those propositions are taken for granted, as of course they simply are in everyday American legal thought and practice.

The routine assumption of lawyers is that if (contrary to fact) CUS contained no substantive limits on government, then (contrary to fact) no finding of a substantive constitutional right could competently be made. (Try getting confirmed for a federal judgeship while

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[2] Contributions to the debate include Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107 (1989); and Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

[3] *See generally* Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621 (1987) (considering how closely the Constitution of the United States fits the notion of a rule of recognition in the jurisprudential theory of H.L.A. Hart).

[4] *See* U.S. CONST. amend. V; *id.* amend. XIV, § 1.

[5] *See, e.g.*, James W. Ely, Jr., *"To pursue any lawful trade or avocation": The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. PA. J. CONST. L. 917 (2006).

[6] *See* U.S. CONST. amend. XIV, § 1.

[7] *See, e.g.*, Randy Barnett, *Who's Afraid of Unenumerated Rights?*, 9 U. PA. J. CONST. L. 1 (2006).

denying that every competent finding in favor of someone's claim to a constitutional right has to be connected by some form of reasoning and inference to what can be read in CUS!) And yet the discourse also routinely sorts established, substantive constitutional rights into categories of "enumerated" and "unenumerated." And now we are on the verge of the key observation, the one that makes this matter into a *debate*, to wit: The class of rights stamped "unenumerated" definitely, as John Orth says,[8] bears a stigma in relation to the other class. In other words, debate persists over the propriety of claiming and finding inside CUS a set of rights that are not enumerated therein. It is that debate which occupies this article.

C. The Course of the Argument

But then what, after all, are we talking about? What could people be getting at—what worry or bias could they be venting, what itch could they be scratching—with talk about rights claimed and found *inside* a written constitution, which that constitution does not "enumerate?" To make the question more concrete: In what way that gets under people's skin is the liberty right in *Moore v. East Cleveland*[9] less enumerated than the speech right in *Texas v. Johnson*?[10]

My response comes in two parts, the first of which—found in Part II—is the easier to get across, and also provides the take-off point for my query about what becomes of our categories in a world of popular constitutionalism. Briefly, my suggestion is that this way of talking—"enumerated"/"unenumerated"—is one that arises specifically within a set of beliefs about the proper place and role of an independent

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[8] *See* John V. Orth, *The Enumeration of Rights: "Let Me Count the Ways,"* 9 U. PA. J. CONST. L. 281 (2006).

[9] 431 U.S. 494 (1977) (finding—roughly—in favor of a claimed constitutional right of freedom to provide in one's residence a home for members of one's extended family).

[10] 491 U.S. 397 (1989) (finding in favor of a claimed constitutional right not to be punished or otherwise sanctioned or burdened for burning an American flag (which one owns) as an act of political expression); *see* RONALD DWORKIN, LIFE'S DOMINION 130–31 (1993) (making use of *Texas* to show that "no fact about the correct use of language can explain the supposed distinction between enumerated and unenumerated constitutional rights").

Note that the question does not disappear when one observes that the holding in *Texas* is based not on some stretching of the term "speech" beyond its core signification to make it cover acts of flag-burning, but rather on a constructive theory of the meaning and purpose of the free speech guarantee. That observation surely is correct. The question, though, is the one that arises when we observe that the holding in *Moore* is no less (and no more!) obviously based on a constructive theory of the meaning and purpose of the liberty guarantee, and not on any simple claim that the term "liberty" just happens to "cover" what Inez Moore was doing. That being plainly the case, why do we blithely call the *Texas* right "enumerated" and the *Moore* right "unenumerated?" *That* is the question I am after. In posing that question, it seems germane to point out—as I do, *see infra* text accompanying notes 32–35—that if the relative absence of a need-to-stretch *were* to be taken as the measure of what does and does not deserve the accolade "enumerated," the *Texas/Moore* pair would be inexplicable. *See* DWORKIN, *supra*.

judiciary in a constitutional democracy. It is a peculiarly American way of talking, and it seems plainly connected to worries about judicial review. Evidently, we are prone to feel that courts are on thinner ice when they find in favor of claims to rights that fall in the "unenumerated" class. My speculation here accords with suggestions raised by essays in this symposium that the "unenumerated" card gets played when some ideological contender feels able by doing so to stir up doubts about the propriety of some contested line of intervention by the Supreme Court into the conduct of public affairs.[11] If so, then it is natural to ask, as I do, whether the notion of unenumerated constitutional rights would register at all in a world in which no court dreams of intervening on behalf of constitutional rights, enumerated or not.

But still we evade the puzzle about what we are talking about when we talk of unenumerated constitutional rights. To say we Americans are prone to feeling uneasy about judicial findings of unenumerated constitutional rights is not even to begin to explain what we think differentiates enumerated from unenumerated, when everyone starts from the premise that all possible constitutional rights are rights that can be read out of CUS by some allowable process of reading. I tackle that puzzle in Part III. I start by connecting the popularity of the distinction to the fact, as I take it to be, that few of us stand at all times safely beyond the reach and the tug of a set of ideas about legality that I call "minimal legal formalism"—roughly, the ideas that legal judgments (just in order to be *legal* ones) are judgments controlled by laws laid down in advance of those judgments, and that those laws exert their control over legal judgments by saying what they say and not saying something different.

But that only sharpens the challenge of explaining how any cognizable American constitutional rights can be other than enumerated. How can a finding in favor of a claimed constitutional right be read out of CUS without a finding that CUS says the right exists? And how can CUS say any such thing without enumerating the right? Keeping *Moore* and *Texas* as my examples, and taking a cue from John Hart Ely,[12] I ask: In what way does the First Amendment's speech clause "mark as special" a "value" encompassing flag-burning, in which the Fourteenth Amendment's liberty clause does not "mark as special" a "value" encompassing free choice of household formation?

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[11] *See* Ken I. Kersch, *Everything is Enumerated: The Developmental Past and Future of an Interpretive Problem*, 8 U. PA. J. CONST. L. 957 (2006); Mark Tushnet, *Can You Watch Unenumerated Rights Drift?*, 9 U. PA. J. CONST. L. 209 (2006).

[12] *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L. J. 920, 943 (1973) (suggesting that a court overturning a statute on constitutional grounds should be able to "defend its decision in terms of inferences from values the Constitution marks as special").

In response, I try in Part III to deduce what people who think there really is a difference here must think. They must think that there is a distinctively *legal* form of argument—a form of argument that is not *simply and merely political*, and is not *simply and merely philosophical* (because judges are not supposed to dictate on *merely* political grounds, or on *merely* philosophical grounds)[13]—which form of argument connects the First Amendment's "freedom of speech" locution to the flag-burning right but does not connect the Fourteenth Amendment's "liberty" locution to free choice in household formation.[14]

I call that presupposed form of argument "standard legal method." I make no claim to know concretely what that form of argument is or to be able to describe it. I neither affirm nor deny the existence or the possibility of this putative form of argument. I say only that anyone reporting a strong sense that there's a difference in the prima facie legitimacy or credibility of the judicial findings of the flag-burning right and the extended-family-living right, in terms of one's being enumerated and the other not, is presupposing the existence of this standard legal method.

I thus bring out a set of beliefs that I say must accompany talk about enumerated and unenumerated constitutional rights, of the kind that insinuates relative disparagement of the latter class. Thenceforward I accept these beliefs as given. Suppose—my query goes—that these are our beliefs (and to be honest I doubt that many of us are ever entirely free of them). In a world without judicial review—in a world of popular constitutionalism—would we, holding these beliefs, see anything problematic about claims to unenumerated constitutional rights, meaning rights that cannot be connected to CUS, through a finding of what CUS *says* when read correctly, by any distinguishably legal-not-merely-political form of argument?

I first cast the question in terms of concerns on behalf of democracy or government by the people. My answer, in Part IV, comes down to four propositions. *First*, if you mean by democracy what a follower of Alexander Bickel would mean, then there certainly can be constitutional rights that constrict democracy excessively, even in the

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[13] *See* Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1344 (2001) (distinguishing between the propositions that law is "political" and that law is "*mere* politics," and attributing normative significance to the distinction).

[14] Again I want to emphasize that I am not suggesting that the connection has to consist in broadening the reference of a term ("speech," "liberty") to make it cover non-core cases. The connection can just as well consist in application of a constructive theory of the respective purposes and meanings of the implicated clauses or, if you like, of the directly implicated clauses construed "structurally" or "intertextually" with the rest of CUS. *See generally* CHARLES L. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1986); Akhil Reed Amar, *Intertextualism*, 112 HARV. L. REV. 747 (1999).

absence of judicial review. However, *second*, on Bickel's conception of democracy, a division of constitutional rights between enumerated and unenumerated fails to correlate with a division between those constitutional rights that do, and those that do not, constrict democracy unduly. *Third*, if you mean by democracy what a follower of Bruce Ackerman would mean, then constitutional rights do not constrict democracy, assuming a certain condition is satisfied. But *fourth*, the condition is that unenumerated constitutional rights are inadmissible.

Finally, in Part V, I raise the question of how liberal contractarian theories of political justification and legitimacy would respond to the enumerated/unenumerated classification for constitutional rights in a world without judicial review. For that, I shall have to show first—and this is not hard—that liberal contractarian theories of legitimacy do not logically or conceptually exclude the possibility of dispensing with judicial review. I then go on to show that these theories must reject the idea of subdividing constitutional rights into enumerated and unenumerated classes, because—notwithstanding possible first appearances to the contrary—in the sight of these theories all constitutional rights are unenumerated. All are, and must be, outcroppings of something akin to the famous "rational continuum" of *Poe v. Ullman*.[15]

II. UNENUMERATED CONSTITUTIONAL RIGHTS, THE CONCEPT OF LAW, "*UBI IUS*," AND THE SEPARATION OF POWERS

A. Justiciability and Separation of Powers

A common worry about unenumerated constitutional rights—call this the Standard Worry—presupposes the institution of judicial review. It also presupposes attachment to the idea—a key component in what Robin West dubs "the legal question doctrine"—that to classify an obligation as one of law is *ipso facto* to make the obligation one to be enforced by the judiciary against noncomplying addressees.[16] By classing a claim as "constitutional" you also class it as "legal" and so willy-nilly make the independent judiciary responsible for its effectuation: *Ubi ius, ibi remedium.* And that means—this being, after all, a *constitutional* sort of a claim—that courts will be expected to effectuate the claim against electorally accountable, political branches of

[15] 367 U.S. 497, 523 (1961) (Harlan, J, dissenting).

[16] Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. 221 (2006); *see also* Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT'L J. CONST. L. 13, 19 (2003) (questioning the bond between constitutional guarantees and judicial enforcement).

government when the latter fail to comply sua sponte. But judicial oversight of the conduct of government by those branches, under cover of claims that are not certifiably authorized by identifiable, antecedently existent constitutional laws, strains or blurs a line between legal and political decision-making that is foundational for a constitutional democracy. Thus runs the Standard Worry about unenumerated constitutional rights. The term implies, as John Orth says, "an addition to the constitutional text without compliance with the amendment process" scripted in Article V.[17]

Of course, we have already noticed that even where no formally identifiable piece of constitutional law spells out *in haec verba* the existence of any right, say of freedom to burn a flag or to use contraception,[18] a court concluding in favor of such a constitutional right's existence may do so (or at any rate purport to do so) *not* by going outside the constitution viewed as law laid down ("CUS")—say, to an unwritten constitution—but rather by applying to that laid-down constitutional law some accepted-as-standard legal method ("SLM") for figuring out what formally recognized legal materials say. The method may be as fancy, as muscular, as deeply tinged by trans-textual factors as you like; as long as it is cognizable as SLM, the Standard Worry is beached. The judicial finding then is certifiably legal and thus not political in the sense of not required by law, for surely "law" encompasses the employment of SLM. And here, then, is what follows: the Standard Worry about *unenumerated* constitutional rights is—it must be—a worry about judicial findings of constitutional rights that do not or cannot claim the backing of an application of a commonly recognized SLM to words and sentences found in recognized constitutional laws. The central case—but it need not be the only one—occurs when the judicial finding floats completely free of any claim to have located in CUS any words or sentences that "mark" certain "values" as "special,"[19] whether taken one by one or combined into structures and relationships.[20]

B. Fighting "Ubi Ius"

Not everyone subscribes to the legal question doctrine or is caught within its grip. For anyone who does not and is not, talk of constitutional law and constitutional rights without judicial enforcement can make perfectly good sense.

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[17] Orth, *supra* note 8.

[18] *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (finding a right for married couples to use contraception within "the penumbra of specific guarantees of the Bill of Rights").

[19] Ely, *supra* note 12.

[20] *See* authorities cited *supra* note 14.

Suppose we have in mind a norm, *N*, to which we wish state officials to conform. Maybe, for some reason, we do not expect or wish our judiciary to get too much mixed up with enforcing compliance with *N*. (Anyone who has thought much about the question of including social and economic rights or guarantees in a constitution can easily fill in the blanks.)[21] Still, we may want to say that *N* is meant to be fully binding and obligatory on those state officials to whom it is addressed. Indeed we want to say *N* is binding in just the ways, and for just the reasons—whatever they may be—that laws in general are understood to be binding even at moments when they are not being externally enforced. Granted, no one can follow a law without interpreting it to determine the tenor of its application to the matter at hand. Granted, interpretive choices are often open to fair and reasonable disagreement. Granted, matters of the greatest moment may sometimes depend on which among two or more reasonably entertainable interpretations the interpreter may settle upon. Still, there is a vast difference between interpreting *N* and disregarding *N*. We want to say that addressees are not meant to have a free choice about heeding *N*, and furthermore that an addressee who simply flouts *N*, without special excuse or justification, is blamable for contempt *of law* in the same way that anyone who flouts the law is blamable. How can we say these things, if we cannot call *N* a law?

So we reject the view that a norm demanding respect for certain rights by state officials, including ordinary lawmakers—it would be, then, a norm of *constitutional* import—cannot count as *law* without its being turned over to judges for enforcement. We deny that constitutional law enforced by judges has to be all the constitutional law there is or that matters.[22] We maintain that constitutional law outside the courts can figure importantly in the conduct of public affairs. We insist that contention outside the courts over constitutional-legal meanings and obligations very possibly can be a politically cogent activity, a site for republican or democratic politics in action.[23] Is there any conceivable reason why anyone who takes this view should worry about allowing into the discourse a class of unenumerated constitutional rights, meaning rights whose existence cannot be warranted without resort to forms of argument that strike many or most as *not*

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[21] *See, e.g.*, Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 412–29 (1993) (reviewing reasons for "judicial underenforcement" of such rights by courts affirming their existence).

[22] Lawrence Sager has offered cogent reasons for taking such a position. *See id.* at 428–35 (reviewing reasons why it is best to "recognize that the Constitution extends beyond the reach of its judicial enforcement").

[23] *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

distinctly legal—where "legal" means not (simply or merely) political or philosophical?

C. *If "Ubi Ius" is Rejected?*

The Standard Worry evaporates under popular constitutionalism. To speak more strictly, it evaporates if we either discard judicial review—which means discarding the legal question doctrine, too, because the legal question doctrine says, in effect, that there can be no constitutional rights without judicial review[24]—or we discard the legal question doctrine while still, for reasons of expediency or of habit, retaining judicial review for some but maybe not all constitutional rights. Where judicial review is totally absent (or is as close to totally absent as the logic of adjudication within a legal system permits),[25] recognition of applicable constitutional rights can occur only in venues where politics is freely admissible—legislative chambers, including committee hearings and floor debates; executive offices and pronouncements, including veto messages;[26] election and ballot-question campaigns. No problem, then—or so it first appears—about claims of constitutional rights that can be supported only by forms of argument that admittedly are *not* distinctly legal-not-merely-political (or legal-not-merely-philosophical, etc.). Nor is there any such problem if we stick with relatively wide-bodied judicial review, but only for prudential reasons and not because we think that anything legal must be for the courts to enforce. Courts then could refrain from messing around with unenumerated constitutional rights, but legislatures, executives, and the voting public could conjure them to hearts' content without overstepping, stretching, or eroding any law/politics boundary.

Evaporation of the Standard Worry under popular constitutionalism does not mean there would remain no other ground for worry about unenumerated constitutional rights. We are going to turn soon to the question of what other sorts of worries might crop up. But first we need to spend some time trying to pin down exactly what lawyers have in mind when talking of a class of "unenumerated" constitutional rights to which—but *not* to a complementary class of "enumerated" constitutional rights—the Standard Worry attaches.

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[24] Any legal right begets judicial enforcement; constitutional rights are legal rights that bind ordinary lawmakers; judicial enforcement of a right against ordinary lawmakers is judicial review.

[25] *See* Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1107–09 (2003) (explaining why judicial review can never be completely avoidable).

[26] Setting aside the off-mainstream view that the veto power is not properly exercisable except in defense of the Constitution.

III. THE FORMAL STRUCTURE OF "UNENUMERATED CONSTITUTIONAL RIGHTS"

Anyone engaged in debate about unenumerated constitutional rights has somewhere in mind an idea about what sort of a thing a constitutional right is, and furthermore about how to tell which ones are enumerated and which are not. That is what I am after here: not what *I* think these things are (constitutional rights, unenumerated constitutional rights) but what I think those who look with suspicion on unenumerated constitutional rights routinely—perhaps necessarily—think they are. I offer no view about whether the conceptual analysis to follow holds water outside the confines of this particular field of debate.

We can safely start with this: An unenumerated constitutional right is a kind of constitutional right, and a constitutional right is a kind of legal right. A *legal* right is a right that would not exist, or be recognized to exist, but for the recognized existence of some body of law that warrants a finding of the right's existence. A *constitutional* right is a legal right that binds classes of actors, such as legislatures engaged in making ordinary laws, whom ordinary laws do not bind. Hence, all constitutional rights, including any that may be unenumerated, are rights that would not exist, or be recognized to exist, but for the recognized existence of a compendium of distinct and special (non-ordinary) laws called the constitution.

To that minimal extent, at least, talk about constitutional rights buys into legal formalism: We think that supporting a claim to a constitutional right means pointing to some extant compendium of laws distinguishable as the constitution, the existence of which is the contingency that somehow makes the difference between the claimed right's existence and non-existence—in favor of existence. If the right exists, it exists by virtue of whatever accounts for the constitution's existence as law and not otherwise. Non-existence is the default position for a claimed constitutional right, and it takes a constitutional law to overcome the default.

The very idea of constitutional rights routinely (I did not say necessarily) carries at least that baggage. And yet, as we have noticed, anyone who thinks in that minimally formalistic way about the category of constitutional rights will soon come to the following puzzle about "unenumerated" constitutional rights: How can the recognized existence of an extra-ordinary law—the constitution—act as the key to recognition of a right's existence, if that law does not "enumerate" that right? How can the constitution-as-law be what redeems the claimed constitutional right from limbo (the default), otherwise than by *saying* that the right exists? And how can the constitution-as-law do that without "enumerating" the right?

I believe that relatively disparaging talk about unenumerated constitutional rights can make everyday sense to lawyers only within a framework of thought that takes for granted all of the following:

(1) The constitutional rights of which we speak are legal rights of a special kind, recognition of which is, accordingly, always a matter for legal judgment. Thus, constitutional rights can exist only by force of the recognized existence of a special and distinct sort of law identified as a constitution or a constitutional law. That is because . . .

(2) All legal judgments—judgments regarding what is and is not lawful or according to law—result from applications of laws that exist apart from and antecedently to those judgments. The antecedently existing laws that thus govern legal judgments consist of words and sentences, at least in part. Laws exert at least some of their control over legal judgments by saying what they say and not saying something else. We can leave open whether laws (or some might prefer to say "law" or "the law") also have non-verbal or non-syntactical roots and ramifications that can sometimes connect them to legal judgments. Here I claim only that the notion of "unenumerated" (as opposed to "enumerated") constitutional rights cannot take wing without a presupposition that a possible—not to say the common or the normal—way for law to control legal judgments is for laws to say what they say and not something different. (Else all rights would be unenumerated, which would destroy our topic. Why talk about black crows when all the crows are black?)

(3) There is an identifiable, standard legal method ("SLM") for deciding what a given constitutional or other law does and does not say. The method may or may not be the same for constitutional laws as for other laws. Either way, there is an SLM for deciding whether a given constitutional law does or does not say that such-and-such a right exists, in a form that benefits or satisfies the claimant, given the facts at hand.

(4) Responsible deciders (e.g., judges) sometimes return findings of the existence of a constitutional right in the claimant's favor, which they premise on identified constitutional laws but which they detectably or confessedly do not reach by use of an applicable SLM as in (3).

(5) In our legal culture, it is arguable that such findings sometimes merit respect as lawful or according to law.

My claim is that the set of findings described in (4) is and must be equivalent to the set of findings concerning the existence of unenumerated constitutional rights. Why so? Just because every recognition of an *un*enumerated constitutional right is supposed to be at least a tad problematic, in some way common to that class but foreign to the complementary class of "enumerated" rights. As John Orth says, to draw the distinction is already to "delegitimize" claims of un-

enumerated rights.[27] Any first-time judicial finding of a right classed as unenumerated will instinctively be felt, by lawyers and other attentive Americans—recent academic assaults on textualism notwithstanding[28]—to be less initially entitled to presumptive respect than will a first-time judicial finding of an ostensibly enumerated constitutional right (to burn a flag, to spend without limit in political campaigns,[29] to have a Ten Commandments display removed from the courthouse walls[30]) that may meet comparably heated resistance in some quarters of society. (I write "first-time" and "initially" in order to allow for the acclimating effects of precedent-following and entrenchment over time.) And yet there can be nothing out-of-the-way about a court's use of SLM to find that an acknowledged constitutional law says that such-and-such a right exists in a claimant's favor. Whenever a judicial finding of a constitutional right's existence registers as in some degree irregular, that must be because we judge that the finding was not reached, or could not have been reached, by an application of SLM to a recognized constitutional law.[31] And since "unenumerated" always insinuates irregular in *some* degree (what other point does this usage have?), we can conclude that the set of findings of the existence of unenumerated constitutional rights is equivalent to the set of findings described in (4).

Take again the exemplary pair I mentioned before, *Texas v. Johnson*[32] and *Moore v. East Cleveland*.[33] A grandmother's freedom to make a home for the children of more than one of her children is *not* enumerated—so established usage indicates—by way of "liberty";[34] it is, if a constitutional right at all, an unenumerated one. By contrast,

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[27] *See* Orth, *supra* note 8.

[28] *See* Kersch, *supra* note 11.

[29] *See* Buckley v. Valeo, 424 U.S. 1 (1976) (holding expenditure limitations in a federal election statute unconstitutional under the First Amendment).

[30] *See* McCreary County v. ACLU of Kentucky, 125 S. Ct. 2722 (2005) (holding that certain displays of the Ten Commandments in courthouses violated the Establishment Clause because their purpose was to advance religion).

[31] Here I note that there are two ways in which we as observers might conclude that a judge or other authority has reached a finding in favor of a claimed constitutional right, but not by applying SLM to a recognized constitutional law. First, we might see the judge taking the view that not all constitutional rights (and maybe not any constitutional rights, and certainly not *this* constitutional right) owe their existence to what some identifiable piece of constitutional law says—SLM, remember, is a method for deciding what a given constitutional law or other law does or does not say. Second, the judge might have taken the view that a constitutional law *does* say the claimed right exists, while *we* take the view that use of SLM does not yield that conclusion.

[32] 491 U.S. 397 (1989).

[33] 431 U.S. 494 (1977).

[34] *See* U.S. CONST. amend. XIV, § 1. Yes, I know, debate still continues about whether the words of this clause set up any substantive guarantees at all, *see, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 15 (1980); however, that debate is beside the point of my inquiry here, *see supra* Part I.B.

freedom to burn a flag you own as an act of political protest *is* "enumerated" by way of "the freedom of speech."[35] How can these judgments be rendered mutually consistent? In what way does the First Amendment's speech clause "mark as special" a "value" encompassing flag-burning, in which the Fifth Amendment's liberty clause does not thus "mark" a "value" encompassing free choice in household formation? Whatever the answer, we see that "enumerated" status cannot be just a matter of the dictionary meanings of the words found in constitutional laws; surely one strains the dictionary meaning of "liberty" no more (not to say less!) by applying it to Inez Moore's assembly of her household than one strains the dictionary meaning of "speech" by applying it to Gregory Lee Johnson's pyrotechnics.

If the dictionary is not the answer to our question about how to render mutually consistent the thoughts that *Moore* is an instance of a judicial finding of an unenumerated constitutional right but *Texas* is not, what else might be? The answer is inevitable: SLM.

Calling the *Texas* right "enumerated" shows that SLM can be supple. Evidently, SLM leaves room for arguing by chains of inference from the scriptural words and sentences (again, singularly or in structural and relational combination) to conclusions about what has been said, including in those chains propositions about the settings and motivations of the scriptural utterance. Concretely, SLM accommodates the possibility of finding that a constitutional law *says* there is a right to burn flags although no constitutional law states *in haec verba* that people have rights to burn flags, nor does "speak" ("speech") normally suggest striking a match and setting some piece of matter aflame. (Compare "Eloquence may set fire to reason."[36]) What calling the *Moore* right "unenumerated" shows is that SLM is supple only up to a point. Remembering that SLM is an approved method for finding out what a constitutional law says, the two instances together show that an appearance of warranted reliance on SLM to defend a finding of a claimed constitutional right's existence is what makes that constitutional right register as "enumerated."

I feel your pain. Under the name of SLM, you say, I am positing some distinctly identifiable method for figuring out what constitutional laws say regarding the existence-or-not of claimed constitutional rights. I am positing, moreover, a method that *does* connect

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[35] *See* U.S. CONST. amend. I. I am generously overlooking the point that—for formalists, anyway—the technically operative key word "liberty" is the same in *Texas* as in *Griswold v. Connecticut*, 381 U.S. 479 (1965) (in the second sentence of Section 1 of the Fourteenth Amendment). *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (assuming that freedom of speech and press are among the "liberties" protected by the Due Process Clause of the Fourteenth Amendment).

[36] *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).

the "freedom of speech" locution in the First Amendment to a flag-burning right but *does not* connect the "liberty" locution in the Fourteenth Amendment to a freedom-to-form-your-own-household right. "What is this SLM?" you protest. "I can't recognize it. Describe it, please." That I cannot do. SLM is not anything that I can describe or you can recognize because it is not anything that is empirically identifiable. It is an abstraction, a place-holder, a parody of what some philosophers might call an idea of reason. *SLM is the notion we cannot do without when called on to explain pairs of "enumerated"/"unenumerated" judgments such as those in* Texas *and* Moore*, within the terms of a minimal legal formalism that conceives of every legal judgment as being controlled by what antecedently existent laws are found to say.*

If such an empty idea of SLM makes you queasy, we could try putting the matter this way: SLM, a method for figuring out what a formally recognized constitutional law says, is a highly contested notion (consider the debate among originalists,[37] textualists,[38] pragmatists,[39] coherentists,[40] eclectics,[41] and moral readers,[42] etc.), and any disagreements about whether a claimed constitutional right is enumerated or unenumerated will directly reflect disagreements about what is and is not encompassed by SLM.[43] If you still feel suspicious of this whole edifice of thought, then I suggest the reason is that you reject the minimal-formalist premise on which it is reared. You do not agree that what some identified, laid-down batch of constitutional law says is *ever* the key to a conclusion respecting the existence or nonexistence of a claimed constitutional right. The true warrant for all such conclusions lies always and entirely elsewhere, you believe. You are in reputable company if that is your view. Perhaps, for example, you agree with Ronald Dworkin that legal judgments are true just in case they "follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of

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[37] *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1970).

[38] *See, e.g.*, John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004).

[39] *See, e.g.*, RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003).

[40] *See, e.g.*, Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

[41] *See, e.g.*, PHILIP C. BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).

[42] *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996).

[43] That proposition holds despite the point made in note 31 that a claim for recognition of an admittedly unenumerated right may appeal to some form of warrant quite aside from what identified pieces of constitutional law can be found to say. If you accept my suggestion that "enumerated" means existence-warrantable-by-use-of-SLM, then whenever there is disagreement over whether some claimed constitutional right is or is not enumerated, there necessarily is disagreement over the content or application of SLM.

the community's legal practice."[44] But then you also are part of a company whose message is that *no* true constitutional right is enumerated (or none is any more enumerated than any other)—and for whom, therefore, talk about unenumerated constitutional rights is both inane and misleading.

If that is where you stand, then it is not your framework of thought that I am trying to explicate here. I am trying to capture some aspects of the routine thought of lawyers who do feel it makes sense to speak of constitutional rights, actual or claimed, that are *enumerated*—by contrast, that is, to unenumerated. And what I insist on is this: Lawyers who routinely think of constitutional rights as either/or—enumerated or unenumerated—have lodged in some part of their brains the thought that propositions (1), (2) and (3) in my series of five are true: that one way, if not the only way, to warrant the existence of a claimed constitutional right is by finding *a* constitutional law (use of the individuating article is significant) that says the right exists, and that there is an identifiable SLM for finding out what constitutional laws say regarding the existence or non-existence of claimed constitutional rights. Those lawyers are also thinking that (4) is true—sometimes courts or other authorities find constitutional rights to exist, when they admit, or we believe, that SLM was not or could not have been used to establish the formal link—the need for which is posited by (1) and (2)—between that right's existence and what is said by some recognized constitutional law.

From there it would follow that the embedded proposition in (5)—findings of existent constitutional rights may merit respect as lawful even though SLM cannot establish their existence—is at least arguable in our constitutional culture. Were that not so, talk about unenumerated constitutional rights could not much engage our attentions. In sum, then, my claim is that all such talk routinely buys into the whole batch of propositions, (1) through (5). Indeed I think that much is close to self-evident, when one thinks about it, and I take it as true in what follows.

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[44] RONALD DWORKIN, LAW'S EMPIRE 225 (1986); *see id.* at 227–399 (spelling out Dworkin's view that the community's legal practice includes the community's whole prior legal history, including constitutional and statutory enactments, judicial decisions applying them, common law decisions, secondary explanatory materials such as judicial opinions and legislative history, and the community's evolving and successive paradigms for assembling and ordering such materials).

IV. A DEMOCRACY-BASED OBJECTION TO UNENUMERATED CONSTITUTIONAL RIGHTS, IN A POPULAR-CONSTITUTIONALIST WORLD?

A. Current-Majoritarian Democracy (à la Bickel)

The Standard Worry's concern with unenumerated constitutional rights is—we said—precisely a worry about *judicial* findings of constitutional rights that do not or cannot claim the backing of an application of a commonly accepted SLM to the words and sentences found in recognized constitutional laws. *That* worry evaporates, we said, in a world of popular constitutionalism. Perhaps, however, other worries remain or come into view in such a world.

Let us now ask: Is there any conceivable reason, *rooted in a concern for democracy*, why anyone in such a world should worry about admitting into general political discourse and debate a notion of unenumerated constitutional rights? We can start by asking whether, in such a world, ideas of constitutional rights in any form might be objectionable from a democracy-protective standpoint.[45] The answer may be yes, depending on what you mean by democracy, and to show why, I repeat an example I have used before of a conceivable—if unlikely—enumerated constitutional right.[46]

Imagine that some country amends its constitution by adding what we may call the Libertarian Amendment. The Amendment reads: "The regulatory state is hereby abolished. Parliament shall make no law attaching liabilities, penalties or burdens of any kind to conduct that would not be actionable at common law."[47] The constitution as amended now contains a very strong, enumerated right of freedom from statutory regulation. Imagine also that in this country there is no practice of judicial constitutional review. Courts are expected to give full effect to all statutory enactments no matter how glaringly unconstitutional anyone may think them. The constitution's substantive requirements and prohibitions are left to be made effective on

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[45] The title of Jeremy Waldron's *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. LEG. STUD. 18 (1993), suggests that Waldron's answer would be yes. However, Waldron's article does not really tackle the question of whether his critique of constitutional rights persists under abolition of judicial review. I, here, offer a suggestion about how it might.

[46] *See* Michelman, *supra* note 16, at 29.

[47] The thought is not entirely fanciful. *See* Lucas v. S.C. Coastal Comm'n, 505 U.S. 1003, 1029–30 (1992) (making actionability under prior "background law," of the uses of property prohibited by a new regulatory enactment, the test of the state's duty to pay compensation for a "taking" of property); Richard A. Epstein, *Takings, Exclusivity and Speech: The Legacy of* Prune-Yard v. Robins, 64 U. CHI. L. REV. 21, 22–28 (1997) (proposing to make common-law nuisance doctrine the baseline for measuring when regulatory enactments amount to takings of property for which the Constitution requires compensation).

those to whom they are addressed through self-discipline bolstered by constituency pressures.

Of course it does not follow that the constitution's substantive parts have no constraining effect on legislative decision-making. In the absence of judicial enforcement, there are two possibilities. One is that the country's legislative officials will allow themselves to be constrained by plain laws of the constitution; the other is they will not. If they will not, then what would be the point of writing the super-libertarian right into the constitution? What would be the point of naming something a constitutional right that we do not mean or expect to be taken seriously by public officials presumed compliant? But if we do then suppose that officials, unsupervised by courts, really will act differently under constraint of a sweeping constitutional rule against statutory regulation than they would in its absence, is democracy not accordingly undone by the Libertarian Amendment?

Perhaps the answer is yes if we follow Alexander Bickel's view that democracy's "essence" is the power of a *current* representative majority to shape enacted public policy to its liking, setting aside earlier enactments as it will.[48] Everyone—supporters and detractors—will see the Libertarian Amendment as profoundly counter-democratic in *that* sense. Shackling current and future representative majorities is exactly the point and aim of the Amendment.

On the other side, one may argue that constitutional shackles are not always counter-democratic, even in Bickel's current-majoritarian sense of democracy. They are counter-democratic when they take the form of interventions by politically unaccountable bodies such as courts, in the name of past constitutional majorities dead and gone, restraining current representative legislative assemblies from giving current popular majorities the laws those majorities want. But that is not a correct description of what goes on in popular constitutionalism. In popular constitutionalism, the "shackles" of which we speak are political pressures coming from a current popular majority demanding the legislature's compliance with a norm of the constitution. For some fraction of that current majority, the motivation for the compliance demand may be a particular liking for the norm in question. For another, no doubt overlapping fraction, the motivation may lie elsewhere—in some value (maybe they call it "rule of law") that its members see in compliance by officials with all duly enacted constitutional norms, like them or not. Even assuming the latter is the sole motivation, it is far from immediately clear that what is going

[48] *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 17 (1962) ("[A]lthough democracy does not mean constant reconsideration of decisions once made, it does mean that a representative majority has the power to accomplish a reversal. This power is of the essence . . . .").

on here deserves to be called a deviation from democracy, even in Bickel's current-majoritarian sense of the term.

But suppose we decide to call it a deviation, and accordingly we raise objection on democracy's behalf. The point to see is that this objection does not attach in any special way to *unenumerated* rights—meaning, here, rights that effectively are constitutionalized by forms of popular deliberation and debate that do not confine themselves to the application of any recognized SLM to formalized constitutional texts. An aggregation of unenumerated rights—assuming them to be such for the sake of the argument—to marital privacy,[49] marital freedom,[50] access to birth control,[51] abortion,[52] traditional freedom of choice in family and household formation,[53] and choice of sexual partner[54] can hardly be thought more constrictive of general legislative competence than the tentacular webs of constraints apparently or allegedly drawn by SLM from "the freedom of speech" and "respecting an establishment of religion."[55] As my example of the Libertarian Amendment is meant to show, constriction flows from what the recognized right is a right to, or how sweepingly it is thought to apply, and not from the ratiocinative processes from which recognition and definition arise.

B. Democracy on Two Tracks (à la Ackerman)

In Bruce Ackerman's two-track, or "dualist," conception of democracy, the essence of democracy lies not in the power of current representative majorities to conform the laws to their wishes. To the contrary, it lies in the power of the people, politically aroused and excited at special moments of "higher" lawmaking, to constrain by their enactments at such moments what is done at other times by legislative agents who have no claim to act in the people's name.[56] In such a view, constitutional rights (true ones, of course, not false ones) are not counter-democratic, they are rather superlatively democratic. That proposition holds when the policing agent is an electorally unaccountable court, and it apparently would hold *a fortiori* when the policing agent is, as the lingo goes, the people themselves.[57] The re-

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[49] *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

[50] *See* Zablocki v. Redhail, 434 U.S. 374 (1978); Boddie v. Connecticut, 401 U.S. 371 (1971).

[51] *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).

[52] *See* Roe v. Wade, 410 U.S. 113 (1973).

[53] *See* Moore v. East Cleveland, 431 U.S. 494 (1977).

[54] *See* Lawrence v. Texas, 539 U.S. 558 (2003).

[55] *See, e.g.*, Paul D. Carrington, *Our Imperial First Amendment*, 34 U. RICH. L. REV. 1167, 1168–70 (2001) (questioning the expansive reach afforded the First Amendment).

[56] *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6–7 (1991).

[57] *See* KRAMER, *supra* note 23.

sult: Dualist theory can entertain no worry on democracy's behalf about constitutional rights in a world of popular constitutionalism.

However conclusive that chain of inference may be, it leaves us short of an answer to the specific question we have on the table. That question is whether two-track theorists might have some reason to hang on to our accustomed differentiation between enumerated and unenumerated rights in a world of popular constitutionalism. We have seen that the answer is "no" for "monistic democrats"[58] like Bickel, who equate democracy with the power of current representative majorities to have their way with the laws. Two-track theorists, we are about to see, must answer differently.

Are Larry Kramer's "people themselves" equatable to Bruce Ackerman's "We the People?" Most certainly they are not. Ackerman's People are the populace conducting an exceptional form of high politics, laying down norms of constitutional law (albeit sometimes by proceedings not scripted by Article V) at punctuated moments. Kramer's people, by contrast, are the populace at any time simply giving their opinions about what the norms laid down mean in practice. Two-track theory has no use for the constitutional opinions of judges when not closely tied to legal-not-merely-political exegesis of texts or quasi-texts laid down in the special political excitement of self-conscious higher lawmaking.[59] No more can it have use for the constitutional opinions of Kramer's people when those are not likewise products of genuine applications of SLM—our term, remember, for legal, not merely political, exegesis of constitutional laws laid down. But a constitutional right whose existence is found by an application of SLM is precisely, on our analysis, an enumerated constitutional right. Two-track democracy theory, we may conclude, must reject unenumerated constitutional rights, in or out of a popular-constitutionalist world.

But Bruce Ackerman, you rise to protest, defends the Supreme Court's privacy decisions—the signature products of the unenumerated rights industry. And indeed he does defend them, but most decidedly *not* as findings of unenumerated rights. To the contrary, Ackerman claims that the privacy results can be obtained by an application to norms of constitutional law, laid down at constitutional moments, of something he calls "synthetic" constitutional interpretation; which, he claims, is the form of SLM (a not-mere-politics mode, remember, of connecting formally cognizable constitutional laws to

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[58] ACKERMAN, *supra* note 56, at 7.

[59] For two-track theory's vehement rejection of trans-formalist judicial findings of constitutional rights, see, for example, Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1070 (1984), which speaks of judicial treatments of constitutional text and precedent that are so "fast and loose" as to amount to "legal nihilism."

findings of constitutional rights) compatible with two-track theory.[60] Ackerman's proposal for synthetic interpretation just goes to show how elusive, how slippery, is our ineluctable notion of SLM.

V. A CONTRACT-BASED OBJECTION TO UNENUMERATED CONSTITUTIONAL RIGHTS, IN A POPULAR-CONSTITUTIONALIST WORLD?

A. Summary of the Argument

I take popular constitutionalism to be a fully robust variant of *constitutionalism.* No less than other variants, popular constitutionalism—on my understanding—still contemplates the salience in the country's affairs of a legal constitution, expected to serve the social-ordering functions and satisfy the social-ordering needs that constitutions, on one or another account, are expected to serve and to satisfy. Among such accounts one finds a group that I label "constitutional-contractarian." These are accounts in which the constitution is pivotal for answering a question of *legitimacy*—meaning moral justification of the coercive operations of civil government. The constitution figures in such accounts as a contract analog, a social quasi-contract in which the place of consent is filled by qualified expectations of consent. (When I write in what follows of the constitutional "contract," please understand me as meaning the contract analog or quasi-contract to which I have just referred.)

Part V.B. sets out a specific example of such a contractarian account of what a constitution is for, drawn from the political philosophy of John Rawls. Part V.C. establishes that this account can tolerate the absence of judicial review, at least in principle. Part V.D. takes up the question of whether it can also tolerate in principle the notion of unenumerated constitutional rights, and Part V.E. gives the answer.

That answer will be "not exactly." It will not issue, though, from any claim that the Rawlsian contractarian view allows only *enumerated* constitutional rights. Somewhat to the contrary, I shall maintain that this view cannot recognize the distinction on which such a claim must depend. I mentioned above the possibility of rejecting totally "the minimal-formalist premise . . . that what some identified, laid-down piece of constitutional law says is *ever* the key to a conclusion respecting the existence or non-existence of a claimed constitutional right." That is what I think the Rawlsian constitutional-contractarian account of the constitution's place in political affairs is committed to doing. Unenumerated-rights talk is, on this view, objectionable because it

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[60] *See* ACKERMAN, *supra* note 56, at 140–42, 150–58.

misleads by suggesting that some constitutional rights (the ones that ring the truest) are enumerated, and some (the second-raters) are not. In a word, I believe Rawlsian constitutional contractarians must eject "unenumerated rights" from the discourse, on grounds of pleonasm.

Here, in brief, is the reason why. In the Rawlsian, legitimating constitutional contract, a core term is a guarantee that politics regarding matters of concern to basic justice will be conducted under a constraint of public reason. That is, no one is to deploy his or her modicum of influence over any law-fixing choice, when that choice is destined to exert coercive pressure on persons within range of the law, in favor of a choice that he or she does not stand ready to defend with reasons that he or she sincerely believes should count as reasons for anyone else in range who is reasonable and rational.[61] As we shall see, this constraint of public reason is not just a matter of form—respect for laws of logic, for the established findings of science, and the like; it is also a matter of *value.* Ultimately, it always comes back to the value of mutual respect and regard among persons conceived as reasonable and rational, equal and free, endowed with interests both in plotting a life for oneself guided by one's own understanding of what gives value to a life, and in recognizing and abiding by fair terms of cooperation with others likewise endowed.

The final upshot of this line of thought, I shall suggest, is that all rights in a Rawlsian, legitimating constitution are, in the last analysis, unenumerated. The public values by which public reason is constrained correspond to the "rational continuum" invoked in what I take to be the classic expression of a constitutional jurisprudence of unenumerated rights: the dissent of Justice John M. Harlan (the second) in *Poe v. Ullman.*[62] What we speak of as "enumerated rights" are nothing but especially, temporally obvious instantiations of that rational continuum.

B. Basics of a Rawlsian Constitutional-Contractarian Account of Political Justification and Legitimacy[63]

Constitutional-contractarian thought places an idealized constitution at the crux of an answer to a problem of political legitimacy. The problem is that of how to justify coercion by lawmaking in a soci-

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[61] To be precise, Rawls would have the constraint apply only where matters of basic justice stand to be affected, *see* JOHN RAWLS, POLITICAL LIBERALISM 137 (1996), but this qualification has no bearing on our argument.

[62] 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

[63] The following discussion is drawn from Frank I. Michelman, *The Problem of Constitutional Interpretive Disagreement: Can "Discourses of Application" Help?, in* HABERMAS AND PRAGMATISM 113, 115–20 (Mitchell Aboulafia et al. eds., 2002).

ety of "free and equal" persons.[64] Speaking specifically of a democracy, justification responds to the question of how "citizens [may] by their vote properly exercise . . . coercive political power over one another." From the reciprocal standpoint of those ("us") to whom the laws are directed, the question is that of how other people's exercises of their shares of political power may be rendered justifiable to us.

John Rawls supplies an answer to these questions that he calls the liberal principle of legitimacy: "Our . . . political power is . . . justifiable [to others as free and equal] . . . when it is exercised in accordance with a constitution the essentials of which all citizens may be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational."[65] In this claim about political justification, we can distinguish three key components of the sort of approach to this question that I call constitutional-contractarian. They are as follows:

1. *Individualism*

At the core of the constitutional-contractarian approach to the justification of political coercion stands a liberal's insistence on the normative primacy—that is, as objects of moral concern—of notionally free and equal individuals; hence, the demand that potentially coercive political acts be acceptable from the standpoints of *each* (not "all," in some collectivized sense of "all") of countless persons among whom conflicts of interest and vision abound. Constitutional contractarianism begins with the idea that exercises of political power are most surely justified when every affected, competently reasoning individual can approve them as in line with his or her own actual order of reasons.

2. *Civility*

Of course one doesn't look for actual approval by everyone; that game is not on.[66] The test for the justification of laws will have to be one of hypothetical, not actual agreement: universal acceptability, not universal acceptance. We look to reasons for general law-abidingness that everyone *is considered* to have by whoever applies the test. What is more: If the contractarian justificatory project is to have any real prospect of success (or so some theorists maintain) then "one's own" order of reasons cannot be conceived as blind to the

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[64] RAWLS, *supra* note 61, at 217.

[65] *Id.*

[66] For a recent, cogent review of why not, see RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

presence of others whom one regards as sources of moral claims to respect and regard just like one's own. Those moral claims will have to be conceived as entering into "one's own" order of reasons—as reasons *for me* as well as for them—and vice-versa.[67]

Constitutional-contractarian thought thus builds special motivational suppositions into its acceptability test. In Rawls's formulation, coercion by law is justified when its exercise accords with a constitutional regime that all may be expected to endorse in the light of principles and ideals acceptable to them not only "as rational" but also "as reasonable." "Reasonable," there, means imbued with the spirit of reciprocity or civility, of recognition of others as free and equal—free as you are or aim to be, your equals in having lives of their own to live and ideas of their own about how to live them. A reasonable person stands ready to accept the laws as long as (a) she sees everyone else generally supporting and complying with them, and (b) she sees how these laws conform to a set of ideals and principles that merit mutual acceptance by a competently reasoning group of persons, all of whom desire, and suppose each other all to desire, to find and abide by fair terms of social cooperation in conditions of deep and enduring but reasonable disagreement over questions of the good.[68]

3. *Constitutional proceduralism*

In modern societies, it seems beyond imagination that every discrete act of lawmaking could plausibly be portrayed as passing a universal-acceptance test, even where it is only a loosened test of hypothetical acceptability to the counterfactually reasonable. It seems that even such a loosened contractarian standard of political justification can only be meant for application to *constitutional* laws—the subset of laws that fundamentally shape, organize, and limit the country's lawmaking *system*, or what lawyers would call its proper-sense legal constitution.[69] Constitutional-contractarian political justification rests on the idea that the acceptability of a constitutional system to every reasonable person is tantamount to the acceptability, to every reasonable

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[67] The point is controversial. *See, e.g.*, DAVID GAUTHIER, MORALS BY AGREEMENT (1986). We can, however, accept it for the sake of expository convenience. The argument I am mounting will go through even if other persons and their presence in the social space are conceived to figure in "one's own" order of reasons only instrumentally, as forces that somehow have to be reckoned with for the sake of one's own self-centered projects. The general, contractarian justificatory strategy is as applicable and apt on one assumption as on the other.

[68] *See* RAWLS, *supra* note 61, at xliv, xlvi, 226–27; John Rawls, *The Idea of Public Reason Revisited*, *in* COLLECTED PAPERS 573, 576–79, 581, 605–06 (Samuel Freeman ed., 1999).

[69] *See* Charles Larmore, *The Moral Basis of Liberalism*, 96 J. PHIL. 599, 606 n.8 (1999) (agreeing with Rawls that the test is "meant to govern chiefly the choice of basic, constitutional principles").

person, of demands for everyone's compliance with every law that issues from the system, regardless of disagreements about the merits of those laws, including their consonance with justice.[70] That is the contract-like element in the conception, and on it depends the attraction of the claim that exercises of political coercion are justifiable insofar as they accord with "*a constitution*, the essentials of which all citizens may be expected to endorse." But what is Rawls doing with the phrase, "the essentials of which?"

Consider the idea of a *sufficient, legitimating constitutional agreement.* Four terms would compose this idea, as follows:

First, what is supposed to be "legitimated" (in the sense of justified morally) by this agreement is an extant practice of political government or rule—the coercive exercise of collective political power, through lawmaking, by and among citizens considered as individually free and equal.

Second, what is supposed to have the desired legitimating effect is agreement by each person affected. Not, however, actual agreement but counterfactual agreement—the "acceptability" of the political practice among persons affected by it, envisioning those persons not only as rational but also as reasonable.

Third, the legitimating counterfactual agreement is a *constitutional*—it is, in an important sense, a procedural—agreement. We don't apply the universal-reasonable acceptability test to each and every specific law that crops up in a country's politics—we rather feel that would be hopeless. We apply the test, instead, to the country's system for lawmaking, its constitution, including any bill of guaranteed rights the system may contain. Lawmakers and others who wield governmental powers may plead *nolo contendere* to complaints of injustice or other defects of substance in specific laws and other official acts, while still pointing to the constitution to sustain the morally compelling (not just the legally valid) character of their acts. Of course, it will have to be a constitution of the right sort: one that all citizens may be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational, or whatever. With—but only with—such a constitution in place, "it's constitutional" suffices to establish the moral probity of demands for compliance with official acts by all to whom the system extends. The consti-

[70] Of course this has implications for the approach that those who interpret the Constitution authoritatively are to take to their work. *See* Samuel Freeman, *Original Meaning, Democratic Interpretation, and the Constitution*, 21 PHIL. & PUB. AFF. 3, 25–28 (1992) (maintaining that constitutional interpreters "are to construe the Constitution so that its essential requirements could be . . . accepted by everyone" from the "common point of view" of "sovereign citizens moved by the same basic interests in preserving our freedom and equal status"), *cited with approval in* RAWLS, *supra* note 61, at 234 n.19; *see infra* text accompanying notes 88–93.

tution in that way serves in the place of a long-term, relational contract—although, obviously, it is not remotely a contract.

And so we come to the fourth term, "sufficient." In order to meet the counterfactual test of rational acceptability to every reasonable person, a lawmaking system has to include a principle or guarantee—in some instances tantamount to a "right"—affecting every topic of possible governmental decision-making for which a rational person, responding reasonably, would demand a guarantee as a condition of willing support for the system as a whole. It may be controversial whether "every topic" necessarily includes at least one topic beyond the barest guarantee of universal adult suffrage, one-person-one-vote, decision by majority rule, freedom from arbitrary detention, and maybe some modicum of protection against the grossest violations of freedom of political expression and association.[71] For now, we can follow Rawls in supposing that a constitutional package sufficient for political justification must include some guarantees of undoubtedly substantive "basic rights and liberties" such as liberty of conscience and freedoms of thought and of movement.[72]

"Enumerated" guarantees, or "unenumerated," or does it matter? Shall it be a list (an "enumeration") of minimally required, guaranteed basic liberties,[73] or a blanket ("unenumerated") guarantee along the lines of "an adequate scheme of . . . basic liberties?"[74] A constitutional-contractarian set of constitutional essentials includes at least one or the other (or maybe both) of those, and it is interesting that Rawls seems drawn to formulations of both kinds. Rawls does expressly say that the constitutional essentials in his scheme comprise a "list" of liberties,[75] but perhaps, as we will see, this must be taken with a grain of salt. Either way, the rights-protective part of the constitution must be extensive enough to compose, along with the constitutional essentials dealing with "the structure of government and the political process,"[76] a system for political decision-making about which every affected, reasonable person can rationally say: *A system measuring up to these principles and terms—all of them—is sufficiently regardful of every reasonable and rational person's interests and status as free and equal*

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[71] *See* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1360–62 (2006) (suggesting that such conditions may suffice for the superior legitimacy of democratic over judicial decision in settings of deep and widespread disagreement over the content of rights).

[72] *See, e.g.*, RAWLS, *supra* note 61, at 227 (explaining that the constitutional essentials include "basic rights and liberties that legislative majorities are to respect").

[73] *See id.* at 291 (listing "freedom of thought and liberty of conscience; the political liberties and freedom of association, as well as the freedoms specified by the liberty and integrity of the person; and . . . the rights and liberties covered by the rule of law").

[74] *Id.* at 292.

[75] *See id.* at 291–92.

[76] *Id.* at 227.

that I ought in all reason and civility (reciprocity) to support it and its legislative products, provided everyone else does.

It is of the utmost importance to our inquiry that the idea of constitutional essentials has a negative or limiting as well as a positive or demanding side. In a constitutional-contractarian perspective, a constituted system can be over-full, in the sense that it can include some principle of limitation or of mandate, the inclusion of which has the effect of *making* the system *not* reasonably acceptable to everyone. (As an appropriately controversial example, consider whether to include in a constitution for South Africa today a principle flatly prohibiting race-conscious government action, for any reason, under any circumstances, ever.) When it comes to drawing up the list of constitutional essentials, false positives are no less fatal than false negatives to the project of constitutional-contractarian political justification. A contractarian essential constitution, while it must not be too sparse, must not be overloaded, either. Of course, that does not yet mean that no supposed constitutional agreement can possibly pass contractarian muster. "Enough but not too much" is not, in the abstract, a logically unsatisfiable sort of demand.

C. Bracketing Judicial Review

We are trying here, remember, to sidestep the Standard Objection to unenumerated constitutional rights, which presupposes judicial review. We want to know whether the idea of unenumerated constitutional rights is in any way problematic for conceptions of constitutionalism that dispense with judicial review, and therefore, necessarily with the "legal question doctrine" as well.[77] In order to extend that inquiry to constitutional-contractarian approaches to political justification in a democracy, we need first to verify that such approaches can get along without judicial review.

John Rawls says surely yes, although he is sympathetic to judicial review and prepared to defend it against charges of incompatibility with democracy.[78] Now plainly there is no *conceptual* reason why constitutional-contractarian political justification could not be cogent in a world of popular constitutionalism, *sans* judicial review. The key question has to be whether the substantive guarantees required in a Rawlsian constitution are credible enough to carry the load of legitimation in the absence of an external, judicial check on politics. That

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[77] *See supra* text accompanying notes 16–25.

[78] *See* RAWLS, *supra* note 61, at 227–30, 231–40; Frank I. Michelman, *Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment*, 72 FORDHAM L. REV. 1407 (2004) (collecting and examining Rawls's comments on judicial review).

question is empirical, not conceptual, as Rawls appreciates.[79] If popular constitutionalists see fit to maintain that the credibility of constitutional guarantees essential to legitimacy can hold up (in one or another country) in the absence of judicial review—as, for example, Mark Tushnet does for the United States, on the stipulation that the requisite guarantees are conceived as "thin"[80]—their claim will not be vulnerable to any logical objection that I can see.

The way now lies open to asking—clear of entanglement with the Standard Objection—whether the constitutional-contractarian approach to political justification in a democracy has any reason to concern itself with the issue of enumerated versus unenumerated packaging for constitutional rights. My answer will be that it does have reason for concern, but that it cannot choose between the two options thus presented.

D. Principles and Applications

No doubt there are some principles and rules for the constraint of state power that everyone who is reasonable must endorse, and no doubt some of those are quite easy to apply to large numbers of imaginable cases: for example, the rule that no one may be held in jail for an alleged offense without a full and speedy trial. Yet it seems to many[81] that cases arise with some frequency in pluralist constitutional democracies—common and important cases—for which no resolving rule can be found that is not reasonably rejectable by someone who is reasonable, as defined.

Here is an example: A constitutional system is not rationally acceptable to everyone who is reasonable—the "agreement" is not a "sufficient" one—if, let us say, it lacks a guarantee of full and equal freedom of conscience. The principle of full and equal freedom of conscience thus becomes a constitutional essential. Unfortunately, while no one rejects the principle, members of society do have severe disagreements about its correct application to some common and undoubtedly major classes of situations. Take, for example, demands for taxpayer support of private religious schools—perhaps even if not of private schools generally, and perhaps even when there are decent, state-funded secular schools open to everyone. Or take demands for exemptions for religiously motivated acts from laws—such as health laws and zoning laws—that anyone might sometimes find burden-

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[79] *See* Michelman, *supra* note 78, at 1411.

[80] *See* TUSHNET, *supra* note 23, at 13 (remarking that the Constitution's "thinness is essential" to his case against judicial review); *id.* at 11 (defining the "thin" Constitution as consisting of "fundamental guarantees of equality, freedom of expression, and liberty").

[81] *See, e.g.*, JEREMY WALDRON, LAW AND DISAGREEMENT (1999).

some, from which occasional exceptions can be allowed with no great harm resulting, but that most people, most of the time (or so it is widely believed), simply must be required to obey, for the general good of society.

Some feel that equal liberty of conscience requires, in such settings, concessions to religious needs. Others feel just as sure that such special concessions to religion directly violate either equal freedom of conscience or some other, adjacent constitutional essential such as equal citizenship. It does not seem that either side is prepared to write off the other as insincere or obtuse. Yet their judgments on this matter are incompatible. Both cannot prevail.

Imagine, now, that one or the other of these contradictory views is expressly laid down by a country's constitution. Suppose it is the no-aid, no-accommodation view. Is the constituted system now rationally and reasonably acceptable to everyone, in light of interests and concerns they may have as free and equal persons? Alternatively, suppose it is the mandatory, pro-accommodation view that gets specifically constitutionalized. Would we *then* still be sure the constituted system was rationally acceptable to every reasonable person? Have we run into a reason to think that a specific enumeration of rights in a constitution may be inimical to legitimacy? Or is the implication rather that *un*enumerated rights are what constitutional contractarians have reason to avoid and rule out?

What we are looking at is the possibility that *neither* a constitutional prescription broadly requiring aid and accommodation *nor* a prescription broadly prohibiting aid and accommodation can be a contractarian constitutional essential. To be sure, this does not mean that *some* quite incisive principle of equal liberty of conscience cannot still be a contractarian constitutional essential. You or I might still be prepared to maintain that a universally reasonable and acceptable constitution has to bar laws that expressly or intentionally punish, ban, or stigmatize people for religious confession as such, or that wantonly target religiously motivated activities for prohibition.

Such laws may fall within a universally agreed "central range of application," as John Rawls calls it, of equal liberty of conscience.[82] But the questions of state support for religiously inflected education and of special accommodation for religion apparently do not. Those questions may quite conceivably be ones that a constitution cannot foreclose, either way, if it hopes to pass the universal-reasonable acceptability test. So perhaps the lesson is that only those constitutional guarantees are tolerable that are securely tethered to their respective central ranges—first by agreement that no constitutional constraint

[82] RAWLS, *supra* note 61, at 295–96.

on state action will be found to exist except by identifying a constitutional law that *says* it exists; second by care in the verbal framing of constitutional laws; and third by a firewall of SLM that lets us more-or-less figure out in advance of enactment, by an application of legal-not-merely-political reason, what this or that constitutional law will be found to say. All of that amounts, of course, to an exact formula for enumerated rights.[83]

But that is not going to work. Try envisioning a constitutional system with no substantive constraints or guarantees beyond the truly uncontested cores of the liberal verities. I mean cores so confined that you cannot ever, in any circumstances, say they are invaded either by state funding of religious schools or by refusal of such funding; by laws instituting affirmative action or by laws prohibiting it; by laws prohibiting abortion or by laws protecting abortion against private and social obstruction; by laws protecting a landlord's freedom to refuse to rent to unmarried or same-sex couples, or a downtown club's freedom to refuse membership to women, or by laws denying those freedoms. We are accustomed to think of these laws as true grist for the constitutional-legal mill, as raising issues of legal validity (and hence, on a contractarian view, of political legitimacy[84]) that are already, in principle, decided by the laid-down law of the Constitution, waiting to be applied. But the issues raised by these laws all lie outside the uncontested central ranges of the basic liberties, and they would be left undecided by the trim constitution we are now contemplating. Under that constitution, no official or non-official contender in civic or legislative debate (much less any court or judge if there is judicial review) could demand or even advocate for one or another resolution by appeal to the constitution. Decision would be left to ordinary political action in which no constitutional-rights cards are playable (no clubs, as we might say in a twist on Thomas Hobbes).[85]

The question is whether a constitutional system with such a constricted set of bill-of-rights guarantees could possibly warrant every reasonable and rational person's agreement to abide by its political outcomes. To answer, we would have to figure our whether some people have rationally cognizable interests of such import as to make it *not* reasonable to ask them to commit to a system that, for example, leaves all issues outside the universally agreed central ranges of the basic liberties to be resolved by future politics with no constitutional

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[83] *See supra* Part III.

[84] *See supra* text accompanying notes 64–71.

[85] "In matter of Government, when nothing else is turn'd up, Clubs are Trumps." Thomas Hobbes, *Of Punishments, in* A DIALOGUE BETWEEN A PHILOSOPHER & A STUDENT OF THE COMMON LAWS OF ENGLAND 140, 140 (J. Cropsey ed., 1971).

pressure either way. Can such a system be sufficient as a legitimating constitutional agreement?

E. The Fall-Back to the Constraint of Public Reason

I do not see how, and neither, I believe, did John Rawls. What he thought—or so I have come to understand as his thought—is that (a) a gap remains between what the incontestable central ranges cover and what a constitutional "contract" fully sufficient for political justification in a democracy would have to guarantee, and (b) what could fill the gap would be a further, call it procedural, guarantee of the application of something called "public reason" to decide claims of constitutional right falling outside the incontestable central ranges. I have previously explained that line of thinking as follows:

> It may be true that no one can know, before the questions are decided either politically or judicially, whether or how the set of constitutional principles and guaranties will be applied to the matter of exempting churches from zoning restrictions, or to that of state-funded education vouchers redeemable at private religious schools. But what we can perhaps know beforehand is something about the spirit or terms in which such matters will be addressed, and that knowledge—it may be suggested—can thicken the constitutional system to the point of sufficing for legitimation. We can know, perhaps (the contractarian account of legitimacy will fail if we cannot), that the right questions will be sincerely posed and competently pursued. And of course we should not forget about those central ranges of application of the basic liberties on which we can posit universal, reasonable-and-rational, substantive agreement. We package together the two types of guarantee—the central ranges and public reason—and the hope, then, is that the result is a constitution that a rational and reasonable person can treat as a sufficient, legitimating constitutional agreement—or, in other words, can say about it something like this: A system for further lawmaking that I can see conforming, in practice, to the substance and also the spirit of this (sparse as the substance is), is a system that I can and in all reason ought to sign up with. The constraint of public reason—the guarantee that the right questions, at least, will be posed and sincerely debated—itself thus becomes one of the constitutional essentials. [86]

Well, *what* spirit? *What* right questions? We will get to that, but let us first nail down how the two types of guarantee—the substantive central-ranges guarantee and the procedural public-reason guarantee—are supposed to work in tandem to fill out a sufficient, legitimating constitutional agreement. The answer lies in the relative tightness and looseness of the two types of guarantee. The "tight" central-ranges guarantee is relatively strong in *decisiveness* of application but

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[86] *See* Michelman, *supra* note 63, at 121–22.

correspondingly restricted in *scope* of application.[87] The "loose" public-reason guarantee extends to a much wider range of politically decidable matters, but at the cost of allowing in much more reasonable disagreement about what is to be done.

The idea, surely, is to use the looser guarantee to supplement the tighter one, in hopes of combining them to produce, in sum, what we need for legitimacy. Constitutional contractarians hope to eke out a sufficient, legitimating constitutional agreement with a guarantee that, for all lawmaking that raises issues affecting the basic structure of society but falling outside the culturally incontestable central ranges of the basic liberal guarantees, resolutions of constitutionality will be sought through sincere debate, invoking reasons addressed to some universally acceptable leading question or questions.

For purposes of our inquiry here, it does not matter exactly what we take the leading question to be.[88] It is enough to know that public reason's leading question in any liberal contractarian justificatory project will have to be rooted in commitments to individualism and civility[89]—and thus to values, as I wrote above, of mutual and reciprocal respect and regard among persons conceived as reasonable and rational, equal and free, endowed with interests both in plotting a life for oneself guided by one's own understanding of what gives value to a life, and in recognizing and abiding by fair terms of cooperation with others likewise endowed.[90] But now we can see that it must be in service to those same values that the universally rational and reasonable constitution is to guarantee the central ranges of the basic liberties.[91] Assuming, then, that a country's constitution is one that can carry the burden of liberal contractarian political justification, any rights it enumerates must be regarded as islands of relative certainty in a more open sea of debate (that is, of exchange of public reasons) over what rights the legitimating constitution guarantees.

I think we can conclude as follows. First, no logical objection appears to the idea that constitutional debate in ordinary popular and political venues could measure up well enough to an ideal of public

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[87] *See* RAWLS, *supra* note 61, at 229, 296 (suggesting that the central ranges guarantee derives its strength from its limitation to only the most essential liberties).

[88] According to John Rawls, the right question ultimately will be that of which resolution of the controverted constitutional application is the more conducive to the end of the adequate and full development of certain "moral powers," the development and exercise of which can be attributed as "higher-order interests" of every person. *See* Frank I. Michelman, *Rawls on Constitutionalism and Constitutional Law, in* THE CAMBRIDGE COMPANION TO RAWLS 394 (Samuel Freeman ed., 2003).

[89] *See supra* text accompanying notes 63–68.

[90] *See id.*

[91] *See* RAWLS, *supra* note 61, at 297 (remarking that the "protection of this range of application is a condition of the adequate development and full exercise of the . . . moral powers of citizens as free and equal persons").

reason to fill out what Rawlsians would regard as a sufficient, legitimating constitutional agreement. On that conceptual point, we need not be fazed by Rawls's characterization of the Supreme Court as (ideally) an "exemplar of public reason."[92]

Second, *all* constitutional-contractarian constitutional rights are, in the last analysis, unenumerated. Without exception, they are a deliverance of the use of public reason to decide the application, to major public controversies over limits to governmental power and discretion, of principles transcending the textual formulations in any empirical constitution. Those islands of "enumeration" turn out to be just a few loci of highly predictable convergence among public reasoners. They are not "isolated points pricked out in terms of" constitutional clauses but, rather, high-visibility outcroppings of the "rational continuum" that is forever forming beneath the waves.[93] Now, obviously, the sort of argumentation that "public reason" connotes does not coincide with SLM, on any conception of SLM that's remotely capable of differentiating legal from political or philosophical disputation—or, hence (if my earlier argument is correct), of differentiating "enumerated" from "unenumerated" constitutional rights.

And why, then, should I say that a constitutional-contractarian approach to political justification in a democracy has trouble with talk about unenumerated constitutional rights? Only because, as I argued near the outset, you cannot engage in such talk without an anchorage in minimal legal formalism, and that anchorage cannot hold against the deeper tides of constitutional-contractarian reason. The "rights" chapter of the legitimacy-bearing constitutional quasi-contract devolves into a commitment to decide claims of limits and constraints on government by and only by good-faith application of principles that transcend—although they are in some sense represented by—whatever textual formulations the chapter may contain.

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[92] *Id.* at 231.

[93] Poe v. Ullman, 367 U.S. 497, 523 (1961) (Harlan, J., dissenting).