Foreign Law, Integrity and the 9th Amendment

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I. Introduction

Throughout the past century of our legal culture, federal courts have affirmed through various rulings that unenumerated rights exist and are equally as important as enumerated rights. The common way judges have justified the existence of these unenumerated rights has been through the due process clauses of the 5th and 14th amendment. Thus, most legal challenges dealing with rights brought before our Supreme Court have involved substantive due process, a principle that aims to protect individuals from majoritarian policy enactments that exceed the limits of government authority. This doctrine of legal reasoning has brought about a positive expansion of civil liberties, particularly within the realm of privacy.[1]

However, the method, while popular among jurists, does not always give strong support for the pre-institutional existence of fundamental rights.[2] Looking elsewhere in our Constitution for a justification of protecting moral rights provides

[1] See Griswold v. Connecticut, 381 U.S. 479, 501 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973); Lawrence v. Texas, 539 U.S. 558 (2003)

[2] See John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 18 (1980); see John Harrison, Substantive Due Process and the Constitutional Text, 83 VA. L. REV. 493, 552 (1997) (offering a detailed analysis of various arguments by which substantive due process might be derived from the constitutional text, but concluding that "the textual plausibility of the various derivations of substantive due process are uniformly negative" and that none of them provides "a natural understanding of the language"). The Court's historical tendency to produce a highly broad interpretation of the meaning of a right to "due process" is frustrating because it creates a derivative right (such as the right to privacy) out of a preexisting right (right not to be deprived of life, liberty and property without due process). In doing so, the courts have completely ignored a constitutional provision that textually supports their claim of the existence of unenumerated rights: the 9th amendment.

an opportunity to further understand its purpose of protecting normative principles conceived by the political community of the past and present. The question, then, is whether there is another clause within our Constitution that protects fundamental rights.

Daniel A. Farber, in his book "Retained by the People: The "Silent" Ninth Amendment and the Constitutional Rights Americans Don't Know They Have", believes he has found an answer.[3] He argues that the 9th amendment, and its cousin: the privileges or immunities clause of the 14th amendment, ought to be taken seriously by virtue of their presence in our Constitution.[4] He suggests that legal professionals should turn to foreign legal sources, consensus and tradition in approaching the 9th amendment and its ambiguous affirmation of rights "retained by the people".[5] Farber provides an argument primarily grounded on legal history mixed with originalism to make his case; he relies, for example, on the intentions, writings, and overall philosophical views of the Framers of the 1787 Constitution and the Civil War Amendments, showing how they endorsed the concept of natural

[3] Farber, Daniel A. *Retained by the People: The "silent" Ninth Amendment and the Constitutional Rights Americans Don't Know They Have*. New York: Basic Books, 2007.

[4] The 9th amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Privileges or Immunities clause of the 14th amendment states: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States".

[5] Farber 104-108

law, the law of nations and most importantly, the relevance of the 9th and 14th amendments as institutional mechanisms that protect individual liberties.[6]

I endorse Farber's view on the importance of the 9th amendment and his exegesis on the amendment's statement on pre-institutional rights. But unlike Farber, I present in this paper a normative account of why our domestic judges ought to use foreign legal sources with a constructive interpretation of the 9th amendment; rather than basing my argument on legal history as Farber does, I will instead rely on a mixture of philosophical and principled legal reasoning. Farber does provide general principles to consider in figuring out the hard question of determining 9th amendment rights; however, the shortcoming here is that he only presents these principles as suggestions, rather than organizing them into an interpretive methodology.[7]

In what follows, I will provide a polished method of 9th amendment interpretation that will require judges to adjudicate cases that deal with general questions of legal rights in accordance with a coherent set of principles. This will require a judge to take two tests into consideration. The first is *the Global Consensus test*. Here, I will show that consensus among extra-national legal sources is crucial because it provides good reasons to believe in the existence of a fundamental right. Moreover, consensus among foreign legal sources is the best aid for 9th amendment

[6] This is unorthodox because originalists/conservatives tend to believe that the Framers would have opposed the citation of foreign law.
[7] Farber, 108

interpretation because it is derived from agents, foreign judges, who possess *epistemic privilege*. The argument for consensus can be understood as a claim that orders judges to turn to evidence that other judges acknowledge a right.

If a domestic judge is able to find international evidence acknowledging that a political right is fundamental, they are then faced with *the Compatibility test*. Here, I will argue that a judge ought to approach the 9th amendment bearing in mind the adjudicative principle of "law as integrity" as it is articulated in Ronald Dworkin's highly influential book *Law's Empire*. Integrity's appeal lies not only in its ability to provide a normative and explanatory account of law as an interpretive enterprise, but also on the boundaries it places on judges so that they reach judgments in accordance with principle rather than arbitrary whim.

In sum, the argument of this paper holds that if a right is unenumerated, but is deemed fundamental through global consensus and compatible with the overarching principles that make up our Constitution, then such a right would fall under the protection of the 9th amendment.[8] The argument here should not be

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[8] The methodology presented in this paper may not be the only rational argument available. Mattias Iser has raised yet another possible alternative. Why not rely on Article VI of the Constitution which states "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; *and all treaties made*, *or which shall be made*, under the authority of the United States, *shall be the supreme law of the land*"? This clause can be interpreted to mean that the human rights treaties to which the United States is a signatory, has binding authority over both the federal and state governments. If that is the case, then that would be a proper institutional tool for judges to use to argue for the use of an international consensus of human rights. While I have no problems with arguing for such a method, I am apprehensive on solely relying on treaty law due to its static nature. Relying on overall global consensus is better because it is more fluid; it allows judges to find newly *discovered* rights that inevitably emerge as time passes in accordance to what the global community says on the matter. My position is that judges may turn to the law of treaties and international institutions *in addition* to the interpretations of judges in their respective foreign states. This view is far more comprehensive than the article VI treaty argument. As a result, if any

confused with inviting judges to engage in judicial activism.[9] Instead, this jurisprudence requires judges to adjudicate in accordance with a comprehensive set of coherent principles that allows for a structured approach to unraveling an ambiguous statute within the constitution.

II. Overview of the Bill of Rights

Before I present the arguments for the two adjudicative tests, in this section I will provide a summary of the aim and underlying principles of the 9th amendment's place of birth: the Bill of Rights. The Bill of Rights puts forth a network of principles, some of which are concrete, others which are designed as near limitless abstractions. Its key clauses are drafted in terms of political morality, ordering for nothing less than for a government to treat everyone, subject to its dominion, with equal concern and respect.[10] The principles within the Bill of Rights define a political ideal, constructing the constitutional skeleton of a society whose citizens live as *free* and *equal*. There are three features that can be noticed from the document's architecture.

(1) The system of principles it expounds are comprehensive since it commands that government have equal concern for basic liberties. Within our political culture, these seem to be the major sources to claims of individual rights;

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other argument for relying on foreign legal interpretation is to be proposed, it ought to rely on global consensus.

[9] Examples of activism are (1) second guessing the government (2) departing from text and/or history (3) departing from judicial precedent (4) issuing broad holdings (5) deciding cases according to the political preferences of the judge.

[10] Ronald Dworkin, Unenumerated Rights: How and Whether Roe should be Overruled, 59 U Chi L Rev 381, 388-89 (1992).

so, anyone who believes that free and equal citizens would be guaranteed a particular individual right will also think that our Constitution already contains that right, unless constitutional history explicitly says otherwise.

(2) The abstract articles of the Bill of Rights are comprehensive in that it requires that the ideals of liberty and equality overlap. Particular constitutional rights that follow from the best interpretation of something such as the Equal Protection Clause will very likely also follow from the best interpretation of the Due Process Clause. It is also likely that even if there was no First Amendment, American courts would have found the freedom of speech, press, and religion embedded in the Fifth, Fourteenth and Ninth Amendments' guarantees of basic liberty.

(3) The Bill of Rights gives federal judges incredible power. Our legal institutions consists of a hierarchy of judges that eventually leads to the Supreme Court. This superior federal court has the last word on the interpretation of the Constitution. Since the clauses command that government show equal concern and respect for the basic liberties, without specifying in further detail what that means and requires, it falls to judges to declare what equal concern requires and the makeup of basic liberties. This means that judges must answer the profound questions of political morality that philosophers, politicians and citizens from all walks of life have debated for centuries.

The rest of us living in society must accept the opinions of a majority of the judges, whose answers to these great issues have binding authority. Thus, when

judges look to interpret the 9th amendment, they are compelled to engage in an interpretation which puts forth the idea that the Constitution guarantees the rights required by the best conception of the political ideals of equal concern and basic liberty. They must accept that our Constitution commands, as a matter of fundamental law, that our judges do their best collectively to construct, inspect, and revise, generation by generation, the requirement of equal concern that the great clauses in their majestic abstraction demand.

As was noted earlier in the section, the principles within the Bill of Rights range from extremely concrete to highly abstract. The third amendment, for example, in its prohibition against quartering troops in peacetime speaks of a right in undeniably concrete terms. The 9th amendment, meanwhile, is constructed in terms of pure abstraction, speaking of textually omitted but inherent political rights reserved by and to the people. Historically speaking, legal practice has accepted a narrow interpretation of the 9th amendment.[11] Nevertheless, it is capable, for the sake of fresh argument, of possessing substantive and procedural properties. The unwritten rights it protects are composed of basic freedoms that ought not to be infringed upon because they are essential to *ordered liberty*. This consideration is vital to a judge who seeks to carry out a constructive interpretation of the statute.

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[11] See Griswold v. Connecticut 381 U.S. 479 (1965); Barron v. Baltimore 32 U.S. 243 (1883); United Public Workers v. Mitchell 330 U.S. 75 (1947). In these three cases, the Supreme Court only mentions the 9th amendment in passing. It has never been used as the primary basis for a majority's opinion in the entire history of the court.

The 9th amendment raises the question of whether it could warrant judges to recognize new rights, both against the federal government and the states. Judges may take varying approaches to understanding its meaning but most will avoid using it as a basis for their decisions. This is because the amendment does not recognize any of the retained rights, nor does it specify a methodology for identifying them; if the amendment gives courts anything, it is a blank check. Thus, a method of interpretation that has an underlying basis of principles is necessary to repair this shortcoming.

III. The Consensus Test: Epistemic Privilege

I argue in this section that if legal institutions across the world achieve a consensus on what constitutes a right, then, domestic lawmakers and judges have *good reasons* to believe that the right is fundamental.[12] This makes up the first test judges must turn to in order to justify relying on extra-national legal sources for the interpretation of the 9th amendment. However, this raises the question as to where the consensus is derived; linguistically, the term "consensus" seems to have very broad implications.[13] To give this idea focus, I will argue that consensus is only a valuable source for insight when it is held among individuals who possess *epistemic privilege*.

[12] This is not to say that consensus guarantees fundamental truth. Just because traffic in most countries is on the right side does not mean that it is fundamental that traffic flows that way. Nevertheless, unanimity can give *good reason* to believe that an idea is fundamental. One's belief that slavery is immoral and ought to be banned would be *reinforced* if others, despite phenomenological differences, agreed that it is an objective truth that liberty is fundamental..

[13] Among whom must there be consensus? Lawmakers? Ordinary citizens? Philosophers? Judges?

Epistemic privilege is a designation that one's extensive experience, exposure and insight within a respected field makes one an ideal source for imparting knowledge onto others. When writing this paper, for example, the research was carried out under the supervision of various philosophy professors whom I went to for their advice, support, knowledge, and constructive criticism. These professors were proper advisors, not just because Binghamton University said so, but because of their responsibilities as scholars; all of them have written theses, dissertations, articles and books on scholarly subjects. They have faced the same challenge that I have faced in writing this paper which makes them a source of good argument. Since the topic of the paper here is on judicial interpretation, my position is that domestic judges should turn to turn to the reasoning of *foreign judges* because of the latter's status as being in a position of epistemic privilege. This will be because of the parallelism in the knowledge and experience of the domestic judge's foreign counterpart. This should be considered for the following four reasons:

(1) Domestic courts will face issues with the same sort of *tools* that foreign courts are likely to have at its disposal. This is not to say that the legal procedures of other countries will be exactly the same as those in the United States, only *similar.* A court, when facing an issue, will have to consider special legal procedures, such as canons of legal interpretation, questions of whether a summary judgment is appropriate, particularities in blue-book citation etc. A domestic judge would not be able to find this when looking into abstract philosophical works, treatises or law

review articles. These sources will not confront the issue with the same *techniques* or *constraints* a foreign court of law might have to deal with since legal writing is very particular. Thus, the decisions of other courts could be speaking in a similar "language" as the court that seeks to learn and be persuaded by its reasoning.

(2) Foreign judges are in a position of privilege for our domestic judges because of the goal and purpose of their profession: carrying out a proper interpretation of the law. The position of a judge is one of great pressure because the legal process they oversee can affect the lives of countless people, the mechanisms of government institutions, and the very interpretation of the law itself. Individuals who hold judgeships studied law in academic institutions, practiced as lawyers and sometimes served in politics. They will face issues in their courts ranging from due process violations, issues of privacy, questions regarding the states' right to inflict punishment among many others. These are issues that are not exclusive to the U.S. courts but to courts all around the world in which judges are granted such power.

In this sense, the reasoning of a foreign judge is informative because he/she's more likely than not to have faced the task of deliberating about a right as the domestic court has. In sports commentary, for example, networks will often hire former athletes because their former experience in the sport gives them a rare perspective that makes their commentary more perceptive, unique and interesting than what anyone else can offer. Experience in the sport gives a former athlete privilege to comment on the strategy of the game because of the involvement he/she

once had in the game. From here, we can see that the condition of having real work experience in the field goes a long way in granting epistemic privilege.

(3) Foreign courts also have an advantage that authors of law review articles, treatises and novels may not encounter: the benefit of explicitly hearing two sides of an issue. These courts will, in most cases, be presented with arguments from two competing sides and will have to weigh in on those arguments before making a decision. The inference here is that courts will be more concerned with the real world implications of their decisions upon reading briefs and hearing oral arguments from the lawyers who are responsible for zealously advocating on behalf of their clients. A court must work with a constrained process (subject to substantive and procedural rules) and its judges must hear both sides of an argument and render a decision that will give fair and impartial weight to both arguments.

(4) A foreign judge may also be forced to modify his position after anticipating potential objections or for the sake of forging a winning coalition if he is part of a large panel of judges. When a judge begins to pen his opinion, he may be forced to persuade a majority of his colleagues to agree with him if he wishes for his view to be part of the majority opinion of the court. As a result, if a judge wants his opinion to be binding, he must win a majority of the panel's votes, all while taking into account the restraints of his profession.

The reasons underlying strong argument should not be limited to what domestic inhabits will agree on about what equal concern for law will require, and about which rights are central. Judges, regardless of their nationality, will engage in a deliberative process in which they reflect on and revise their beliefs about an area of inquiry that is moral or non-moral. They will work back and forth among their considered judgments about particular cases, the principles or rules that govern them, and the theoretical considerations that they believe bear on accepting these considered judgments, principles, or rules. Eventually, they will revise these elements wherever necessary in order to achieve an acceptable coherence among their deliberations.

IV. The Consensus Test: Importance of Global Legal Consensus

I have shown in the previous section why foreign judges have epistemic privilege in relation to their domestic counterparts. Thus, the consensus American judges must find must be derived from the rulings of foreign judges. In this section, I will argue why consensus is necessary for discovering cosmopolitan normative principles within the realm of rights.[14] This is because consensus is a heuristic concept that gives a judge good reason to believe in the objectivity of a norm. Sometimes finding consensus amounts to counting whether a substantial number, preferably a majority, of foreign courts uphold the particular right in question.

[14] Although I argue that judges should look to a globalized consensus when approaching domestic legal issues, I do not presume that because "everyone is doing it, we should do it too." This would lead to the false presumption that a majority opinion is always by default the right one.

The attractiveness of consensus can be explained across a spectrum of academic disciplines. Some political scientists, for example, have invoked Condorcet's jury theorem which says that the greater quantity of subjects sampled on a particular issue, the more likely it is for a majority of them to be empirically right about the issue, assuming that each individual is more likely to be right than wrong.[15] I will not endorse or reject any particular way on how to quantify consensus as that would involve statistical research that legal scholars, political scientists and economists would be more inclined to embark on. I am instead concerned about the philosophical implications of international agreement on rights.

Each member of differing national communities will have their own distinct perspective of the world as a result of stark differences in culture, socio-economic status, religious, and political views. This will inevitably lead to a discrete variety of opinions on a diverse range of relevant topics. But what happens when in spite of these differences, legal authorities reach the same authoritative judgment on what constitutes a political right? If judges from different backgrounds reach a similar deliberation, ruling or agreement as to what constitutes a so-called legal truth, despite the overt differences in their backgrounds, it is likely then that these conclusions will provide *prima facie* hints that the norm is objective.

To further elaborate on this idea, consider the following statement Aristotle puts forth in book three of the *Politics*:

[15] Cf. Posner and Sunstein, "The Law of Other States"

For the many, of whom each individual is not a good man, when they meet together may be better than the few good, if regarded not individually but collectively, just as a feast to which many contribute is better than a dinner provided out of a single purse. For each individual among the many has a share of excellence and practical wisdom, and when they meet together, just as they become in a manner one man, who has many feet, and hands, and senses, so too with regard to their character and thought. Hence the many are better judges than a single man of music and poetry; for some understand one part, and some another, and among them they understand the whole.[16]

Aristotle speaks of the benefits of an inclusive form of governmental authority, one in which decision making procedures are carried out by many rather than by a few, an individual, or an exclusive collective. He makes, in essence, a political statement speaking out against oligarchical and aristocratic forms of governance. More importantly, Aristotle contends that the fusion of many minds and viewpoints are *superior* to any that is conceived by a few. The people, when acting as a unified body, are able to make better decisions than any one person, due to the presumption that there is an underlying strength in numbers when there is a pooling of wisdom, experiences, and intuitions. When this occurs, it increases the likelihood of reaching objective solutions to hard legal questions.

If this is true, then the Aristotelian logic is applicable to the notion that legal authorities should look to their foreign counterparts when thinking about these questions. Although a judge's powers will vary from state to state, their functional role as an adjudicator and interpreter of law will generally remain constant. As a result, there is an immense source of foreign legal knowledge that judges can tap into as they interpret their own legal issues. Accordingly, this increase in available

[16] Aristotle, *Politics,* book 3, chapter 11

information can, in the Aristotelian sense, lead to a helpful analysis of finding what constitutes a legal right.

Another way to construe this argument in support of international agreement is by analogizing it to the benefits of freedom of speech and expression as John Stuart Mill does in his influential book *On Liberty*. Perhaps referring to non-domestic legal sources allows judges, and even the public, to attain an understanding of various "truths" of the world or as Aristotle puts it, allows them to "understand the whole."[17] It is crucial that we promote discussion because the silencing of discourse rests on the presumption of infallibility; however, from a rational perspective, humans are inherently infallible.

Since people would no longer be able to understand the arguments for both sides of an issue without free speech, judges may not be able grasp the true meaning of the laws they work so hard to interpret without the freedom to look beyond domestic legal sources. As a result, the refusal to give foreign legal doctrine any consideration in legal interpretation can be thought of as being analogous to a denial to listen to any potential sources of what could possibly be objectively true. Judges ought to look at all viewpoints of a legal issue and can use these viewpoints to instill confidence in his/her position.

[17] J.S. Mill has also stated in his Three Essays on Religion "As the human intellect, though weak, is not essentially perverted, there is a certain presumption of the truth of any opinion held by many human minds, requiring to be rebutted by assigning some other real or possible cause for its prevalence."

It is also worth mentioning that searching for international agreement isn't unprecedented in our legal practice. The Supreme Court, in the case *Roper v. Simmons* (2005), applied the principle of a global community standard in its majority ruling, in which they held that adults cannot be executed for crimes they committed when they were minors. The majority based its opinion on global norms, stating "the United States is the only country in the world that continues to give official sanction to the juvenile death penalty…It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty..."[18]

A skeptic, however, might point out that judges will rely on global consensus because they want to conceal the fact that they are adjudicating on the basis of their own personal opinions. A questionable judge will use foreign law to argue that they are achieving legal justice, when in actuality, they have personal interests in mind. Perhaps when a judge uses foreign law in the interpretation of the 9th amendment, they are using it as a clever way to shroud their activist tendencies and personal preferences.

Relying on global consensus shouldn't be mistaken as allowing judges to engage in activism because it is capable of actually doing the opposite: acting as a *restraint* on judges' deliberations rather than providing a key to a "flood gate." If a domestic judge were to look to the opinion of foreign judges of other freedom loving, liberal,

[18] *Roper V. Simmons,* 543 U.S. 551 (2004)

and democratic countries they would be limited to what those judges say on the existence and scope of a particular human right.[19] If a judge for some reason seeks to create an arbitrary right (e.g. the right to a million dollars), citing foreign judges is unlikely to help his/her case because it is improbable that there would be a consensus among rational non-domestic judges acknowledging the existence of such a right.

In addition, a critic might also point out that if we allow the consensus of foreign judges to be implemented with constitutional interpretation, it will undermine U.S. sovereignty to determine which rights are protected under the Constitution. Federal judges, who hold authority on constitutional issues, are appointed through a democratic process. These judges are granted their powers through Article III of the constitution and are nominated by the President. The nominee then participates in a senate hearing to decide whether he/she should be appointed. The politicians that participate in this process are elected by and are accountable to the people. However, foreign judges will not face this democratic procedure but are still capable of shaping the scope of political rights for the people in this country. Thus, the critic would say that a domestic judge relying on global consensus for legal interpretation is relinquishing a degree of U.S. self-determination.

It is crucial to be mindful of the fact that it is always a *domestic decision maker* that decides how global consensus can be applied. The criticism that relying on

[19] The reasons for turning to such countries will be given further explanation in the section on the "Compatibility Test".

consensus is undemocratic is based on the assumption that a foreign judge has some authority over the interpretation of U.S. law. However, the argument for consensus doesn't give foreign judges any actual binding authority over U.S. law. These judges, as was argued in the previous section, are in a position of epistemic privilege because their responsibility for making decisions with real-world effects will provide a better path to judgment than someone who does not have that kind of immediate responsibility. This in turn makes them a good source of argument, not an agent with binding authority. It is and always will be a U.S. federal judge that decides how consensus can help define the scope of legal rights through the channels of the 9th amendment.

V. The Consensus Test: Evidence of What Works

I will now argue that foreign legal institutions give consensus legitimacy within this method of interpretation because it provides empirical illumination to common legal problems. Justice Breyer provides a lucid explanation for this claim in his dissent in *Printz v. United States* (1997).[20] Foreign law not only provides insight to common legal problems, but evidence for what kind of law actually works. If a domestic court faces an issue that is not at all common, it is more likely to find a closer analogy to the problem and its solution when turning to a foreign court.

[20] Printz v. United States, 521 U.S. 898, 921 n.11, 977 (1997) (Breyer, J., dissenting) "Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own…*But their experience may nonetheless cast an empirical light* on the consequences of different solutions to common legal problems – in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity."

Jeremy Waldron provides strong support for this empirical illumination argument. In his view, law's functional properties can be *analogized* to the way scientists conduct research.[21] The scientific community is pervasively cosmopolitan, where knowledge within the field transcends national and cultural boundaries. Every scientist in the world thinks in terms of the consensus of knowledge within their community of researchers, all of whom possess epistemic privilege. If scientists deal with similar research issues, there is often a consensus as to how to approach a particular issue and what solutions are necessary. The agreement between scientists is fluid, not static; so, if a better solution is discovered, then that will generally become the accepted practice. Scientific knowledge is available as a resource for study, analysis, and can act as building block for others to conduct their own research and achieve other breakthroughs. While law is not science and science is not law, there can be benefits to law if it incorporates the cosmopolitan character of science.

A person who has no understanding of physics has reason to believe that the theory of general relativity is true, not only because Albert Einstein said so, but because of the consensus among physicists. These physicists are granted epistemic privilege because of their position as individuals who are regarded as experienced practitioners in their respected field: they are certified to speak on a subject because they possess degrees granted by academic institutions and peer review each

[21] Jeremy Waldron, Partly Laws Common to All Mankind 103 (2012) This is not to say that law is the same as science, rather, both share fundamental similarities.

another's work to determine whether the findings conform to established standards. A physicist will spend a lifetime studying the nature of physics; a judge may spend the same amount of time with respect to law.

To further elaborate this point, consider the way medical science works. If a deadly illness began to take form in the United States, it would be absurd to argue that because the problem is in the United States, only American medical science should solve it. The United States would be expected to look to scientific conclusions, strategies, and answers that have been validated in public health practices of other countries. This analogy applies to extra-national law since it is a source of knowledge that can be used effectively if another country had already implemented it into practice. It is useful then to pay attention to how different countries deal with legal issues in order to ensure that we are taking the best approach to the legal problem at hand.[22] Judges can decide what potential solutions should and should not be used after seeing how they play out in other countries. They will be compelled not to follow what fails, but what works in the context of the legal principles already in place.

With this in mind, the 9th Amendment should be given further contextualization by looking to countries that have legal provisions that mirror its rules. The U.S.

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[22] Sandra Day O'Connor has stated "there is much to learn from other distinguished jurists who have given thought to the same difficult issues we face here. Moreover, "other legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day; they over much from which we can learn and benefit…Our flexibility—our ability to borrow from other legal systems—is what will enable us to remain progressive, with systems that can cope with a rapidly shrinking world." O'Connor, *The Majestry of the Law, 234.*

Constitution is not the only supreme legal document in the world to have a guarantee of implied rights. In Australia's Constitution, for example, there is no inclusion of a Bill of Rights which has made it susceptible to criticism that it only provides scant protection of rights and freedoms. To mitigate this, the High Court of Australia declares *implied rights* after a majority of the presiding judges come to an agreement on the matter. This is accomplished after these judges read two or more sections of the constitution together to reach a conclusion on the implied existence of a particular right. The Australian High Court, for example, carried out this procedure in the case *Nationwide News Pty Ltd v. Willis* (1992) in which four judges argued for an implied right to freedom of communication on political matters.[23]

In the same vein, Article 40.3 of Ireland's constitution recognizes the presence and existence of unenumerated rights. Like our judiciary and that of Australia's, the Irish Supreme court is the source for determining the content of these rights. Constitutional provisions protecting implied rights are therefore not an exclusive feature of the American constitutional framework; it is a feature that exists in the constitutions of other nations as well. Thus, an American court could, for example, look to Australia and Ireland for help in interpreting the 9th amendment because their constitutions possess *parallel* provisions.

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[23] See, Nationwide News Pty Ltd v. Willis, 177 CLR 1 (1992) (writing "there is implied in the Constitution a limited freedom to communicate between a State and Territories criticisms of instrumentalities of the Commonwealth Government)

Judges have a vast array of established legal insight to turn to within the global community. They can look to global legal precedence, and like scientists, should approach legal issues in a manner similar to those who have dealt with them previously. When interpreting our own Constitution, it is certainly true that its mechanisms are substantially different from the constitutional systems in other countries, but, it is important to note that despite its differences, the experience of others can help illuminate solutions to the legal problems courts will inevitably face; this is because foreign judges will have in one instance or another faced the issue of arguing for the preexistence of rights as American courts. Accordingly, the 9th amendment affirms the protection of basic human rights and directs our judiciary to search for them in a principled, coherent fashion.

VI. The Compatibility Test: Incorporating Law as Integrity

In this section, I will show that if judges accept "law as integrity", they are compelled to use this jurisprudence as a filter to the *type* of foreign law that they may be permitted to cite. Integrity must be incorporated after our judges find the necessary evidence of international consensus on the existence of a right. Integrity, in its basic sense, commands us in our practice of law (adjudication and the making of law) to see the legal enterprise as keeping faith with a coherent body of principle that governs all of us in the exercise of power over one another in the community. A successful constructive interpretation of our political and legal practices would recognize integrity as a distinct political ideal that sometimes calls for compromise

with opposing ideals.[24] Judges, in accordance with integrity must do all that is possible to treat our present system of public standards as expressing and respecting a coherent set of principles.

A judge who accepts integrity will think that the litigants before him/her are entitled, in principle, to have their acts and affairs judged in accordance with the best view of what the legal standards of the community required or permitted at the time they acted. This is because integrity demands that these standards be seen as coherent, with the state speaking with a single voice. Within their interpretive practices, judges must take the public standards of the community, so far as it is possible, to express a single, coherent scheme of justice and fairness in the right relation. The judge must come to a decision what the best is for the present and future, all things considered.[25] When he/she adopts a principle, they must give full weight to that principle in other cases he/she decides.

The value of integrity lies in its capability to answer the most pressing objection to the citation of extra-national legal sources. One might say that if judges' cite foreign law in their interpretation of the constitution, it could lead to the implementation of laws and reasoning that stem from authoritarian and morally

[24] Ronald Dworkin, *Law's Empire*, 1986, Cambridge: Harvard University Press 176-275; There will be inevitable disagreements that arise on various legal issues conflicting ideas is natural in the realm of politics. Even if we based our political activity on the virtues of only justice and fairness, we will find reasons to believe that they pull in opposite directions. Some deny any tension between the two because they fundamentally derive from each other; so, justice has no meaning apart from fairness (just is fair and fair is just). Others might say that fairness and justice are independent of one another. When this disagreement occurs those who manage our political institutions must reach compromises that holds true to what the community believes constitutes political fairness.

[25] Such an approach would require the adjudicator to examine not only the arguments for the position they initially take, but also the arguments that are against it.

depraved foreign governments. What is to stop a judge from turning to Sharia law in Saudi Arabia to argue that the punishment of execution does not violate a right to not have cruel and unusual punishment inflicted upon a guilty defendant? Perhaps a judge could turn to Pakistani law to argue that there exists a right for individuals not to be blasphemed. Thus, utilizing foreign law may lead to a dangerous slippery slope that would enable the implementation of immoral laws into our legal institutions. So, the jurisprudence in this thesis may actually end up restricting civil liberties rather than expanding them.

There are two considerations a judge must bear in mind when faced with this test. (1) When a judge utilizes integrity, he/she must bear in mind the nature of the constitution he/she is expounding. The public standards of the community must be incorporated in the best effort possible to express a single, coherent scheme of justice and fairness. Interpretation as a whole aims to impose an ideal meaning on the text of the tradition being interpreted. (2) A judge must think of the deliberation he/she engages in as being part of what Dworkin refers to as a metaphorical chain novel.[26] When he/she, for example, claims a particular right of liberty as being fundamental, he/she must show that the claim is consistent with the bulk of precedent and with the main structures of constitutional arrangement.

[26] Dworkin 228-232. Dworkin holds that under the common law tradition, judges must imagine themselves as being a group of novelists whose job is to add a chapter to a metaphorical book. The purpose of this analogy is to show that a judge whose opinion adds to precedent must take into consideration the opinions of judges of the past and future. This is to show that there must be some consistency in the way different judges carry out an interpretation of the law.

A judge who keeps this body of principles in mind would realize that no amendment that make up the composition of the Constitution has ever restricted the scope of rights and personal freedoms guaranteed to its citizens. In accordance with integrity, the interpretation of the 9th amendment must fit that standard. An American judge, keeping in mind the faith in tradition that integrity requires, would see that throughout the Constitution's history, all of its amendments have only expanded various personal freedoms.[27] They would realize that the purpose of every amendment has been to create government obligations to ensure the capacity to freely practice fundamental freedoms.[28] With this in mind, a judge attempting to interpret the 9th amendment would be forced to turn to legal reasoning from foreign sources that only lead to the *expansion* rather than the contraction of fundamental rights.

If we turn to the previous example of citing Sharia law, he/she would not be able to make such reference under this procedure because such law fundamentally calls for the infringement of rights: women are treated as second class citizens; freedom of expression is impermissible, and violations of due process rights are systematic. The doctrine of Sharia law goes against the ideals of liberalism endowed in our

[27] The one exception was the 18th amendment, an infamous constitutional provision that initiated the era of prohibition. However, the ratification of the 21st amendment lead to the subsequent repeal of the 18th. This instance of constitutional experimentation shows the character of the procedure of amending the constitution to fit the wishes of the community. We hold, at a theoretical abstraction, that our constitution must ensure that those living beneath its command are equal and free. The 18th amendment as it was eventually realized did not live up to those virtues as it infringed on personal liberties.

[28] For example, we have a right to not be punished for speech against the government, right to not be deprived of life, liberty and property without due process, right of women to vote etc.

Constitution and therefore would not fit an interpretation of the 9th amendment or any other amendment for that matter. Judges who properly conform to integrity would realize that the nature of such law violate the ideals of justice, fairness and equality that our Constitution must safeguard. The judge would find more useful insight that fits the tradition of our Constitution by turning to the legal opinions of judges in nations that uphold liberal democratic values and promote the expansion and protection of human rights.

If we turn to the Pakistani anti-blasphemy law, that too is disqualified for reference in this procedure. The 9th amendment synthesized with foreign law can be used to invalidate many aspects of the common law and local statutes. However the exception is that the reasoning a judge uses to invoke the 9th amendment may not conflict with rights already *enumerated* in the Constitution. The rights that have amended the Constitution possess political legitimacy not only because the political community holds that they exist at a pre-institutional level, but also because they are deemed to be so fundamental that they are outlined into positive law to provide them with full institutional enforcement. Thus, any reference to the anti-blasphemy law in Pakistan could not be used through the 9th amendment because: (1) the law is an infringement on a *natural* right to free speech (2) it violates the free exercise clause of the 1st amendment.

In this sense, integrity would say that a federal judge cannot invoke a right that goes against those outlined in the other amendments because the 9th amendment

simply is not any more important than any other amendment. A judge must use the 9th amendment to declare the existence of right and to define the scope of that right, but he/she could not use this procedure in a way that will lead to a negative consequence for basic rights; doing so would go against the principles conceived of by the political community to which a judge is required to show deference.

However a skeptical reading of law as integrity might lead one to say that the 9th amendment should remain untouched because that is what precedence requires. The general established practice of the 9th amendment is that it has been sparsely applied throughout legal history. This reading of integrity would say that the 9th amendment should not be taken as seriously as this thesis argues since constitutional scholars and judges have been reluctant to incorporate it into real world legal analysis. As a result, the lack of precedent on the amendment defines its role in our legal tradition. Legal practice has seemingly accepted it as an interpretive rule that requires that no conclusions about the existence of a right should be drawn from its absence within the constitutional text.

On the other hand, Dworkin argues that integrity also compels judges to impose meaning on the institution that they seek to uphold. They must look at the institution in its best light and restructure the meaning after reflecting upon its meaning.[29] This makes up the interpretive attitude of integrity, so, the right interpretation of the 9th amendment would explain what it requires. Dworkin is not

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[29] Dworkin, 47

clear as to what thresholds should be placed on the various considerations a judge must take into account: tradition, precedence, moral inclinations, community principles etc. What is certain, though, is that a judge, after reflecting on all possible considerations, would have to decide what brings about the best interpretive practice of the amendment. A judge would need to presume is that despite the fact that legal history has been reluctant to incorporate the 9th amendment, the best interpretation of the statute is to use it in a way to fulfill its primary function: to protect rights in accordance with what fits the overall scheme of the Constitution.

Integrity can also provide a strong response to the originalist objection. An originalist would argue that this jurisprudence would be repudiated by the framers since it pervasively derogates from the original intent of the amendment. As a whole, originalism requires that constitutional interpretation should, to the greatest extent possible, remain fixed by factors like original public understandings or authorial intentions. As a result, they would say that the meaning of the 9th amendment must be intertwined with the understanding of the Bill of Rights as a whole.[30] The original intent its framers held was to preserve individual rights that had long been protected by the *states* and not by the *federal* government.[31]

The originalist would also point out that the framers held the position that unenumerated rights refer to the laws of the states and not to transcendent federal norms. In addition, the 9th amendment, in the originalist view, could not be used in

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[30] Russell L. Caplan, "The History and Meaning of the Ninth Amendment", *Virginia Law Review* 69, No. 2 (1983), 260

[31] Ibid.

conjunction with the 14th amendment's incorporation doctrine as a prohibition against the states because the framers' intention was that it should be used as a shield for the states, not a sword to be used against them.[32]

First, it is important to note that the interpretation of the 9th amendment using integrity would require that it be read in conjunction with the 14th amendment. This means that the incorporation doctrine applies to the amendment, making it a statutory protector of individual's political rights from both the *federal* and *state* governments. A judge approaching the law with integrity would realize that interpreting the statute in this way provides the best interpretation of the amendment because it imposes a purpose on the law in order to make it the best possible example of the form to which it is taken to belong; thus, judges bearing this jurisprudence in mind would have to accept this dual application of the law.

Integrity also wouldn't necessarily refute originalism in its entirety; rather, it invokes some considerations against it with respect to 9th amendment interpretation. A judge who interprets the Constitution with integrity would certainly have to take into consideration the objections the originalist raises, assuming they are correct about the framer's actual intent. A judge would be aware that the constitution he/she is responsible for interpreting is meant to be long lasting; our constitution, like many others, is designed to preserve the principles of governance within which the contentious affairs of law and politics are conducted.

[32] Ibid.

A judge using integrity would be cognizant of the fact that constitutions, particularly the one belonging to the United States, tend to include very abstract, moral provisions that both limit and grant powers to government bodies in significant ways.[33] It is important then to recognize that constitutions can and must adapt to ever-changing circumstances without losing their identity or their legitimacy. A judge would also realize that the choice to employ abstract moral terms within the 9th amendment (certain rights…retained by the people) instead of more concrete, non-moral terms (federal government should not infringe on unwritten rights but the states theoretically may), is presumably made in recognition of the following facts.

It is important that governments not violate certain important rights of political morality. Our government is designed to protect the rights of its constituents who may alter the institutional bodies of governance if they fail to fulfill their obligations of ensuring a society that is both *free* and *equal*. The constitutional authors could not account for all possible scenarios when framing its provisions because, rationally speaking, it is not possible for the past or present generation to provide a fully comprehensive account of what rights do and do not exist. Therefore, the 9th Amendment is included in the Bill of Rights to mitigate the fear that all rights not listed would be open to infringement.

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[33] The first amendment's enumeration of "freedom of speech", for example, is vague in that is does not define the scope of such a freedom. Does this only apply to speech speaking out against the government? What about hate speech? What about speech that can result in injury to another?

While the idea of human rights may be pre-institutional, history has shown that only as time passes are particular rights acknowledged due to the changing norms of society. So, a judge would have to realize that there are rights in existence waiting to be discovered. Once an understanding of the existence of a right is achieved through consensus, it is then the obligation of the judiciary to ensure the protection of that right using the 9th amendment. Indeed, the rights protected under the amendment would have to be viewed in a way so that it represents the community personified, expressing a coherent conception of justice and fairness.[34]

Since the framers could not anticipate the future, judges interpreting the law must be mindful of global consensus and the evolving scenarios that could trigger rights. Even when the framers agreed on the scope of a right at the moment of its adoption, and are comfortable binding themselves to their *concrete* conception of the right, it is not clear that future generations will subscribe to the same notion. Therefore, constitutional provisions are expressed in *abstract* terms e.g. the 9th and its statement of "certain rights…retained by the people." This gives the current generation of judges the ability to compare and contrast their understandings with those held by the framers as integrity would require. Thus, providing both a coherent interpretation of the 9th amendment and the rights it acknowledges would require not only taking into account prior intent or precedence, but the assumption that its proposition is correct if its constructive interpretation follow from the principles of justice, fairness, and procedural due process.

[34] Dworkin, 225

VII. Conclusion

I have provided a normative account for a jurisprudence to aid legal authorities on reaching a sound interpretation of the 9th amendment. While the proposal to turn to foreign law to determine 9th amendment rights is not novel-- being first argued in Daniel Farber's book "Retained by the People: The Silent Ninth Amendment and the Constitutional Rights Americans Don't Know They Have" in 2007-- I have nevertheless taken Farber's suggestions on using the 9th amendment in conjunction with foreign law and organized them into a procedural method that is both theoretical and practical.

I have addressed his lack of a theory of interpretation by presenting a methodology that consists of two tests that allow judges to interpret the amendment in accordance with principle: (1) the consensus test and (2) the compatibility test. While Farber uses a form of originalism to argue that our judges should turn to foreign law because the framers would have wanted them to do so, I have instead shown *why* global consensus is important and how it acts as an aid for discovering political rights. Unlike Farber, I have also provided an account of epistemic privilege and how it is a descriptive quality held among all foreign judges *vis a vis* domestic judges. Finally, I have introduced Ronald Dworkin's account of integrity into this procedure and have shown how it ensures that the extra-national conceptions of legal rights are compatible with preconceived constitutional principles.

The textual implication of the 9th amendment is that it provides protection to all unenumerated rights. The scope of these rights are immense; reproductive rights, the right to end one's life, gay rights, the right to education, the right to government protection and the right to travel perhaps all fall under the amendment's protection. Indeed, this would only be possible if these rights pass the consensus and compatibility test. The strength of the consensus test is that it does not restrict judges to acknowledge what one generation of people say about rights. It is a fluid concept in that allows judges in the present and future to discover new rights that may emerge if the requisite evidence of convergence is found.

Justice Robert Jackson once stated outwardly that "the Ninth Amendment rights which are not to be disturbed by the Federal Government are still a mystery to me."[35] No case in the entire history of the Supreme Court has ever been decided solely on the basis of the 9th amendment. However, this does not mean that the 9th amendment should remain in obscurity; it has the potential of playing an immense role in the discourse on substantive rights and the expansion of civil liberties in American Constitutional law. The utility of the 9th amendment lies in its recognition that basic human rights are an already viable part of the constitutionally guaranteed rights of Americans. As I have shown in this paper, there can be a prudential solution to answering the hard question of how judges can interpret the 9th amendment.

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[35] R. Jackson, The Supreme Court in the American System of Government 74-75 (1955).