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

Farber, Daniel A. *Retained by*

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

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This is unorthodox because originalists/conservatives tend to believe that the Framers would have opposed the citation of foreign law.

Farber, 108

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 and . 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.

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

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 . This consideration is vital to a judge who seeks to casb. 12 Tfuenot otonstio a 72(k)47su 72(.93 Tm[p)-3(r)4(otes.BT54 352

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 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

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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..

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 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 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 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

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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

The attractiveness of consensus can be explained across a spectrum of academic

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 . Perhaps referring to non-domestic legal sources allows judges, and even the public, to attain an

It is also worth mentioning that searching for international agreement isn't unprecedented in our legal practice. The Supreme Court, in the case

(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 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,

Roper V. Simmons, 543 U.S. 551 (2004)

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 (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.

Jeremy Waldron provides strong support for this empirical illumination argument. In his view, law's functional properties can be 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

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Jeremy Waldron, Partly Laws Common to All Mankind 103 (2012) This is not to8960092guay that law iu the ame as science, rather, both0092guhare undamental imilarities.

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.

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 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 (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.

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

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

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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. Sosl , le -10(u)66(tio)-3(n)6(t)-15v-taboesas[illegible] we will f46.18

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.

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 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

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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.

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 and not by the 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

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

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 and 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

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 p