

The Ninth Amendment Post-Dobbs: Could Federalism Swallow Unenumerated Rights?

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**THE NINTH AMENDMENT POST-*DOBBS*:
COULD FEDERALISM SWALLOW UNENUMERATED RIGHTS?**

KIMBERLY L. WEHLE*

*Just weeks before the Supreme Court in *Dobbs v. Jackson Women’s Health Organization* abolished the individual right to terminate a pregnancy without government interference, Republican Senators in then-Judge Ketanji Brown Jackson’s confirmation hearings queried her about the Ninth Amendment twenty-three times. Because the Ninth Amendment has long been treated as either excess verbiage or a rule of construction, the Senators’ redundant questioning was auspicious: Could it play a role in the 6–3 conservative majority’s reconfiguration of twentieth century constitutional law precedent? This Article explores the potential relationship between the Ninth Amendment and the modern Court’s approach to unenumerated rights as a matter of substantive due process. It posits that, from the federalism vantage point outlined in dissenting opinions in *Griswold v. Connecticut*, the Ninth Amendment, considered alongside *Dobbs*, may be positioned to justify reversion of other unenumerated rights to state legislatures within a generation’s time.*

*The problem with the *Dobbs* approach is that reliance on federalism as the panacea for rights protection is, empirically speaking, a myth. The majority in *Dobbs* signaled a penchant toward a restrictive view of unenumerated rights using “history and tradition” as the touchstone, emboldening the role of States over other sources of what Justice John Paul Stevens once called the “conceptual core” of liberty. But the *Dobbs* majority wrongly assumed that the electoral system works fairly to reflect the actual will of the voting public. It also ignored the Supreme Court’s decades-long hostility to voting rights, unnecessarily limiting the ability of individuals to elect representatives who will respond to the will of constituents. The Court’s new doctrinal trajectory is thus not sufficiently robust to protect the individual from government overreach.*

*Long before *Griswold*, the Court outlined an approach to unenumerated rights in *Meyer v. Nebraska*, which recognized rights beyond the Constitution’s text as necessary to liberty while at the same time confining unelected judges’ power to recognize new rights arbitrarily. Viewed as a*

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mechanism for cabining the vast powers of government, Meyer offers a paradigm-shift in rights analysis—one that is grounded in the Court’s precedent as positive law—that would appropriately tether it to the concepts of limited government that deeply animate the Constitution rather than on socially controversial culture debates.

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INTRODUCTION

During Justice Ketanji Brown Jackson’s Senate confirmation hearings, Senator Mike Lee (R-Utah) asked a question that most certainly was not on the minds of regular Americans: “The Ninth Amendment of course states,”

he observed, “that the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.’ Judge Jackson, what specific rights has the Supreme Court identified as flowing from the Ninth Amendment?”¹ To the extent it suggested reinvigoration of this overlooked provision of the Constitution in the wake of *Dobbs v. Jackson Women’s Health Organization*,² which erased constitutional protection for individual pregnancy decisions in deference to state legislatures, the query was telling.

Senators John Cornyn (R-Tex.), Ted Cruz (R-Tex.), and Marsha Blackburn (R-Tenn.) posed similar questions as that of Senator Lee. Cornyn asked, “What other unenumerated rights are out there?”³ Cruz dug deeper: “Do you hold a position on whether individuals possess natural rights, yes or no?”⁴ Blackburn (who tweeted erroneously the next day that “[t]he Constitution grants us rights to life, liberty, and the pursuit of happiness—not abortions”⁵) said to Jackson: “I do want to go to your judicial philosophy and back to the Ninth Amendment. . . . Do you believe that the Ninth Amendment is a source of unenumerated rights?”⁶ In response to this line of questioning, Jackson expressed to Lee, “The Supreme Court, as I understand it, has not identified any particular rights flowing directly from the Ninth Amendment, although, as you said, the text of the amendment suggests that there are some rights that are not enumerated.”⁷

All told, the Ninth Amendment came up twenty-three times in Jackson’s colloquies with Republican senators.⁸ The focus on this topic was more political than legal. Lee added, “So did President Biden ask you either about your judicial philosophy more broadly, separate and apart from the Ninth Amendment, or ask you about your approach to the Ninth Amendment?”⁹

1. *Jackson Confirmation Hearing, Day 2 Part 3*, C-SPAN, at 00:11:00 (Mar. 22, 2022), <https://www.c-span.org/video/?518342-11/jackson-confirmation-hearing-day-2-part-3>.

2. 142 S. Ct. 2228 (2022).

3. *Jackson Confirmation Hearing, Day 2 Part 2*, C-SPAN, at 00:23:40 (Mar. 22, 2022), <https://www.c-span.org/video/?518342-10/jackson-confirmation-hearing-day-2-part-2>.

4. Aaron Blake, *GOP Pits Ketanji Brown Jackson Against the Declaration of Independence*, WASH. POST (Apr. 5, 2022, 6:00 AM), <https://www.washingtonpost.com/politics/2022/04/05/jackson-natural-rights-questions/>.

5. Marsha Blackburn (@MarshaBlackburn), TWITTER (Mar. 23, 2022, 7:18 PM), <https://twitter.com/marshablackburn/status/1506772336812429319?lang=en>. It is the Declaration of Independence, not the Constitution, that has the phrase “life, liberty, and the pursuit of happiness.”

6. *Jackson Confirmation Hearing, Day 2 Part 6*, C-SPAN, at 01:27:15 (Mar. 22, 2022), <https://www.c-span.org/video/?518342-102/jackson-confirmation-hearing-day-2-part-6>.

7. *Jackson Confirmation Hearing, Day 2 Part 3*, C-SPAN, at 00:11:35 (Mar. 22, 2022), <https://www.c-span.org/video/?518342-11/jackson-confirmation-hearing-day-2-part-3>.

8. See *supra* notes 1–7.

9. *Jackson Confirmation Hearing, Day 2 Part 3*, C-SPAN, at 00:15:20 (Mar. 22, 2022), <https://www.c-span.org/video/?518342-11/jackson-confirmation-hearing-day-2-part-3>.

When Justice Clarence Thomas was tapped for the high Court, then-Senator Joe Biden was chair of the Senate Judiciary Committee.¹⁰ In advance of Thomas's confirmation hearings, Biden penned a column in the *Washington Post* baiting Thomas into a debate around "natural law" and "natural rights"—concepts Biden endorsed.¹¹ Referring to his differences with Robert Bork, whose Supreme Court bid failed, Biden wrote: "No issue divided Judge Bork and me as much as this single question: Are there fundamental rights—not explicit in the Constitution—that are protected by that document? My answer to that question, relying on principles of natural law, was an emphatic 'yes'"¹²

Of course, Biden's statement begged the question of how to interpret the Constitution when it comes to unenumerated rights. As he conceded, "natural-law arguments have been used to support conflicting conclusions: to attack the legitimacy of slavery—but also to defend it; to demand equal rights for women—but also to deny them . . . [;] to defend a constitutional right to privacy—but also to assault it."¹³

Despite its flaws, Biden's framing of the contradictions embedded in unenumerated individual rights doctrine and theory was auspicious. During Justice Brett Kavanaugh's confirmation hearings, Senator Ben Sasse (R-Neb.) had posited a theory of the Ninth Amendment as a tool of federalism, arguing that "if the Federal Government has not said this is a power uniquely enumerated for the Federal Government, *States and locals, you are the only governments that still have these remaining powers.*"¹⁴ Jackson's confirmation hearings signaled that this theory of the Ninth Amendment—as a mandate that the power to define unarticulated individual rights belongs to state legislatures, not to the federal constitution in its current form—could be activated under the modern far-right Supreme Court majority.

The pressing question now is what will become of existing rights not articulated in the Constitution but recognized in other Supreme Court precedents—one that reconstitutes a debate that scholars and judges have had

10. Devin Dwyer, *Justice Clarence Thomas Rebukes Biden-Led Confirmation Hearings in New Film*, ABC NEWS (Nov. 28, 2019, 5:05 AM), <https://abcnews.go.com/Politics/justice-clarence-thomas-rebukes-biden-led-confirmation-hearings/story?id=67235780>.

11. Joseph R. Biden Jr., *Law and Natural Law: Questions for Judge Thomas*, WASH. POST (Sept. 8, 1991), <https://www.washingtonpost.com/archive/opinions/1991/09/08/law-and-natural-law-questions-for-judge-thomas/5a55c9dd-da8c-4fec-9339-1a053860c92a/>.

12. *Id.*

13. *Id.*

14. *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 501 (2018), <https://www.govinfo.gov/content/pkg/CHRG-115shrg32765/pdf/CHRG-115shrg32765.pdf> [hereinafter *Confirmation Hearing of Justice Kavanaugh*] (statement of Sen. Ben Sasse) (emphasis added).

for well over two hundred years, and which *Dobbs* reignited.¹⁵ This Article identifies the Ninth Amendment as a potential component in that debate and explores how it could be used to justify a retreat from substantive due process regarding other implied individual rights protections under the Constitution on the rationale that issues of unenumerated rights foundationally belong in the hands of individual states, not the federal government. This argument appeared in the dissenting opinions in the landmark case identifying an unenumerated right to privacy, *Griswold v. Connecticut*.¹⁶ Given that *Dobbs* justified reversing *Roe v. Wade*¹⁷ on grounds of federalism, a reframing of Ninth Amendment theory could bolster the prerogative of state legislatures over additional unenumerated rights.

Part I explores the historical backdrop behind the Ninth Amendment, as well as the relationship between the Ninth and Tenth Amendments, and

15. For examples of the longstanding debate over unenumerated rights, see, for example, *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387–88 (1798) (opinion of Chase, J.) (“Whether the Legislature of any of the States can revise and correct by law a decision of any of its Courts of Justice . . . is a question of very great importance, and not necessary NOW to be determined; because the resolution or law in question does not go so far. I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the Constitution or fundamental law of the State.”); *id.* at 399 (opinion of Iredell, J.) (“If . . . the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgement, contrary to the principles of natural justice.”); see also James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (noting that “the constitution often admits of different interpretations”); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–22 (1962) (discussing the counter-majoritarian nature of judicial review); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 703 (1975) (“In reviewing laws for constitutionality, should our judges confine themselves to determining whether those laws conflict with norms derived from the written Constitution? Or may they also enforce principles of liberty and justice when the normative content of those principles is not to be found within the four corners of our founding document?”); Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1208–09 (1984) (discussing controversy “between the ‘interpretivists,’ who believe that the Court must confine itself to norms clearly stated or implied in the language of the Constitution, and the ‘noninterpretivists,’ who believe that the Court may protect norms not mentioned in the Constitution’s text or in its preratification history”); Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1127 (1987) (suggesting “that the founding generation did not intend their new Constitution to be the sole source of paramount or higher law, but instead envisioned multiple sources of fundamental law”); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 18 (1990) (arguing that “[t]he Court of each era is likely to choose different provisions of the Constitution or different formulations of invented rights as the vehicles for its revisory efforts,” with “different techniques for claiming that what is being done is ‘law’”); Eric J. Segall, *Lost in Space: Laurence Tribe’s Invisible Constitution*, 103 NW. U. L. REV. COLLOQUY 434, 434 (2009) (reviewing LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* (2008)) (“For over two hundred years, scholars, judges, and constitutional theorists have debated whether the American people possess fundamental rights and liberties beyond those derived from the explicit text of the United States Constitution.”).

16. 381 U.S. 479, 511 (1965) (Black, J., dissenting).

17. 410 U.S. 113 (1973).

sketches how a resuscitation of the Ninth Amendment as a federalism directive could undermine equal protection doctrine and civil rights legislation grounded particularly in the Commerce Clause.¹⁸

Part II then describes current doctrine addressing unenumerated rights under the Constitution, including *Roe*, *Dobbs*, and substantive due process, and situates the discussion within the power granted Congress under Section 5 of the Fourteenth Amendment.¹⁹

Part III reviews traditional sources of unenumerated rights as a backdrop for understanding how the Ninth Amendment could be harnessed as a substitute for substantive due process. Positive law, Lockean concepts of natural rights, and religious canon are recognized mechanisms for identifying constitutional rights that are not expressed in the text. Under *Dobbs*, the dispositive standard now looks to history, tradition—and state legislatures. This Part dispels the core assumption of the *Dobbs* majority behind sending abortion rights back to state legislatures, to wit, that electoral systems function with integrity and accuracy to register and reflect the will of the people.²⁰

Part IV crystalizes the discussion around two broad sources of rights: notions of individual liberty on the one hand and debates over exclusive sovereignty on the other.²¹ Under an individual liberty approach, the Ninth Amendment preserves a basket of rights that pre-existed in some iteration of modern law. From the standpoint of exclusive sovereignty, by contrast, the debate is consistently framed as a power struggle between federal power and states' prerogative. This Part explores a third, comparatively overlooked, option for lodging the power of "government" that stems from European Enlightenment thinking underlying the U.S. Constitution: the retained powers of the individual for self-determination without any government role whatsoever. Under this model, the Ninth Amendment preserves a balance between the people versus government per se rather than the power of the federal government versus that of the states.

This Part suggests that the fate of unenumerated constitutional rights—not just abortion but also a possible panoply of foundational notions that include parenting, educating, contracting, working in a profession of choice without government interference, and racial justice—could revert to the states within a generation's time.²² The doctrine's vulnerability with respect to rights analysis stems in part from a misplaced emphasis on the individual as the holder of a "good" called rights. Instead, it should focus on the nature

18. See *infra* Part I.

19. See *infra* Part II.

20. See *infra* Part III.

21. See *infra* Part IV.

22. See *infra* Part IV.

and scope of the threat to rights, that is, an overbearing government's intrusive incursions into certain areas of life in a manner anathema to foundational concepts of liberty.

This Article concludes that rights analysis should move away from approaching rights as somehow “owned by” an individual and more appropriately tether it to the concepts of limited government that animate the Constitution, rather than on socially controversial culture debates. Long before *Griswold*, the Court outlined an approach to unenumerated rights in *Meyer v. Nebraska*,²³ which recognized rights beyond the Constitution's text as necessary to liberty—while at the same time confining unelected judges' power to recognize new rights arbitrarily. Adopting a *Meyer*-based approach to constitutional rights jurisprudence could operate as both coextensive with the Ninth Amendment and iterative of the foundational idea of restrained government at the federal, state, and local levels. A government-focused lens on unenumerated rights—even if out-of-reach under the current Supreme Court majority's history-and-tradition test—would also offer a workable mechanism for addressing what appear to be novel, modern-day encroachments on sacred areas of individual life (such as banned teachings in public schools or books in libraries, for example) while minimizing the inevitable tendencies toward subjectivity and ideology that have eroded the legitimacy of the modern Supreme Court.

I. NINTH AND TENTH AMENDMENTS

Introductory students of constitutional law learn that, with a couple of exceptions (namely, the Ex Post Facto and Bill of Attainder Clauses of Article I), the original Constitution contains no detailed articulation of the rights of individuals in relation to the government. The Framers instead anticipated that rights would be protected by virtue of the government's structure, with its separated powers—three branches at the federal level, each positioned to check attempts at overreach by either of the other two, and a countervailing system of state governments, which exist in part to ensure that too much power does not amass in the national government.²⁴

Three years after the Constitution was officially ratified on June 21, 1788, the Bill of Rights—the document's first ten amendments—was added to provide additional individual protection against a potentially overbearing federal government.²⁵ It did nothing with respect to the states, but included

23. 262 U.S. 390 (1923).

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

25. U.S. CONST. amends. I–X.

two provisions that were key to gaining support for ratification²⁶: the Ninth Amendment, which provides that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”; and the Tenth Amendment, which states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”²⁷

On the face of it, the Ninth Amendment is about *rights* while the Tenth is about *powers*. As recounted by Kurt Lash, the Ninth Amendment addressed concerns about “limiting the constructive expansion of federal power into matters properly belonging under state control.”²⁸ The Tenth “was meant to declare the principle that all nondelegated powers were reserved to the States,” and the words “or to the people” were included to reflect a contemporary theory of popular sovereignty “that *sovereign power remains with the people, not with their government*.”²⁹ The dual amendments thus identify and preserve three distinct sources of governmental power—the federal government, the states, and the people themselves.

Only after the Civil War was state power expressly constrained through the addition of the Thirteenth, Fourteenth, and Fifteenth Amendments, which were designed to ensure that former slave-holding states complied with the terms of Reconstruction.³⁰ This latter trio has since done an extraordinary amount of “work” when it comes to identifying and protecting individual rights against government interference.³¹ The Fourteenth Amendment contains the powerful Due Process and Equal Protection Clauses, and it was through the Fourteenth Amendment that the Supreme Court incorporated the

26. Kurt Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 333 (2004) (discussing Madison’s initial draft and subsequent debate).

27. U.S. CONST. amends. IX–X.

28. Lash, *supra* note 26, at 394.

29. *Id.* at 370 (emphasis added).

30. U.S. CONST. amends. XIII–XV (the last section in each amendment authorizes Congress to enact legislation to ensure enforcement in the states).

31. See generally, e.g., Jim Chen, *Come Back to the Nickel and Five: Tracing the Warrant Court’s Pursuit of Equal Justice Under Law*, 59 WASH. & LEE L. REV. 1203, 1211 (2022) (“The Warren Court’s civil rights consensus rested on three foundations: (1) the use of the Fifth Amendment due process to bind the federal government to the sort of limitations imposed on the states by the Fourteenth Amendment’s Equal Protection Clause; (2) the expansion of Congress’s power to enforce the Due Process and Equal Protection Clauses of the Fourteenth Amendment; and (3) the continuation of the New Deal’s understanding of Congress’s power to regulate interstate commerce.”); Justin Collings, *The Supreme Court and the Memory of Evil*, 71 STAN. L. REV. 265, 298 (2019) (discussing “the redemptive reading of the Reconstruction Amendments . . . animated by a felt need to repudiate not only antebellum slavery but also the racial caste system that succeeded it”); Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1806 (2010) (arguing that “the Reconstruction Amendments . . . give[] Congress all the authority it needs to pass modern civil rights laws”).

Bill of Rights to apply to the states as well as the federal government.³² But the pertinent text is terse and substantively ambiguous.

From the 1830s through the Civil War, Southern Democrats dodged the concept of individualized rights and the Declaration of Independence's assertion that "all men are created equal" by conceiving of democracy as enabling men to elect leaders and legislators at the State level.³³ In the words of historian Heather Cox Richardson, the theory was:

If voters chose to do unpopular things—like take Indigenous lands, enslave their Black neighbors, or impose taxes on Mexicans and Chinese and not on white men—that was their prerogative. Even if the vast majority of the U.S. population opposed those state laws, there was nothing the federal government could do to change them.³⁴

This logic required the federal government to enforce the rights of States, even in newly populated western territories, and even if morally abhorrent.³⁵

The Civil War was fought on that theoretical battleground. Abraham Lincoln and organizers of the Republican Party feared that the Democrats' view of the Constitution would produce oligarchies that concentrated wealth and power in the hands of a few men.³⁶ They believed that the government's

32. The First, Second, and Fourth Amendments have been fully incorporated, whereas the Supreme Court has only incorporated parts of the Fifth, Sixth, and Eighth Amendments. The Third, Seventh, Ninth, and Tenth Amendments have not been incorporated at all. *See* *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (guarantee against the establishment of religion); *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245 (1934) (free exercise of religion); *Gitlow v. New York*, 268 U.S. 652 (1925) (freedom of speech); *Near v. Minnesota*, 283 U.S. 697 (1931) (freedom of the press); *DeJonge v. Oregon*, 299 U.S. 353 (1937) (right of assembly and petition); *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (right to bear arms); *Mapp v. Ohio*, 367 U.S. 643 (1961) (freedom from unreasonable search and seizure); *Aguilar v. Texas*, 378 U.S. 108 (1964) (warrant requirements); *Benton v. Maryland*, 395 U.S. 784 (1969) (double jeopardy); *Malloy v. Hogan*, 378 U.S. 1 (1964) (self-incrimination); *Chi., Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226 (1897) (taking of property without compensation); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (speedy trial); *Parker v. Gladden*, 385 U.S. 363 (1966) (impartial jury); *In re Oliver*, 333 U.S. 257 (1948) (public trial and notice of accusations); *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confront hostile witnesses); *Washington v. Texas*, 388 U.S. 400 (1965) (compulsory process to obtain witness testimony); *Washington v. Texas*, 388 U.S. 14 (1967) (right to confront favorable witnesses); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Schilb v. Kuebel*, 404 U.S. 357 (1971) (excessive bail); *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (excessive fine); *Robinson v. California*, 370 U.S. 660 (1962) (cruel and unusual punishment).

33. *See 1856 Democratic Party Platform*, AM. PRESIDENCY PROJECT (June 2, 1856), <https://www.presidency.ucsb.edu/documents/1856-democratic-party-platform>.

34. Heather Cox Richardson, *April 15, 2022*, LETTERS FROM AN AMERICAN, (Apr. 15, 2022), <https://heathercoxrichardson.substack.com/p/april-15-2022>.

35. *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

36. James H. Read, *The Reconstruction Republicans: Answering the Slaveocratic Revolution*, LAW & LIBERTY (May 28, 2018), <https://lawliberty.org/book-review/the-reconstruction-republicans-answering-the-slaveocratic-revolution/>.

role instead was to answer the will of the people. They won the theoretical battle. They also won the war. The detractors, who believed in state power, turned to violence again. “Sic semper tyrannis!”—or “thus always to tyrants”—shouted John Wilkes Booth from the stage at Ford’s Theatre in Washington, D.C., after he pulled the trigger of the gun that took President Lincoln’s life on the morning of April 15, 1865.³⁷

Ultimately, it is the U.S. Supreme Court, per its own pronouncement in *Marbury v. Madison*,³⁸ that is tasked with fleshing out what those enforceable rights are in the first instance. Arguably, provisions like the First Amendment are relatively easier to adjudicate because they specify one or more particular rights protected, such as speech and religion (although the Court’s massive, multi-tiered First Amendment jurisprudence belies such simplicity³⁹). To the extent that the Court decided to expand on enumerated rights language in a First Amendment case—by recognizing freedom of association,⁴⁰ for example, which is not in the text itself—the particular individual rights language confines the Justices to some degree, leaving less room for the arbitrary or ideological exercise of judicial discretion around the recognition of unenumerated constitutional rights.

However, the view of pre-Civil War Democrats is gaining heft today. As Richardson explains, the nineteenth-century Democrats insisted then that the federal government “could do nothing that the Framers had not enumerated in the Constitution, even if the vast majority of Americans wanted it.”⁴¹ Again, in modern times, the argument is being advanced, this time by the modern Republican Party. And it is gaining momentum across the country, at all levels of government—including on the U.S. Supreme Court.

A. History and Scholarly Approaches

For over two centuries, contention has existed as to how to define unenumerated rights. At the Philadelphia Convention, there was fierce debate over the draft Constitution’s lack of specific rights and freedoms, with James Madison and the Federalists arguing that enumerating the powers of the three

37. Richardson, *supra* note 34.

38. 5 U.S. (1 Cranch) 137 (1803). Though the Court’s holding regarding its power of review was not expressly derived from the Constitution, the Court used structural reasoning to grant themselves this unenumerated right.

39. See generally Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1249–50 (1995) (arguing that “contemporary First Amendment doctrine is . . . striking chiefly for its superficiality, its internal incoherence, [and] its distressing failure to facilitate constructive judicial engagement with contemporary social issues connected with freedom of speech,” and bemoaning that “[s]ystematically to demonstrate this, of course, would require a treatise”).

40. NAACP v. Alabama, 357 U.S. 449 (1958).

41. Richardson, *supra* note 34.

branches of the federal government would sufficiently protect individual interests.⁴² In Federalist No. 84, Alexander Hamilton wrote that inclusion of rights could operate to expand the limited powers of government, as “why declare that things not be done which there is no power to do?”⁴³ In a 1789 correspondence debating the need for a Bill of Rights, Thomas Jefferson, an Anti-Federalist, wrote to Madison that “[h]alf a loaf is better than no bread. If we cannot secure all our rights, let us secure what we can.”⁴⁴ The Federalists ultimately agreed to a Bill of Rights, which was ratified in 1791, with Madison including the Ninth Amendment to stave off any implication that unenumerated rights would revert to the federal government.⁴⁵

Kurt Lash has traced the historical record to establish that the Ninth Amendment originated in the states, and that “every proposed draft of the Ninth Amendment which emerged from the states, as well as every draft considered by Congress, included a provision controlling the ‘interpretation’ or ‘construction’ of the Constitution.”⁴⁶ According to Lash, scholars disagree on whether the Ninth Amendment was meant to preserve “the right to local self-government on matters not assigned to the federal government” or instead to underscore the Framers’ “belief in individual natural rights.”⁴⁷ In support of the local self-government interpretation, for example, New York had proposed amendments that “spoke of ‘Power, Jurisdiction and Right[s]’ retained by ‘the People of the several States, or to their respective State Governments to whom they may have granted the same.’”⁴⁸ To support a natural-rights reading, by contrast, Randy Barnett has pointed to a draft Bill of Rights by Roger Sherman of Connecticut, which included language stating:

The people have certain natural rights which are retained by them when they enter into Society. Such are the rights of Conscience in matters of religion; of acquiring property and of pursuing happiness & Safety; of Speaking, writing and publishing their Sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances.⁴⁹

42. Lash, *supra* note 26, at 348.

43. THE FEDERALIST NO. 84, at 513 (ALEXANDER HAMILTON) (Clinton Rossiter ed., 1961).

44. *From Thomas Jefferson to James Madison, 15 March 1789*, NAT’L ARCHIVES: FOUNDERS ONLINE (March 15, 1789), <https://founders.archives.gov/documents/Jefferson/01-14-02-0410>.

45. Lash, *supra* note 26, at 350.

46. *Id.* at 351.

47. *Id.* at 362.

48. *Id.* at 364 (quoting Amendments Proposed by the New York Convention (July 26, 1788), in *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 21–22* (Helen E. Veit et al. eds., 1991)).

49. 1 RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 5 n.14 & app. A at 351 (Randy Barnett ed., 1989) [hereinafter 1 RIGHTS RETAINED

Lash has traced the back-and-forth textual changes to the Ninth and Tenth Amendments in great detail, ultimately settling on the local self-government interpretation, and concluding that the language “link[ed] the prerogatives of the people with the autonomy of the states,” and that “to the Founding generation, preserving the retained rights of the people amounted to the same thing as preserving the retained rights of the states.”⁵⁰

Yet the tension felt between the Federalists and Anti-Federalists in the eighteenth century over rights not included in the Constitution continues today among legal scholars, much like that expressed by James Madison and Thomas Jefferson over 200 years ago.⁵¹ In 1789, before the first Congress, James Madison reiterated the concern of Federalists that every individual right could never be exhaustively enumerated, and introduced the following initial draft of the Ninth Amendment:

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.⁵²

Although Federalists initially opposed the addition of a Bill of Rights in the Constitution, as noted previously, Madison became a key advocate, eventually drafting the Bill of Rights.⁵³

Given the history of the Ninth Amendment, the concept of natural, inalienable, and unenumerated rights can comfortably be framed as deeply rooted in American history and tradition—a touchstone of the modern Supreme Court’s test for unenumerated rights set forth in *Dobbs*. Scholars have concluded that the Ninth Amendment was added to protect rights not listed in the Bill of Rights—it was Madison’s way of ensuring that the other “half a loaf” was not overlooked because the amendments contained only a

BY THE PEOPLE] (quoting Roger Sherman’s Draft of the Bill of Rights, *reprinted in* N.Y. TIMES, July 29, 1987); Lash, *supra* note 26, at 365 (discussing Barnett’s view); *see also* Calvin R. Massey, *The Natural Law Component of the Ninth Amendment*, 61 U. CIN. L. REV. 49, 94 (1992) (reading Sherman’s draft denoting “the influence of natural law on the creation of the Ninth Amendment”).

50. Lash, *supra* note 26, at 394.

51. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 59 (2004) (“With the inevitable danger created by any limited enumeration of unlimited rights specifically in mind, James Madison devised what became the Ninth Amendment.”).

52. 1 ANNALS OF CONGRESS 452 (June 8, 1789) (statement of Rep. James Madison) (June 8, 1789); *see also* Lash, *supra* note 26, at 360–62 (discussing Madison’s initial draft and subsequent debate).

53. Gordon Lloyd, *Madison and Jefferson Discuss the Bill of Rights*, TEACHING AM. HIST. (Dec. 15, 2020), <https://teachingamericanhistory.org/blog/madison-and-jefferson-discuss-the-bill-of-rights/>.

partial listing of rights.⁵⁴ The Tenth Amendment, in turn, underscored federalism principles as an additional constraint on federal power, stating that the powers not given to the federal government are reserved to the states or to the people.⁵⁵

But where, for Madison, did the unenumerated rights protected by the Ninth Amendment and retained by the people come from? Madison wrote that there were natural rights—the “pre-existent rights of nature”—as well as positive rights, or rights resulting “from a social compact” between individuals.⁵⁶ Identifying these amorphous Ninth Amendment rights, whether natural or positive, has sparked debate among scholars for generations.⁵⁷ The one consensus is that courts have been reticent to apply the Ninth Amendment precisely because identification of unenumerated rights is a nebulous exercise.⁵⁸

Nonetheless, while the primary battleground for unenumerated rights doctrine has been substantive due process, an obvious textual source is the Ninth Amendment. Again, it provides that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,”⁵⁹ and directly binds the federal government

54. See, e.g., BARNETT, *supra* note 51, at 235 (“The Ninth Amendment does more than merely refer to . . . unenumerated natural rights and affirm their existence It also mandates how they are to be treated: they are not to be ‘denied or disparaged.’”); *supra* note 44 and accompanying text.

55. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 121 (1998) (“The Ninth [Amendment] is said to be about unenumerated individual rights, like personal privacy; the Tenth about federalism . . .”).

56. See James Madison, *Speech in Congress Proposing Constitutional Amendments*, JAMES MADISON: WRITINGS 437, 445–46 (Jack Rakove ed., 1999) (“[T]rial by jury cannot be considered as a natural right, but a right resulting from the *social compact which regulates the action of the community*, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.” (emphasis added)). See generally JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690). Locke comes from the philosophical perspective that there are rights that derive naturally from the Creator that claim all men were naturally equal, and thus were naturally free.

57. Compare BARNETT, *supra* note 51, at 60 (“I am claiming only that the natural ‘rights . . . retained by the people’ to which the Ninth Amendment refers are liberty rights.” (omission in original)), with David M. Burke, *The “Presumption of Constitutionality” Doctrine and the Rehnquist Court: A Lethal Combination for Individual Liberty*, 18 HARV. J. L. & PUB. POL’Y 73, 122 (1994) (calling the Ninth Amendment “little more than a constitutional oddity” with “little prospect of ever winning from the Court the respect it deserves”). See generally Mitchell Gordon, *Getting to the Bottom of the Ninth: Continuity, Discontinuity, and the Rights Retained by the People*, 50 IND. L. REV. 421, 422, 426 (2017) (reviewing “several schools of thought about the Ninth Amendment,” which the author deems “the Greta Garbo of the Bill of Rights”).

58. Gordon, *supra* note 57, at 423 (“Small wonder the Ninth Amendment, like Garbo, has largely been left alone. Few courts have ever used it as the basis of a decision; the U.S. Supreme Court has never done so.” (footnote omitted)).

59. U.S. CONST. amend. IX.

and only less obviously (through the Fourteenth Amendment), the states.⁶⁰ Yet the Ninth Amendment has been considered substantively feckless. During her Senate confirmation hearing, Justice Amy Coney Barrett shared the conventional wisdom that “the Ninth Amendment is often treated as a rule of interpretation. It states that the individual’s rights are preserved, but its meaning has not been fleshed out through litigation.”⁶¹ She added that “the Ninth Amendment was once famously described by Judge Bork as an ink blot. . . . I don’t think it’s an ink blot just to be clear—but it’s not one that—that there is a whole lot of case law on.”⁶²

The “ink blot” theory is probably wrong.⁶³ Aside from confining the Ninth Amendment to a rule of construction, there are two leading substantive readings—neither of which have been embraced by the Court to date—that appeared in dueling concurring and dissenting opinions in *Griswold v. Connecticut*.⁶⁴ One line of thought, urged by Justice Arthur Goldberg in his

60. Cass R. Sunstein, *Dobbs and the Travails of Due Process Traditionalism* (Harv. Pub. L., Working Paper No. 22-14, 2022), <https://ssrn.com/abstract=4145922> [hereinafter Sunstein, *Dobbs and Due Process Traditionalism*]. Analyzing the *Dobbs* majority’s view of substantive due process, Sunstein offered this about the Ninth Amendment:

There are also questions about the Ninth Amendment. On a reasonable view, that amendment applies to the national government (whatever it means), and if it applies to the states, it would be because it is incorporated via the Fourteenth Amendment, most plausibly through the Privileges and Immunities Clause. (As they say: Awkward.) It is broadly consistent with the overall approach of the Court to say that if the Ninth Amendment does anything of relevance (a big if), it adds nothing to the Fourteenth Amendment, even if it is incorporated.

Id. at 8 n.38.

61. *Nomination of the Honorable Amy Coney Barrett to Be an Associate Justice of the United States Supreme Court: Responses to Questions for the Record*, 116th Cong. 15 (Oct. 16, 2020), <https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20QFRs.pdf> (question from Sen. Chris Coons).

62. *Barrett Confirmation Hearing, Day 2 Part 4*, C-SPAN, at 52:20 (Oct. 13, 2020), <https://www.c-span.org/video/?476316-5/barrett-confirmation-hearing-day-2-part-4&event=476316&playEvent>.

63. See TRIBE, *supra* note 15, at 147–48 (“What . . . appears to make it possible for some readers of the Ninth Amendment to view it as a source of material rights, and for others to reduce it to a vacuous blur, is that neither the text of the Ninth Amendment nor any other textual fragment in the Constitution contains any directive as to just how the Ninth Amendment itself, which appears to state a rule about how to read the Constitution, is to be read.”).

64. TRIBE, *supra* note 15, at 145–46. For additional exegeses on the Ninth Amendment, see, e.g., KURT T. LASH, *THE LOST HISTORY OF THE NINTH AMENDMENT* (2009); DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE* (2007); PAUL R. ABRAMSON ET AL., *SEXUAL RIGHTS IN AMERICA: THE NINTH AMENDMENT AND THE PURSUIT OF HAPPINESS* (2003); MARSHALL L. DEROSA, *THE NINTH AMENDMENT AND THE POLITICS OF CREATIVE JURISPRUDENCE: DISPARAGING THE FUNDAMENTAL RIGHT OF POPULAR CONTROL* (1996); CALVIN R. MASSEY, *SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION’S UNENUMERATED RIGHTS* (1995); STEPHEN K. SHAW, *THE NINTH AMENDMENT: PRESERVATION OF THE CONSTITUTIONAL MIND* (1990); 1 *THE RIGHTS RETAINED BY THE PEOPLE*, *supra* note 49; 2 *THE RIGHTS RETAINED*

concurrence, is that it does protect unenumerated rights, even against encroachment by the states.⁶⁵ Justices O'Connor, Kennedy, and Souter built on this reading when they cited the Ninth Amendment in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁶⁶ writing that “[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.”⁶⁷ The alternative approach, outlined by Justices Hugo Black and Potter Stewart in *Griswold*, is that it is strictly about protecting states’ rights against the federal government.⁶⁸

Like the Ninth Amendment, the Tenth Amendment deals with states’ rights as well, but there is an important textual distinction, which suggests the Tenth Amendment’s outsized role in preserving federalism. The Tenth Amendment provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁶⁹ Justice Brett Kavanaugh explained in his confirmation hearing:

The Tenth Amendment reinforces the structure of federalism that is in our constitutional system. It is important always to remember the role of the States in our constitutional systems, and it is important to recognize as individual citizens something we often forget, particularly in a process like this. Our rights and liberties are protected by the Federal Constitution and by the Federal courts, but they are also protected by State constitutions and State courts.⁷⁰

Unlike the Tenth, the Ninth Amendment *does not reference the states at all*—it only addresses rights “retained by the people.”⁷¹ The Tenth mentions “States” two times.⁷² On its face, the Ninth would thus appear to capture rights beyond just those that are within states’ prerogative. It is a matter of a stalwart canon of construction, “*expressio unius est exclusio alterius*”—the expression of one thing is the exclusion of the other.⁷³

BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (Randy E. Barnett ed., 1993).

65. *Griswold v. Connecticut*, 381 U.S. 479, 488–96 (Goldberg, J., concurring).

66. 505 U.S. 833 (1992).

67. *Id.* at 848.

68. *Griswold*, 381 U.S. at 510–20 (Black, J., dissenting).

69. U.S. CONST. amend. X.

70. *Confirmation Hearing of Justice Kavanaugh*, *supra* note 14, at 121 (statement of then-Judge Brett Kavanaugh).

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

72. *See* U.S. CONST. amend. X.

73. *United States v. Barnes*, 222 U.S. 513, 518 (1912). *See generally* NORMAN SINGER & SHAMBIE SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 47:23 (7th ed. 2017).

B. Ninth and Tenth Amendment Doctrine

That is not how the Supreme Court has historically interpreted the Ninth Amendment, however.⁷⁴ Instead, it has shied away from wrestling with the Ninth Amendment much at all, a hesitancy evident in the *Dobbs* majority opinion overturning *Roe*.⁷⁵ Interestingly enough, citing the district court's opinion, the Supreme Court in *Roe* had suggested that the right to choose whether to have children was potentially "protected by the Ninth Amendment, through the Fourteenth Amendment."⁷⁶ Despite ultimately lodging the right to abortion access in the Due Process Clause of the Fourteenth Amendment, the Court acknowledged the potential legitimacy of either source:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, *or*, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether to terminate her pregnancy.⁷⁷

74. While the United States Supreme Court has rarely interpreted the Ninth Amendment, other courts have. Some lower courts, for example, have used the Ninth Amendment to secure abortion rights. *See* *Abele v. Markle*, 342 F. Supp. 800 (D. Conn. 1972) (holding that an unjustifiable state intrusion into the personal privacy of women by criminalizing abortion unless necessary to preserve a woman's or her unborn child's life violates the Ninth Amendment), *vacated*, 410 U.S. 951 (1973); *Young Women's Christian Ass'n of Princeton, N.J. v. Kugler*, 342 F. Supp. 1048 (D.N.J. 1972) (finding that women have a constitutional right to privacy under the Ninth Amendment to determine whether to bear a child or terminate a pregnancy), *vacated*, 475 F.2d 1398 (3d Cir. 1973) (unpublished table decision); *Doe v. Rampton*, 366 F. Supp. 189 (D. Utah 1973) (holding that the state does not have a compelling interest that overrides a woman's Ninth Amendment right to privacy and liberty); *Women's Med. Ctr. of Providence, R.I. v. Roberts*, 530 F. Supp. 1136 (D.R.I. 1982) (finding that a mandate imposed on a woman seeking an abortion to provide written consent to termination at least twenty-four hours prior to the abortion violates the Ninth Amendment). Courts have also evaluated the Ninth Amendment in bankruptcy, *see* *Kape v. Home Bank & Trust Co.*, 18 N.E.2d 170 (Ill. 1938) (holding that Congress' broad power over bankruptcies is not limited by the Ninth Amendment); in cases involving the environment, *see* *Nat'l Sea Clammers Ass'n v. City of New York*, 616 F.2d 1222 (3d Cir. 1980) (holding that the Ninth Amendment does not provide a constitutional right to a pollution-free environment); in connection with firearms regulation, *see* *San Diego Cnty. Gun Rts. Comm. v. Reno*, 98 F.3d 1121 (9th Cir. 1996) (finding that the Ninth Amendment does not encompass unenumerated, fundamental, individual right to bear firearms); and in matters of dress and appearance, *see* *Kraus v. Bd. of Educ.*, 492 S.W.2d 783 (Mo. 1973) (holding that the school board's regulation concerning male students' hair length violated the Ninth Amendment).

75. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2245 (2022) (mentioning the Ninth Amendment as a constitutional avenue from which the right to abortion is allegedly derived, but not discussing it any further).

76. *Roe v. Wade*, 410 U.S. 113, 122 (1973) (quoting *Roe v. Wade*, 314 F. Supp. 1217, 1225 (N.D. Tex. 1970)).

77. *Id.* at 153 (emphasis added).

The *Dobbs* majority opinion did not grapple with this aspect of *Roe*, relying instead on what Cass Sunstein recently called “a form of due process traditionalism,” founded on conservative “Burkean arguments”⁷⁸ that emphasize tradition, and “Thayerian arguments”⁷⁹ that defer to democratic systems. Justice Alito wrote for the majority:

The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment.⁸⁰

Nonetheless, as Justice Jackson’s confirmation hearings indicated, the Ninth Amendment remains on the minds of some conservative politicians.

As recognized previously, Kurt Lash painstakingly traced the doctrinal history of the Ninth Amendment, concluding that contrary to the widespread “ink blot” belief, the Ninth Amendment was repeatedly “applied in tandem with the Tenth as an expression of limited federal power and retained local autonomy” until the New Deal, in cases ranging from federal regulation of prostitution, drugs, unfair trade practices, and bribery to federal preemption of state law, railroad rate regulations, wage and hour regulations, and child labor-related laws.⁸¹ For the most part, courts rejected claims that the Ninth Amendment operates as a standalone source of unenumerated rights.⁸² Then as part of the “New Deal Revolution,” a majority of the Court began to “uphold laws [it] had previously opposed as beyond federal power” and to erect “a new framework for protecting the individual rights listed in the first eight amendments.”⁸³ The reading of the Ninth Amendment as preserving local self-government was abandoned, and “[f]or the next thirty years, not a single invocation of either the Ninth or Tenth Amendments would be successfully brought in any federal court.”⁸⁴

Lash has argued that the Ninth Amendment was reduced to a mere “truism” in later cases,⁸⁵ including in the 1957 decision *Roth v. United States*.⁸⁶ In *Roth*, the Court considered whether a criminal code provision

78. Sunstein, *Dobbs and Due Process Traditionalism*, *supra* note 60, at 2, 6; *see also* Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006).

79. Sunstein, *Dobbs and Due Process Traditionalism*, *supra* note 60, at 1; *see also* Cass R. Sunstein, *Thayerism* 2 (Sept. 10, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4215816 (“In the late nineteenth century, James Bradley Thayer argued in favor of a sharply limited role for courts in a democratic society.”).

80. *Dobbs*, 142 S. Ct. at 2242.

81. Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597, 663 (2009).

82. *Id.* at 661–67, 674–79.

83. *Id.* at 688–89.

84. *Id.* at 689.

85. *Id.* at 697;

86. 354 U.S. 476 (1957).

making the mailing of obscene materials punishable was unconstitutional under the Ninth and Tenth Amendments.⁸⁷ The plaintiff was convicted under the law and argued “that the federal obscenity statute unconstitutionally encroaches upon the powers reserved by the Ninth and Tenth Amendments to the States and to the people to punish speech and press.”⁸⁸ The Court disagreed, finding congressional authority for the legislation under the postal power established by Article I, Section 8, Clause 7 of the Constitution. The Court reasoned:

The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. . . . If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.⁸⁹

Professor Lash construed *Roth* as an illustration of the Ninth Amendment on the sidelines: “[H]aving concluded that obscene materials were not protected under the First Amendment, the issue became one of federal power to regulate the mail. Concluding that such power existed was enough to do away with the Ninth and Tenth Amendment claims without further discussion.”⁹⁰

Today, *Roth* still offers an analytical framework for using the Ninth Amendment as a means of protecting individual rights. Under that framework, which accepts the Ninth Amendment primarily as a rule of construction versus a substantive source of unenumerated rights, step one would ask whether a power is expressly given to the federal government under the U.S. Constitution. If yes, as happened in *Roth* itself, the federal government can exercise that power. If the Constitution does not expressly reserve a certain power to the federal government, under step two, the “totality of sovereignty originally in the states and the people” forbids the federal government from exercising it.⁹¹ This two-part *Roth* test is expanded on further in Part IV. The final framework, incorporating *Meyer* and proposed in more detail below, offers a vehicle for elevating the sovereignty of the people—as distinct from that of the federal government or the states—into the doctrinal calculus for identifying and protecting unspecified individual rights.

87. *Id.* at 480.

88. *Id.* at 492.

89. *Id.* at 493 (quoting *United Pub. Workers v. Mitchell*, 330 U.S. 75, 95–96 (1947)).

90. Lash, *supra* note 81, at 698.

91. *Roth*, 354 U.S. at 492 (quoting *United Pub. Workers*, 330 U.S. at 95–96). Note, however, that in *Tennessee Electric Power Co. v. Tennessee Valley Authority*, the Supreme Court held that private individuals lack standing to raise Ninth Amendment claims on behalf of a state. 306 U.S. 118, 144 (1939).

C. *Griswold Concurrence*

Ninth Amendment doctrine finally took center stage in 1965, with Justice Arthur Goldberg’s concurring opinion in *Griswold v. Connecticut*, in which he conceptualized the Ninth Amendment as operating to preserve unenumerated individual rights. He argued “that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights,” and that support for such rights lies in “the language and history of the Ninth Amendment.”⁹² On original meaning, he wrote that “the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.”⁹³ “While this Court has had little occasion to interpret the Ninth Amendment,” Goldberg added, the maxim in *Marbury v. Madison* that “[i]t cannot be presumed that any clause in the constitution is intended to be without effect” implies that the Court can still invoke the Ninth Amendment as necessary.⁹⁴

Justice Goldberg then explained why a textualist inquiry into the Constitution’s plain language as a test for identifying a right to contraception would be error, as it would overlook the Ninth Amendment. (Yet this is what Justice Alito did, many years later, in *Dobbs*.⁹⁵) Justice Goldberg explained:

[A] judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms . . . would violate the Ninth Amendment, which specifically states that “[t]he enumeration . . . of certain rights shall not be construed to deny or disparage others retained by the people.”⁹⁶

Justice Goldberg’s central argument was that the Ninth Amendment could not be made redundant as a matter of plain textualism. Moreover, he argued, the claim that the Ninth Amendment only applies to the *federal* government proves too much because states—no more than the federal government—lack the constitutional authority to affirmatively *infringe* on unenumerated rights: “[T]he Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement.”⁹⁷

92. *Griswold v. Connecticut*, 381 U.S. 484, 486–87 (Goldberg, J., concurring).

93. *Id.* at 488.

94. *Id.* at 490–91 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803)).

95. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2245 (2022) (“We begin by considering the critical question whether the Constitution, properly understood, confers a right to obtain an abortion.”).

96. *Griswold*, 381 U.S. at 491–92 (first emphasis added) (quoting U.S. CONST. amend. IX).

97. *Id.* at 493.

To the dissent's claim that this open-ended reading of the Ninth Amendment impermissibly broadens the powers of the judiciary, Justice Goldberg responded:

I do not mean . . . to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government. *Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive. . . .* The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments. I do not see how this broadens the authority of the Court; rather it serves to support what this Court has been doing in protecting fundamental rights.⁹⁸

To cabin the concern that the Ninth Amendment leaves judges “at large to decide cases in light of their personal and private notions,” Justice Goldberg suggested that “‘they . . . look to the ‘traditions and [collective] conscience of our people’ to determine whether a principle is ‘so rooted [there] . . . as to be ranked as fundamental.’”⁹⁹

But Justice Goldberg's understanding of “traditions” is not like Justice Alito's in *Dobbs*, which utilized selective recounting of history. Rather, Justice Goldberg's idea of “traditions” appeared to center around whether a particular right “is of such a character that it cannot be denied without violating those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.’”¹⁰⁰ For context, Justice Goldberg added that “[l]iberty’ also ‘gains content from the emanations of . . . specific [constitutional] guarantees’ and ‘from experience with the requirements of a free society.’”¹⁰¹ He then cited *Pierce v. Society of Sisters*¹⁰² and *Meyer v. Nebraska*¹⁰³ as establishing that “the right ‘to marry, establish a home and bring up children’ was an essential part of . . . liberty.”¹⁰⁴

98. *Id.* at 492–93 (emphasis added).

99. *Id.* at 493 (alterations in original) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

100. *Id.* (quoting *Powell v. State of Alabama*, 287 U.S. 45 (1932)).

101. *Id.* at 493–94 (second alteration in original) (quoting *Poe v. Ullman*, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting)).

102. 269 U.S. 510 (1925).

103. 262 U.S. 390 (1923).

104. *Griswold*, 381 U.S. at 495 (quoting *Meyer*, 262 U.S. at 399).

In dissent, Justice Hugo Black responded to Justice Goldberg with an unmistakable reading of the Ninth Amendment as squarely about federalism: “That Amendment was passed . . . to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication”—or more specifically, “to protect state powers against federal invasion.”¹⁰⁵ Justice Goldberg’s view, he feared, would enable the Ninth Amendment’s use “as a weapon of federal power to prevent state legislatures from passing laws they consider appropriate to govern local affairs.”¹⁰⁶ Justice Black explained that although “no legislative body ever does pass laws without believing that they will accomplish a sane, rational, wise and justifiable purpose,” he refused to accept the “natural law due process philosophy” underlying cases like *Pierce* and *Meyer*.¹⁰⁷ He also rejected the notion that the Constitution must adapt with time.¹⁰⁸ If people want changes to the Constitution, the answer is to formally amend it:

The Constitution makers knew the need for change and provided for it. Amendments suggested by the people’s elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me.¹⁰⁹

In his separate dissent, Justice Potter Stewart turned to elections as the means of identifying new legal protections. He condemned the Connecticut statute as “an uncommonly silly law,” but similarly asserted—much like Justice Alito in *Dobbs*—that it was not for the courts to “substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.”¹¹⁰ The power to declare, protect, or infringe rights is lodged primarily in state legislatures; if individuals want a say in that, they can do it at the ballot box.

D. Post-Griswold

With the exception of its dicta in *Roe*, in which the Court acknowledged the Ninth Amendment as a possible alternative source of reproductive rights without embracing it,¹¹¹ since *Griswold*, the Supreme Court has said

105. *Id.* at 520 (Black, J., dissenting) (emphasis added).

106. *Id.*

107. *Id.* at 512–13.

108. *Id.* at 516, 522.

109. *Id.* at 522.

110. *Id.* at 527 (Stewart, J., dissenting) (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963)).

111. See *supra* notes 76–77 and accompanying text.

relatively little about whether the Ninth Amendment has a meaningful role in individual rights analysis.

*Richmond Newspapers, Inc. v. Virginia*¹¹² addressed whether a criminal trial could be closed to the public and the press—a question that is not answered by the Constitution’s text. A plurality of the Court ruled, in the words of Chief Justice Warren Burger, that the Court was “bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice,” including the right to attend criminal trials.¹¹³ Burger rejected the State of Virginia’s argument “that the Constitution nowhere spells out a guarantee for the right of the public to attend trials, and that accordingly no such right is protected”¹¹⁴—but he located the right in the First and Fourteenth Amendments without identifying the Ninth Amendment as a *source* of unenumerated rights.

Instead, citing Madison for the proposition that “[t]he possibility that such a contention could be made did not escape the notice of the Constitution’s draftsmen,” Burger wrote generically that:

[The] arguments such as the State makes have not precluded recognition of important rights not enumerated. Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and of privacy, the right to be presumed innocent, and the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or Bill of Rights. Yet these important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit guarantees. The concerns expressed by Madison and others have thus been resolved; fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.¹¹⁵

His opinion named the Ninth Amendment only in a footnote: “Madison’s efforts, culminating in the Ninth Amendment, served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others.”¹¹⁶

In a colorful dissent, Justice William Rehnquist complained that the Court had endowed itself with too much power by identifying a new right, and responded to Burger’s use of the Ninth Amendment as a rule of

112. 448 U.S. 555 (1980).

113. *Id.* at 573.

114. *Id.* at 579.

115. *Id.* at 579–80 (footnote omitted).

116. *Id.* at 579 n.15.

construction by retorting that the Ninth Amendment compelled no such conclusion:

In the Gilbert and Sullivan operetta “Iolanthe,” the Lord Chancellor recites:

‘The Law is the true embodiment
of everything that’s excellent,
It has no kind of fault or flaw,
And I, my Lords, embody the Law.’

It is difficult not to derive more than a little of this flavor from the various opinions supporting the judgment in this case.¹¹⁷

Justice Rehnquist added that he did “not believe that the Ninth Amendment confers upon us any . . . power to review orders of state trial judges closing trials in such situations.”¹¹⁸ Nor did he offer an alternative reading of the Ninth Amendment that would give it meaning.

Thus, although parried about in the various *Griswold* opinions, and non-substantively referenced in the *Roe* and *Richmond Newspapers* cases, the Ninth Amendment has remained in its largely obsolete posture since the New Deal. Yet in the wake of *Dobbs*, which effectively supplanted substantive due process as a source of unenumerated rights, the Ninth Amendment has become more salient. (Certain Republican Senators apparently believe so.) Although it is unlikely that the Ninth Amendment will ever be construed as a standalone source of substantive rights, as Justice Goldberg wrote in *Griswold*, “since 1791 it has been a basic part of the Constitution which we are sworn to uphold.”¹¹⁹ How best to “uphold” the Ninth Amendment is a question that the Supreme Court has never resolved, but one that should be revisited.

The next Part walks through the various alternative approaches for identifying unenumerated constitutional rights, and the implications of that doctrine post-*Dobbs* as a backdrop for further discussion of the Ninth Amendment as reformulated under *Roth* and *Meyer*.

II. UNPACKING ALTERNATIVE UNENUMERATED RIGHTS DOCTRINE

There exist a handful of textual sources for unenumerated rights under the Constitution (although none would likely satisfy conservatives on the modern Court or are more obvious than the Ninth Amendment). This Part reviews them with an eye towards unpacking the reasoning in *Dobbs*, including the following: the Privileges and Immunities Clause, the Commerce Clause, equal protection, substantive due process, and Section 5

117. *Id.* at 604 (Rehnquist, J., dissenting).

118. *Id.* at 605.

119. *Griswold v. Connecticut*, 381 U.S. 479, 491 (1965) (Goldberg, J., concurring).

of the Fourteenth Amendment. It outlines the prevailing Supreme Court construction of each provision and explains how that doctrine could be impacted by the majority's approach in *Dobbs*. This Part also critiques the assumption underlying *Dobbs* that the state electoral system is sufficiently robust and accessible to satisfy the due process concerns underlying *Roe*.

This Part is doctrinally heavy for a reason. Much of the commentary and debate around the substantive due process foundation of *Roe* center around the *Griswold* notion of "privacy" on one hand, and the concepts of textualism and originalism on the other, both of which are alternative approaches to reading constitutional ambiguity. This Part concentrates in one place the other primary sources of unenumerated rights in the Constitution to dispel the assumption that *Roe* was a bizarre outlier with shaky foundations, or worse, an example of rare judicial activism. The Constitution is an old document and contains many vague terms that are susceptible to various constructions, including when it comes to unenumerated rights, as this Part makes plain. Readers who are well-versed in these doctrinal fundamentals might prefer to move straight to Part III, which summarizes the primary theoretical approaches to identifying unenumerated rights, and/or to Part IV, which explains the paper's proposal for marrying the Ninth Amendment with *Meyer v. Nebraska* as an alternative to the *Dobbs* framework, which relies on textualism plus history and tradition.

A. Privileges and Immunities Clause

One alternative source of unenumerated rights is the Fourteenth Amendment's Privileges or Immunities Clause, which provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."¹²⁰ Unlike the Ninth Amendment, this Clause applies expressly to the states, using the words of Article IV of the Constitution. That provision states that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."¹²¹ Neither the Fourteenth Amendment nor Article IV defines "privileges and immunities," however; those terms remained unsettled when the Fourteenth Amendment was proposed as part of Reconstruction.

Nonetheless, as Justice Clarence Thomas acknowledged in *McDonald v. City of Chicago*,¹²² "[t]he mere fact that the Clause does not expressly list the rights it protects does not render it incapable of principled judicial application."¹²³ In language that is pertinent to the dissenting Justices'

120. U.S. CONST. amend. XIV, § 1.

121. U.S. CONST. art. IV, § 2, cl. 1.

122. 561 U.S. 742 (2010).

123. *Id.* at 854.

considerations in *Griswold*, Thomas admitted that fears about “the risks of granting judges broad discretion to recognize individual constitutional rights in the absence of textual or historical guideposts” apply equally whether those rights are recognized under the substantive due process doctrine or the Privileges or Immunities Clause.¹²⁴ Thomas signaled an interest in learning “what the ratifying era understood the Privileges or Immunities Clause to mean,”¹²⁵ noting further that it “should be no more ‘hazardous’ than interpreting” other ambiguous clauses, such as the Necessary and Proper Clause.¹²⁶

Beginning with the *Slaughter-House Cases*,¹²⁷ the Supreme Court has applied a presumptively narrow reading of the Privileges and Immunities Clause, holding that it only protects the rights of natural citizenship, such as the right to travel, freedom of assembly and of petition, and access to the writ of habeas corpus.¹²⁸ This list did not evidently include legal rights associated with state citizenship as a matter of property, contract, or family law. In dissent, Justice Stephen Johnson Field complained that the interpretation rendered the Clause “a vain and idle enactment, which accomplished nothing.”¹²⁹ On this reading, the Clause would not capture unenumerated rights such as the right to vote, serve on juries, pursue a particular occupation or, presumably, obtain an abortion, either.¹³⁰

The Supreme Court has never articulated standards to apply in assessing a claim that a state has violated the Fourteenth Amendment’s Privileges and Immunities Clause. Writing for the Court in *Saenz v. Roe*,¹³¹ Chief Justice William Rehnquist acknowledged the “fundamentally differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment,” while affirming nonetheless that “it has always been common ground that this Clause protects the . . . right to travel,”

124. *Id.*

125. *Id.* at 855.

126. *Id.*

127. *Butchers’ Benevolent Ass’n v. Crescent City Live-Stock Landing & Slaughter-House Co.* (Slaughter-House Cases), 83 U.S. (16 Wall.) 36 (1872).

128. *See generally id.*

129. *Id.* at 96 (Field, J., dissenting). For support of Justice Field’s position, see AMAR, *supra* note 55.

130. *See* MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 29 (1986) (distinguishing political rights from those guaranteed under the Fourteenth Amendment); CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (according to Senator Jacob Howard of Michigan, “[t]he right of suffrage is not, in law, one of the privileges or immunities . . . secured by the Constitution”); *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 548 (4th Cir. 2013) (holding that the Fourteenth Amendment’s Privileges and Immunities Clause “does not include the right to pursue a particular occupation”).

131. 526 U.S. 489 (1999).

including “the right of the newly arrived citizen the same privileges and immunities enjoyed by other citizens of the same State.”¹³²

Scholarly debate over the role of the Fourteenth Amendment’s Privileges and Immunities Clause is substantial and beyond the scope of this paper.¹³³ But its ambiguity stands as textual recognition that the Constitution contemplates the existence of protected unenumerated rights.’

B. Commerce Clause

Another alternative source of unenumerated rights doctrine is the Commerce Clause. Article 1, Section 8, Clause 3 of the U.S. Constitution gives Congress the power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”¹³⁴ Under the *Roth* Court’s formulation for Ninth Amendment claims, so long as this language authorizes Congress to act, the “totality of sovereignty originally in the states and the people” is not impugned.¹³⁵

In *Gibbons v. Ogden*,¹³⁶ Chief Justice John Marshall wrote for the Court that “commerce” means not just buying and selling commodities but also “commercial intercourse,” including the navigation of boats, and that “[t]he word ‘among’ means intermingled with.”¹³⁷ But the Court has since fluctuated on how far Congress can go under Marshall’s flexible approach to the terms “commerce” and “among.” In *United States v. Lopez*,¹³⁸ for example, the Court held that Congress could not use the Commerce Clause to pass a law prohibiting people from carrying firearms within 1,000 feet of a school.¹³⁹ In 2000, the Court again squeezed the Commerce Clause’s authority, holding in *United States v. Morrison*¹⁴⁰ that Congress exceeded its powers in enacting the Violence Against Women Act (“VAWA”), which authorized victims to sue their perpetrators.¹⁴¹

132. *Id.* at 502–03.

133. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Douglas G. Smith, *Natural Law, Article IV, and Section One of the Fourteenth Amendment*, 47 AM. U. L. REV. 351, 358 (1997) (noting the relationship to the Guarantee Clause of Article IV, Section 4, and that “[i]t is not clear that the Guarantee Clause was thought to protect substantive rights”).

134. U.S. CONST. art. I, § 8, cl. 3.

135. *Roth v. United States*, 354 U.S. 476, 493 (1957).

136. 22 U.S. (9 Wheat.) 1 (1824).

137. *Id.* at 189–90, 194.

138. 514 U.S. 549 (1995).

139. *Id.* at 567. *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 3.4 (6th ed., 2019).

140. 529 U.S. 598 (2000).

141. *Id.* at 626–27.

Also grounded in the Commerce Clause is Title II of the Civil Rights Act of 1964 (“CRA”), which forbids discrimination on the basis of race, color, religion, or national origin by places of public accommodation such as hotels and restaurants.¹⁴² In 1964, in *Katzenbach v. McClung*,¹⁴³ the Court upheld the CRA over the constitutional objection of restaurant owners who served whites only.¹⁴⁴ The restaurant owners had sued the U.S. government to enjoin enforcement of the CRA, arguing that Congress exceeded its power under the Commerce Clause because their business in a single state did not amount to engaging in or affecting interstate commerce.¹⁴⁵ The Court held that the Commerce Clause, in conjunction with the Necessary and Proper Clause, gives Congress the power to regulate local entities that burden the flow of interstate commerce.¹⁴⁶ Because the restaurant’s activities had a “substantial economic effect” on interstate commerce (approximately half the food served by the restaurant moved across state lines), Congress could use its Commerce Clause power to combat racial discrimination there and in similar places of public accommodation.¹⁴⁷

If the Supreme Court were to pull back on the scope of Congress’s Commerce Clause authority on federalism or other grounds, it could have implications for the CRA and related statutes. Consider *Dobbs* and its two-step approach to unenumerated rights: Is the right express in the Constitution? If not, is the right grounded in history and tradition?¹⁴⁸ While the Commerce Clause says nothing about racial discrimination, at the time of the framing of the Ninth Amendment, race-based discrimination in privately-owned places of public accommodation was rampant. Although sounding extreme, it is hence conceivable that a conservative majority’s *Dobbs* test for federal civil rights litigation could send regulation of race-based “rights” back to the States on the theory that the rights are not individual but are lodged in the states as a sovereign representative of the people.

C. Equal Protection

A third alternative source of unenumerated rights is the Fourteenth Amendment’s Equal Protection Clause, which took effect in 1868, and provides that “nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”¹⁴⁹ In the 1872 *Slaughter-House*

142. 42 U.S.C. § 2000a.

143. 379 U.S. 294 (1964).

144. *Id.* at 297.

145. *Id.* at 302.

146. *Id.*

147. *Id.* (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)).

148. *See Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2243 (2022).

149. U.S. CONST. amend. XIV, § 1.

Cases, the Court narrowly construed the purpose of the Fourteenth Amendment as solely focused on “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.”¹⁵⁰ If the Fourteenth Amendment is exclusively slavery-related—much like the Thirteenth, which banned slavery outright—then it does not offer much by way of protecting civil rights other than blatant discrimination against formerly enslaved individuals. The Court observed that “[w]e doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.”¹⁵¹

This changed in 1955 with *Brown v. Board of Education*.¹⁵² In extending the reach of equal protection to public schools, the Court emphasized that consideration of “the circumstances surrounding the adoption of the Fourteenth Amendment in 1868,” including “then existing practices in racial segregation . . . is not enough to resolve the problem with which we are faced.”¹⁵³ “At best, they are inconclusive” for purposes of deciding whether race-based segregated schools are constitutional, the Court determined, particularly in light of “the status of public education at that time.”¹⁵⁴ The Court explained: “In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. . . . Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states.”¹⁵⁵

Under *Dobbs*, this exposition of the law in 1868 could, at least in theory, now be determinative of whether the Constitution bans segregated education. The dissent in *Dobbs* by Justices Breyer, Sotomayor, and Kagan described the rationale behind *Brown*, which overruled *Plessy v. Ferguson*¹⁵⁶ along with its “separate but equal” doctrine:

By 1954, decades of Jim Crow had made clear what *Plessy*’s turn of phrase actually meant: “inherent[] [in]equal[ity].” . . . Whatever might have been thought in *Plessy*’s time . . . both experience and “modern authority” showed the “detrimental effect[s]” of state-

150. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1872).

151. *Id.* at 81; *see* *Strauder v. West Virginia*, 100 U.S. 303, 306–07 (1880) (discussing the *Slaughterhouse Cases*).

152. 347 U.S. 483 (1954).

153. *Id.* at 489; *see also* *Bolling v. Sharpe*, 347 U.S. 497 (1954). *See generally* CHEMERINSKY, *supra* note 139, § 9.1.1.

154. *Brown*, 387 U.S. at 489.

155. *Id.* at 489–90.

156. 163 U.S. 537 (1896).

sanctioned segregation: It “affect[ed] [children’s] hearts and minds in a way unlikely ever to be undone.”¹⁵⁷

The dissent underscored that “if the *Brown* Court had used the majority’s method of constitutional construction, it might not ever have overruled *Plessy*, whether 50 or 500 years later.”¹⁵⁸

The Court also may have compromised *Brown* in its 2023 ruling in *Students for Fair Admission v. Harvard*,¹⁵⁹ in which it held that race-based affirmative action programs in college admissions violate the Equal Protection Clause, on a theory that the Constitution is colorblind, which is rooted in Justice John Marshall Harlan’s dissent in *Plessy*. As a matter of express constitutional language, just as Alito underscored that “the Constitution makes no mention of abortion” in *Dobbs*,¹⁶⁰ a ban on racially segregated schools could fail.

Under *Dobbs*’s formulation for recognizing unenumerated rights, *Brown* is secondarily fraught in light of history and tradition, divorced from any modern understanding of what Sunstein calls “moral progress.”¹⁶¹ As Adam Liptak explained for the *New York Times*,¹⁶² Southern members of Congress issued a statement in 1956 known as the “Southern Manifesto,” denouncing *Brown* because “[t]he original Constitution does not mention education. Neither does the 14th amendment nor any other amendment.”¹⁶³ The statement went on to emphasize, much like Alito did regarding the criminalization of abortion in 1868, that:

When the [14th] amendment was adopted, in 1868, there were 37 States of the Union. Every one of the 26 States that had any substantial racial differences among its people either approved the operation of segregated schools already in existence or subsequently established such schools by action of the same lawmaking body which considered the 14th amendment.¹⁶⁴

The stage is thus set today, at least conceivably, for *Brown*’s reversal, as radical and unthinkable as that seems.

To be sure, Justice Brett Kavanaugh’s concurring opinion in *Dobbs* offered a theoretical salve to a possible rethinking of *Brown*: “The Court’s

157. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2341–42 (2022) (Breyer, Sotomayor, & Kagan, JJ., dissenting) (alterations in original) (quoting *Brown*, 347 U.S. at 494, 495).

158. *Id.* at 2342.

159. 143 S. Ct. 2141 (2023).

160. *Dobbs*, 142 S. Ct. at 2240.

161. Sunstein, *Dobbs and Due Process Traditionalism*, *supra* note 60, at 9.

162. Adam Liptak, *The Abortion Decision, Haunted by Brown v. Board of Education*, N.Y. TIMES (Aug. 1, 2022), <https://www.nytimes.com/2022/08/01/us/politics/abortion-brown-board-education.html>.

163. 102 Cong. Rec. 4515 (1956).

164. *Id.* at 4515–16.

decision today,” he wrote, “restores the people’s authority to address the issue of abortion through the processes of democratic self-government established by the Constitution.”¹⁶⁵ If people want unenumerated rights, they can seek them through their representatives. Kavanaugh fully recognized that “the Constitution authorizes the creation of new rights—state and federal, statutory and constitutional.”¹⁶⁶ “But when it comes to creating new rights,” he stated, “the Constitution directs the people to the various processes of democratic self-government contemplated by the Constitution—state legislation, state constitutional amendments, federal legislation, and federal constitutional amendments.”¹⁶⁷

The litany of options Kavanaugh outlines does not recognize the existence of unenumerated rights protected under the Constitution as it is written. Rights must be identified in legislatures, if at all—either by statute or via constitutional amendments. This argument is old, predating the Civil War. And as between federal and state legislatures, Kavanaugh’s theory could newly harness the Ninth and Tenth Amendments as further “direct[ing] the people” to the State.¹⁶⁸

D. Roe, Dobbs, and Substantive Due Process

Fourth, enter the concept of substantive due process, which as noted previously, the Court has repeatedly used to lodge unarticulated rights in the Constitution—such as marriage, child-rearing, and abortion—many of which Americans have come to take for granted. *Dobbs* made plain that the core source of unenumerated constitutional rights is now vulnerable, along with the panoply of rights it protects.

Substantive due process did not begin with *Roe*, and the rights it encompasses are some of the most mundane and uncontroversial in American society. Most people link *Roe*’s legal foundations to *Griswold*, which struck down Connecticut laws making it illegal for married couples to use contraceptives and made anyone “who assists, abets, counsels, causes, hires or commands another to” use contraceptives equally culpable.¹⁶⁹

Writing for the majority, Justice Douglas lodged the right to choose contraception in the Court’s past jurisprudence, not on a “privacy” right invented out of whole cloth—a detail that has lost its salience in modern

165. *Dobbs*, 142 S. Ct. at 2305 (Kavanaugh, J., concurring).

166. *Id.* at 2306.

167. *Id.*

168. *Id.*

169. *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965) (quoting CONN. GEN. STAT. § 54-196 (1958)). A licensed physician and a professor were found guilty of violating the accessory law and fined for giving information about contraception to married people.

debates over abortion.¹⁷⁰ He pointed to other foundational areas where the Constitution is silent: “The association of people is not mentioned in the Constitution nor in the Bill of Rights,” he wrote, to be sure.¹⁷¹ Yet “[t]he right to educate a child in a school of the parents’ choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language.”¹⁷² However, the Constitution had already been construed to protect these rights under the Fourteenth Amendment.¹⁷³

In *Meyer v. Nebraska*, the Court in 1923 held that due process precludes states from prohibiting the teaching of a foreign language to children.¹⁷⁴ A Nebraska law made it a crime to teach in any school—public or private—a language other than English to students through the eighth grade.¹⁷⁵ (“Latin, Greek, [and] Hebrew [were] not proscribed; but German, French, Spanish, Italian, and every other alien speech [were] within the ban.”¹⁷⁶) A teacher was convicted of teaching German to a ten-year-old in a parochial school maintained by Zion Evangelical Lutheran Congregation.¹⁷⁷ The lower court upheld the statute, explaining that “[t]he salutary purpose of the statute is clear,” that is, “[t]he legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land.”¹⁷⁸ It fastened the legislature’s authority in the general police power of the state.¹⁷⁹

On Nebraska’s claim that the Fourteenth Amendment’s Due Process Clause did not protect a substantive right to something like education, the Supreme Court disagreed. “While this Court has not attempted to define with exactness the liberty thus guaranteed,” it explained, “the term has received much consideration and some of the included things have been definitely stated.”¹⁸⁰ At a minimum:

Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to

170. *Id.* at 481–83.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Meyer v. Nebraska*, 262 U.S. 390, 402–03 (1923).

175. *Id.* at 396–97.

176. *Id.* at 401.

177. *Id.* at 396–97.

178. *Id.* at 397–98 (quoting *Meyer v. State*, 187 N.W. 100, 102 (1922)).

179. *Id.* at 398–99.

180. *Id.* at 399.

enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. . . .

*The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted.*¹⁸¹

Recognizing the importance of education to the general welfare, the Court concluded that, because knowledge of the German language is not harmful, “[p]laintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment.”¹⁸²

Citing *Meyer*, in *Pierce v. Society of Sisters*,¹⁸³ the Court subsequently struck down the Oregon Compulsory Education Act, which required parents to send kids ages eight to sixteen to the public school in the district where the child resided, on similar grounds. “[W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control,” the Court explained, because “[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”¹⁸⁴ The Court thus nodded to an inherent, so-called inalienable individual right, which was *not* derivative of state or federal power.

The *Pierce* Court did not ground the “fundamental theory of liberty”¹⁸⁵ in any constitutional text. Nor, for that matter, did it frame its analysis around an individual right *per se*. The gist of the Court’s concern centered on the state’s power to *force* parents to accept government-mandated education. The constitutional right was thus as much about constraints on a domineering government as it was about protecting some esoteric privilege hovering over individuals as a feature of citizenship or presence in the United States. The *Meyer* Court explained:

That the state may do much . . . in order to improve the quality of its citizens, physically, mentally and morally, is clear Perhaps it would be highly advantageous if all had ready understanding of

181. *Id.* at 399–400 (emphasis added) (citations omitted).

182. *Id.* at 400.

183. 268 U.S. 510 (1925).

184. *Id.* at 534–35 (emphasis added).

185. *Id.* at 535.

our ordinary speech, *but this cannot be coerced* by methods which conflict with the Constitution¹⁸⁶

The recognition of an individual right thus operated in reciprocity to the attempt of an arbitrary government to put its tentacles on a feature of private, family life that was presumed to be beyond the reach of coercion: a child's upbringing and education.

In *Griswold*, too, the Court outlined the substantive penumbras but also pivoted back to marriage—one of the protected areas listed in *Meyer*—writing: “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”¹⁸⁷ It can thus be said that the Court in *Griswold* found the government's *overreach* constitutionally objectionable, much like the Court found educational coercion repugnant in *Meyer* and its progeny.

Then in 1973, the Court, by a 7–2 vote, issued the landmark decision in *Roe v. Wade*, which drew the boundary against government intrusion into pregnancy at the point of fetal “viability,” falling at around twenty-four weeks of pregnancy.¹⁸⁸ In *Roe*, Justice Harry Blackmun initially applied the *Meyer/Griswold* line to find unconstitutional a series of Texas statutes making it a crime to “procure” or attempt to procure an abortion, except “by medical advice for the purpose of saving the life of the mother.”¹⁸⁹ The plaintiff wished to terminate her pregnancy and argued “that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.”¹⁹⁰ Yet Justice Blackmun foundationally characterized the claim as one that the Texas laws “improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy.”¹⁹¹

Thus, unlike in *Meyer* and *Griswold*, the case was ultimately framed around the individual's possession of some sort of precious legal entitlement—rather than around the nature of the government intrusion and whether it was of a sufficiently grotesque nature to warrant judicial restriction on the government (as opposed to the creation of a legal zone of protection around the individual). At bottom, Blackman wrote, the *Griswold* “right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough

186. *Meyer*, 262 U.S. at 401 (emphasis added).

187. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

188. *Roe v. Wade*, 410 U.S. 113, 163–65 (1973).

189. *Id.* at 117–18.

190. *Id.* at 120.

191. *Id.* at 129.

to encompass a woman's decision whether or not to terminate her pregnancy."¹⁹²

Note that, although the Court distinguished a "concept of personal liberty" from "restrictions upon state action," *Roe* ultimately hinged on "[t]he detriment that the State would impose upon the pregnant woman by denying this choice"—rather than on the need in a system of limited government to draw a red line around certain acts of the state as inherently doing too much, too far.¹⁹³ Medically diagnosable harm, the "distressful life and future" of having to manage "additional offspring," psychological harm, the taxing nature of child care, "the distress, for all concerned, associated with the unwanted child," and the "stigma of unwed motherhood" were all listed as grounds for striking down the laws—each focused on the "rights" of the individual, here, a woman, who traditionally did not have equivalent incidents of citizenship as her male counterparts under U.S. law.¹⁹⁴ Blackmun then sketched out how "at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant."¹⁹⁵ Thus began the Court's shaky balancing test jurisprudence, which weighs the woman's interests against those of the State—rather than focusing on State efforts to reach into areas of life it has no business regulating.

This basic right was reaffirmed many times, although the Court in *Planned Parenthood v. Casey*¹⁹⁶ substantially diluted constitutional protections for it by replacing strict scrutiny with a different balancing test.¹⁹⁷ *Casey* effectively greenlighted government restrictions on abortion before viability so long as they did not impose an "undue burden" on the pregnant woman—a subjective, largely standardless inquiry that diluted the weight given to a woman's individual right to abortion.¹⁹⁸

Despite *Casey*'s negative impact on abortion access, litigation over the legitimacy of *Roe* continued unabated. The conventional view among conservative scholars and commentators was, in the words of Justice Thomas's dissenting opinion in *June Medical Services, LLC v. Russo*,¹⁹⁹ that

192. *Id.* at 153.

193. *Id.*

194. *Id.*

195. *Id.* at 155.

196. 505 U.S. 833 (1992).

197. *Id.* at 873–74.

198. *Id.* The Court has also used an undue burden analysis in the Commerce Clause arena. *See South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). Beyond abortion, the test has found limited application in due process cases, although the Court has used the word "undue," finding for example that the state must "provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint" of an involuntarily-commented mental health patient in a state institution. *Youngberg v. Romeo*, 457 U.S. 307, 319 (1982).

199. 140 S. Ct. 2103 (2020).

the Court in *Roe* “created the right to abortion out of whole cloth, without a shred of support from the Constitution’s text.”²⁰⁰ The conservative Federalist Society criticized it as a “kind of fundamentally legislative decision-making.”²⁰¹ On the thirty-second anniversary of *Roe*, Representative Patrick McHenry (R-N.C.) released a press release stating:

No where in the U.S. Constitution is there written a right to abortion. No where in the U.S. Constitution is there a right to ‘privacy’—upon which those judges based their decision.

The *Roe* versus *Wade* decision symbolizes a low point in American jurisprudence. It marks a point when folks who couldn’t find legislative support for their ideas went to the courts to pass their radical laws for them.²⁰²

Even among progressives, there has long been a widespread belief that *Roe* was a wobbly outlier in constitutional jurisprudence, albeit well-intentioned. The assumption is that in fashioning a right to abortion, the Court went out on an analytical limb that would inevitably break with time.²⁰³

Of course, in 2022, the Court reversed *Roe* in *Dobbs v. Jackson Women’s Health Organization*,²⁰⁴ abolishing an established individual constitutional right for the first time in history and erecting a new, two-part test for testing unenumerated rights: (1) Is the right express in the Constitution? (2) If not, was it recognized as a matter of (so far, unbounded) history and tradition?²⁰⁵ Had the Court mindfully adhered to *Meyer*’s narrow list of matters that are constitutionally off-limits for government regulation, including freedom from bodily restraint and the ability to establish a home and bring up children, it would have been hard-pressed to deny individual reproductive choice.²⁰⁶ Most people would not quarrel with the premise that

200. *Id.* at 2142 (Thomas, J., dissenting).

201. Philip D. Williamson, *The Gordian Knot of Abortion Jurisprudence*, FEDERALIST SOC’Y (Nov. 4, 2021), <https://fedsoc.org/commentary/publications/the-gordian-knot-of-abortion-jurisprudence>.

202. Press Release, Representative Patrick McHenry, U.S. House of Representatives, Congressman McHenry Reprimands *Roe v. Wade* on Anniversary of Supreme Court Decision; Calls for an End to Legislating from the Bench (Jan. 24, 2005), <https://mchenry.house.gov/news/documentsingle.aspx?DocumentID=25764>.

203. Before her appointment to the Supreme Court, Justice Ruth Bader Ginsberg reportedly gave speeches critiquing the *Roe* majority, in which she stated that “the court ventured too far in the change it ordered,” “halted a political process that was moving” to protect abortion more broadly, and prompted “the mobilization of the right-to-life movement.” David G. Savage, *Where Roe Went Wrong: A Sweeping New Abortion Right Built on a Shaky Legal Foundation*, L.A. TIMES (May 3, 2022), <https://www.latimes.com/politics/story/2022-05-03/how-roe-vs-wade-went-wrong-broad-new-right-to-abortion-rested-on-a-shaky-legal-foundation>.

204. 142 S. Ct. 2228 (2022).

205. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2243 (2022).

206. *See Meyer v. Nebraska*, 262 U.S. 390, 396–99 (1923).

these aspects of personal life are none of the government's business,²⁰⁷ although *Meyer* did not identify the source of its list of banned governmental actions. The Fourteenth Amendment's prohibition on the taking of life, liberty, and property without due process was instead extended—much like the freedom to assemble produced a freedom to associate under the First Amendment—to construe the concept of “liberty” to include certain areas of life that are so bound up with what it means to possess liberty that the government cannot trespass, period.

E. Fourteenth Amendment Section 5

Finally, the Enforcement Clause of the Fourteenth Amendment—which provides that “[t]he Congress shall have the power to enforce, by appropriate legislation, the provisions of this article”—might not hold up as an inviolate mechanism for doing so.²⁰⁸ Under this provision, Congress can in theory legislatively enact substantive individual rights to effectuate the Equal Protection Clause and the Due Process Clause, for example.²⁰⁹

So far, the Supreme Court has interpreted Section 5 as limited to giving Congress power to enact legislation regulating state and local government action for purposes of preventing or remedying violations of rights that have *already been recognized*—or not—by the Court. As a result, if Congress were to enact legislation enshrining the right to abortion under Section 5 of the Fourteenth Amendment (or alternatively under the Commerce Clause), challengers could argue that *Dobbs*'s reversal of the right to abortion is dispositive; Section 5 cannot override it.

In *Ex parte Virginia*,²¹⁰ one of the earliest decisions to address congressional enforcement power, the Supreme Court wrote that the

207. *Meyer* was not the Court's first pronouncement on the subject. In *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), it held that a state prohibition on out-of-state insurance companies conducting business within the state violated an individual's liberty to contract under the Due Process Clause of the Fourteenth Amendment. The Court wrote:

The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

Id. at 589.

208. U.S. CONST. amend. XIV, § 5.

209. The question of whether Section 5 is a mandatory prerequisite to enforcement of the Fourteenth Amendment rather than a legislative option for Congress has arisen of late in connection with Section 3, which bans individuals who took an oath to uphold the Constitution from holding office again if they engaged in insurrection, and former President Donald Trump's eligibility for a second term in the White House given his participation in the events of January 6, 2021.

210. 100 U.S. 339 (1879).

Reconstruction amendments “were intended to be . . . limitations of the power of the States and enlargements of the power of Congress.”²¹¹ The Court further stated that “[t]hey are to some extent declaratory of rights, and though in form prohibitions, they imply immunities, such as may be protected by congressional legislation.”²¹² *Ex parte Virginia* thus lends some support for the proposition that Congress could use Section 5 to pass legislation protecting abortion against encroachment by the States. But with limited exceptions, the Supreme Court in subsequent cases went on to adopt a more conservative approach to the scope and ability of Congress to enact legislation to enforce the Fourteenth Amendment under Section 5.

Only a few years after *Ex parte Virginia*, the Court in the *Civil Rights Cases*²¹³ struck down portions of the Civil Rights Act of 1875 prohibiting discrimination by private parties in public places, holding that such laws are unconstitutional. Justice Joseph P. Bradley wrote: “It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.”²¹⁴ Thus, the Court held, Congress can only intervene to remedy existing “State laws and acts done under State authority.”²¹⁵ Much later, in a pair of cases decided in 1966, the Court signaled a further shift away from a broad reading of Section 5, declining to address “the question of what kinds of other and broader legislation Congress might constitutionally enact” to enforce the Fourteenth Amendment.²¹⁶

That same year, however, in *Katzenbach v. Morgan*,²¹⁷ the Court held that the Voting Rights Act of 1965 (“VRA”)—the law that contains key provisions for addressing racial discrimination in voting as well as gerrymandering—was within Congress’s authority. This was despite the fact that “[n]either the language nor history” of Section 5 supported the argument that Congress could only enforce rights previously and expressly recognized

211. *Id.* at 345.

212. *Id.*

213. 109 U.S. 3 (1883).

214. *Id.* at 11.

215. *Id.* at 13. The precise ruling stood until 1964, when the Court in *Heart of Atlanta Motel, Inc. v. United States* upheld Title II of the Civil Rights Act of 1964, which likewise banned racial discrimination in places of public accommodation, citing the Commerce Clause as authority. 379 U.S. 241 (1964).

216. *United States v. Guest*, 383 U.S. 745, 755–56 (1966); *see also* *United States v. Price*, 383 U.S. 787 (1966). *But see* *Guest*, 383 U.S. at 762 (Clark, J., concurring) (stating it was “both appropriate and necessary . . . to say that there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights”); *see also* *Guest*, 383 U.S. at 775–77 (Brennan, J., concurring in part and dissenting in part) (stating that Section 241 of the Civil Rights Act of 1964 was “an exercise of congressional power under § 5 of that Amendment”).

217. 384 U.S. 641 (1966).

by the Court. Justice William J. Brennan wrote for the majority: “A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment.”²¹⁸ The Court thus rejected the argument that Congress can only act where the States have already legislated, and that with the VRA Congress had “usurped powers reserved to the States by the Tenth Amendment.”²¹⁹

Instead, the Court concluded, Section 5 revealed an intent to give Congress the power to enforce the Fourteenth Amendment through “the same broad powers expressed in the Necessary and Proper Clause.”²²⁰ It represented a “positive grant of legislative power” that allows Congress to “exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.”²²¹ Under *Katzenbach*, therefore, legislation was “appropriate” to enforce the Fourteenth Amendment so long as it was “plainly adapted to that end” and “not prohibited by but [was] consistent with ‘the letter and spirit of the [C]onstitution.’”²²² Furthermore, the Court reasoned, Congress—not the Court—was responsible for weighing considerations involved in exercising its Fourteenth Amendment enforcement power.²²³

Four years later, following changes in its composition, the Supreme Court in *Oregon v. Mitchell*²²⁴ addressed the constitutionality of certain amendments to the VRA. While concluding that abolishing literacy tests and “other devices used to discriminate against voters on account of their race in both state and federal elections” was a constitutional exercise of congressional power,²²⁵ the justices differed as to the basis for such power.²²⁶

218. *Id.* at 648.

219. *Id.* at 646.

220. *Id.* at 650.

221. *Id.* at 651 (applying test from *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

222. *Id.* (quoting *McCulloch*, 17 U.S. at 421).

223. *Id.* at 653 (“It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did. There plainly was such a basis to support § 4(e) in the application in question in this case. Any contrary conclusion would require us to be blind to the realities familiar to the legislators.”).

224. 400 U.S. 112 (1970).

225. *Id.* at 118.

226. Justice Black relied primarily on the Fifteenth Amendment, *id.* at 132, whereas Justice Douglas relied on Section 5 enforcement of the Equal Protection and Privileges and Immunities

Justice Black, writing for the Court, wrote that “it cannot be successfully argued that the Fourteenth Amendment was intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves.”²²⁷ Nor can Congress “convert our national government of enumerated powers into a central government of unrestrained authority.”²²⁸

Later, in 1997, the Court in *City of Boerne v. Flores*²²⁹ held that the Religious Freedom Restoration Act *exceeded* Congress’s Section 5 powers.²³⁰ The Court reasoned that Section 5 only permits enforcement through measures intended to remedy past wrongs or to enforce existing constitutional protections; it does not give Congress “the power to decree the substance of the Fourteenth Amendment’s restrictions on the States.”²³¹ The Court explained: “*Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.*”²³² Although the line between remedial and substantive measures “is not easy to discern” and Congress has “wide latitude” to make such a determination, it added, “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.”²³³

The Court recognized that *Katzenbach* “could be interpreted as acknowledging a power in Congress to enact legislation that expands” Fourteenth Amendment rights.²³⁴ But it noted that such an interpretation was not the necessary or “even the best one.”²³⁵ Because the judicial branch determines what the law is, Congress may not expand enforcement of the Fourteenth Amendment beyond those rights recognized by the Court. Under *Flores*, therefore, preventive measures are likely to be upheld as remedial in only very limited circumstances.²³⁶

Clauses of the Fourteenth Amendment, *id.* at 135–37 (Douglas, J., concurring in part and dissenting in part).

227. *Id.* at 127 (majority opinion).

228. *Id.* at 128–29.

229. 521 U.S. 507 (1997).

230. *Id.* at 511.

231. *Id.* at 508.

232. *Id.* at 519 (emphasis added).

233. *Id.* at 519–20.

234. *Id.* at 527.

235. *Id.* at 527–28 (citing *Katzenbach v. Morgan*, 384 U.S. 641 (1966)).

236. *See id.* at 532. In *Trump v. Anderson*, the Supreme Court on March 4, 2024, cited *Flores* and held that Congress must enact new legislation under Section 5 as a necessary predicate to activating the Disqualification Clause, which is in Section 3 of the Fourteenth Amendment and prevents individuals who took an oath to defend the Constitution but engaged in insurrection from holding federal office. 144 S. Ct. 662, 667 (2024).

Then, in *Shelby County v. Holder*,²³⁷ the Court pulled back even further on congressional power to enforce the Fourteenth Amendment by striking down as unconstitutional Section 4 of the VRA, which contained the coverage formula that determined which jurisdictions are subject to preclearance by the Justice Department under Section 5 of the VRA based on their histories of discrimination in voting. Sidestepping the Fourteenth Amendment's Section 5, the Court emphasized that the Tenth Amendment reserved power to the states—including the power to regulate elections—as well as “the fundamental principle of equal sovereignty” among the states.²³⁸ It accordingly concluded that the VRA's “[Section] 5 ‘imposes substantial federalism costs’ and ‘differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty.’”²³⁹

More recently, as noted previously, in *United States v. Morrison*, the Supreme Court struck down the private cause of action provided under the VAWA as exceeding Congress's authority.²⁴⁰ The VAWA was enacted pursuant to the Commerce Clause as well as Section 5 of the Fourteenth Amendment to address biases related to gender-based violence in state legal proceedings.²⁴¹ In addition to restricting Congress's Commerce Clause powers,²⁴² the Court held that Section 5 of the Fourteenth Amendment did not give power to Congress to enact the VAWA.²⁴³

As it stands, then, if the modern Court were to send additional unenumerated rights protections to the exclusive control of state legislatures, and Congress were to respond with legislative protections, its jurisprudence under Section 5 of the Fourteenth Amendment would not present a meaningful obstacle to later striking down such legislation.²⁴⁴

F. Federalism and the Myth of Electoral Accountability

Having explained constitutional sources for unenumerated rights, the Part concludes by addressing the *Dobbs* Court's answer to the unenumerated

237. 570 U.S. 529 (2013).

238. *Id.* at 542–43.

239. *Id.* at 540 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202, 203 (2009)).

240. *United States v. Morrison*, 529 U.S. 598, 620–22 (2000); *see supra* note 140–141 and accompanying text.

241. *Id.* at 605–07.

242. *Id.* at 607–19.

243. *Id.* at 619–27.

244. The Respect for Marriage Act of 2022, Pub. L. 117-228, 138 Stat. 2305 (2022), which protects gay and inter-racial marriage, could accordingly be under scrutiny if the Court were to reverse its rulings in *Obergefell v. Hodges*, 576 U.S. 644 (2015), or *Loving v. Virginia*, 388 U.S. 1 (1967), on a *Dobbs* theory, i.e., that the right to marriage is unenumerated and consequently is within the prerogative of the States to regulate.

rights conundrum: Let state legislatures decide. In sending abortion rights—and women’s rights—back to state legislatures for regulation in lieu of the Constitution itself, the *Dobbs* majority made no effort to recognize, let alone grapple with, the myriad problems inherent in our electoral system. It merely assumed that state legislatures, and women’s ability to vote for legislators, will suffice to step in where *Roe* left off.

But the conservative justices’ nod to federalism as the panacea for rights protection in *Dobbs* is, pragmatically speaking, a myth.²⁴⁵ Not only does it untenably assume that the electoral system works fairly and reflects the actual will of the voting public,²⁴⁶ but it ignores the unfortunate reality that the Supreme Court has been hostile to voting rights over decades, gutting congressional legislation aimed at expanding the franchise and closing the federal courts to judicial review of categories of voting rights cases with constitutional implications. This Section explains why depending on states for the protections of these rights is untenable.

One fundamental problem with voters effectively having a say in legislative policy-making is gerrymandering. Gerrymandering is the practice by which, every ten years, state and local governments carve up and manipulate the geographical boundaries of an electoral district to maximize the power of one political party over the other. Two common techniques are “packing”—that is, drawing a district in a tortured way that concentrates voters of a certain party, making it all but impossible for others to choose a candidate from a competing party for that district. And “cracking”—taking a logical geographic boundary that happens to contain a predominant number of voters from a particular party, breaking it up into pieces, and adding those fragments to other districts dominated by the competing party so that those voters’ voices no longer matter. As Jane Mayer wrote for the *New Yorker*, Ohio is a prime example of a state so gerrymandered to favor radical GOP legislatures that Matt Huffman, the president of the Ohio Senate, said in May to the Columbus *Dispatch* about the Republicans’ legislative supermajority: “We can kind of do what we want.”²⁴⁷

245. Although *Dobbs* suggests that the Court is poised to enhance state power over individual rights protected doctrinally under the Constitution, the Court has not been consistent in its deference to the states. See Mark Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97 (2022) (describing recent cases in which the Supreme Court has interfered with state power); see also Kimberly Wehle, *How the Court Became a Voting-Rights Foe*, ATLANTIC (Feb. 23, 2022), <https://www.theatlantic.com/ideas/archive/2022/02/scotus-gerrymandering-voting-rights/622866/>.

246. See generally PIPPA NORRIS, WHY AMERICAN ELECTIONS ARE FLAWED (AND HOW TO FIX THEM) (2017).

247. Jane Mayer, *State Legislatures Are Torching Democracy*, NEW YORKER (Aug. 6, 2022), <https://www.newyorker.com/magazine/2022/08/15/state-legislatures-are-torching-democracy>.

Although the original Constitution contains no affirmative right to vote, with Section 2 of the VRA,²⁴⁸ Congress drew a legislative line banning election discrimination and gerrymandering based on race and enabling lawsuits to enforce it. In *Shaw v. Reno*,²⁴⁹ the Supreme Court in 1993 held that gerrymandered boundaries that cannot be explained on grounds other than race violate the Constitution's Equal Protection Clause, declaring that "bizarrely shaped" districts strongly indicate racial intent.²⁵⁰ The VRA, combined with the Court's earlier constitutional interpretation, provided a solid foundation for protecting voting rights and strengthening American democracy. But that is not the direction the Court's conservative majority has gone.

The slide away from voting-rights protections began in 2010, with the Court's 5–4 decision in *Citizens United v. Federal Election Commission*,²⁵¹ which held that legislative restrictions on "independent expenditures" from corporations violate the First Amendment right to free speech.²⁵² (There is an irony here, of course, to the extent that *Dobbs* rolled back reproductive rights for lack of textual support, while the First Amendment says nothing about the legal fictions that are corporations.) Donations directly to campaigns and their committees—something that individuals, but not corporations, can make—are capped. So, for individuals, donating more than \$3,300²⁵³ to a single candidate is illegal, on the rationale that a greater amount could corruptly sway an elected politician's decision-making once in public office. However, if an individual or a corporation buys a \$1 million Super Bowl ad containing "electioneering communication[s]," that speech cannot be congressionally restricted so long as the ad is not coordinated with the candidate.²⁵⁴ The trick is that only extremely wealthy individuals and corporations can do such a thing—leaving them with more political power than average people. The Court ruled this way even though Congress determined in legislation dating back more than a hundred years that such spending might unduly influence candidates for office and warrants regulation.

Three years later, the Court in *Shelby County v. Holder* again struck down a key portion of an act of Congress²⁵⁵—this time, Section 5 of the VRA.²⁵⁶ Section 5 of the VRA was designed to push back on states'

248. 52 U.S.C. § 10301.

249. 509 U.S. 630 (1993).

250. *Id.* at 686 (Souter, J., dissenting).

251. 558 U.S. 310 (2010).

252. *Id.* at 318–19.

253. 52 U.S.C. § 30116(a).

254. *Citizens United*, 558 U.S. at 367–68.

255. *Shelby County v. Holder*, 570 U.S. 529 (2013).

256. 52 U.S.C. § 10304; *see supra* notes 237–239 and accompanying text.

outmaneuvering of the Fifteenth Amendment’s post-Civil War prohibition on laws restricting ballot access based on race. To keep Black voters from the polls, states enacted arbitrary hurdles to voting—such as reciting the Declaration of Independence or counting the bubbles in a bar of soap—as a precondition to ballot access. These schemes disproportionately impacted Black voters. Section 5 required states with unsavory histories of imposing such barriers to run proposed laws by the Justice Department before the laws could take effect.

The program was a legislative triumph, and Chief Justice Roberts himself wrote for the majority in *Shelby County* that “[t]he Act has proved immensely successful at redressing racial discrimination and integrating the voting process.”²⁵⁷ Section 5 was reauthorized multiple times by substantial supermajorities in Congress.²⁵⁸ Nonetheless, the Supreme Court held that Section 4’s formula for determining which states needed the DOJ’s approval to enact new voting laws—a process known as “preclearance”—was outdated, sending Congress back to the drawing board.²⁵⁹ Although “voting discrimination still exists; no one doubts that,” Roberts wrote for the majority that “the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.”²⁶⁰ Roberts reasoned that the preclearance formula was “based on decades-old data and eradicated practices” because minority-voter access had made great strides since 1965.²⁶¹

The Court thus deemed the formula an unconstitutional infringement on states’ ability to regulate elections under the Tenth Amendment—a painful irony, given that in *Dobbs* it used federalism to justify returning issues like abortion to the states for voters to decide, while previously using federalism to strike down efforts to ensure that people in those states can meaningfully vote. *Shelby County* was a sharp departure from prior precedent, as the Court had already rejected a similar constitutional challenge brought by Texas after Congress reauthorized the law in 2006.²⁶² That congressional determination was based, in the words of Justice Ruth Bader Ginsburg, on an “exhaustive evidence-gathering and deliberative process.”²⁶³

The third nail in the voting-rights coffin came in 2019 with *Rucho v. Common Cause*.²⁶⁴ Although the Court had banned racial gerrymandering

257. *Shelby County*, 570 U.S. at 548.

258. See Civ. Rts. Div., *About Section 5 of the Voting Rights Act*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/about-section-5-voting-rights-act> (last updated Nov. 17, 2023).

259. *Shelby County*, 570 U.S. at 537.

260. *Id.* at 535–36.

261. *Id.* at 549, 551.

262. *League of United Latin Am. Citizens v. Perry*, 548 U. S. 399, 440 (2006).

263. *Shelby County*, 570 U.S. at 593 (Ginsberg, J., dissenting).

264. 139 S. Ct. 2484 (2019).

in *Shaw v. Reno*, in *Rucho*, Roberts wrote for a 5–4 conservative majority that constitutional claims of partisan gerrymandering are “political questions” that cannot be heard in court.²⁶⁵ The courthouse doors are thus permanently closed to claims that packing and cracking electoral districts for purposes of entrenching party power are unconstitutional. Voters must go back to gerrymandered politicians for help by asking that they give up the reins of power that gerrymandering provides them with and divide up districts more fairly.²⁶⁶

Voting-rights activists have turned elsewhere. The John R. Lewis Voting Rights Advancement Act of 2021,²⁶⁷ which languished in 2022 because of the threat of a Republican filibuster, was Congress’s answer to *Shelby County*. In addition to working via Congress, voters turned to Section 2 of the Voting Rights Act for relief through the courts in the interim. Section 2 imposes a permanent nationwide ban on voting practices that discriminate on the basis of race, color, or membership in a language minority group defined elsewhere in the statute.²⁶⁸ After *City of Mobile v. Bolden*,²⁶⁹ in which the Supreme Court in 1982 added a discriminatory intent showing to make a claim, Congress amended the law and set forth a “totality of the circumstance” test for violations. Section 2 covers any qualification or prerequisite to voting but has primarily—pre-*Shelby County*—been used for gerrymandering claims, with a 1986 case called *Thornburg v. Gingles* establishing the primary standards for vote dilution claims involving redistricting schemes.²⁷⁰

However, the Section 2 strategy also met the Court’s antipathy when used to challenge voting requirements and procedures. In 2021, in *Brnovich v. Democratic National Committee*,²⁷¹ Justice Alito wrote a 6–3 majority opinion (with Justice Amy Coney Barrett now on the Court) that effectively inserted a multi-factored and rigorous judicial standard into Section 2 as a prerequisite to voters seeking relief from laws inhibiting ballot access,²⁷² although Section 2 remained intact as a challenge to gerrymandering. In 2023, the Court upheld a Section 2 challenge to redistricting by a 5–4 vote in

265. *Id.* at 2500.

266. The Court need not have gone down this path. The political-question doctrine is notoriously squishy and untethered from the constitutional text, and the majority did not deny the broader constitutional implications of political gerrymandering. It just refused to hear them. Justice Elena Kagan bemoaned in dissent: “For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.” *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting).

267. H.R. 4, 117th Cong. (2021).

268. 52 U.S.C. § 10301.

269. 446 U.S. 55 (1980).

270. 478 U.S. 30 (1986).

271. 141 S. Ct. 2321 (2021).

272. *Id.* at 2338–40.

Allen v. Milligan,²⁷³ refusing to weaken the standards for such cases. In *Allen*, voters and other groups challenged Alabama’s gerrymandered map following the 2020 Census, arguing that it violated Section 2 by creating only one minority district out of seven, even though Black residents make up twenty-seven percent of the state’s population.²⁷⁴

Writing for the majority, Chief Justice Roberts—despite having penned *Citizens United*—held that the extensive record in the case supported the lower court’s conclusion that the plaintiffs’ claim was likely to succeed under Section 2.²⁷⁵ Alabama later defied the Court by creating a single Black district but was rebuffed when attempting to get it endorsed on a second appeal.²⁷⁶

Against this backdrop, to declare as Justice Alito did in *Dobbs* that “[o]ur decision returns the issue of abortion to [state] legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office,”²⁷⁷ blinks reality—especially given that *Alito* authored *Brnovich* as well. Yet after *Dobbs*, it is unlikely that the flaws in the electoral process and mechanism for enforcing voting rights would stall the Court from sending more constitutionally unenumerated rights determinations back to state legislatures, conceivably using the Ninth Amendment as support.

III. “UNENUMERATED” RIGHTS: RETAINED OR RELINQUISHED?

Dobbs could mark the beginning of a wider retraction of federal authority over individual rights. In light of that threat, the question becomes whether the states can be trusted to protect rights that have previously been under the protection of the U.S. Constitution. One possibility, which *Dobbs* embraces, is that state governments through their largesse—and with the authority theoretically granted by a majority or plurality of voters—might decide to enact laws affording certain rights that the Constitution does not otherwise articulate. That formulation assumes, however, that the government itself somehow exists as the *source* of unenumerated rights through its legislators’ and other elected officials’ attenuated accountability at the ballot box.

As second possibility is that there exist rights separate and apart from those that are “gifted” from legislatures, and that individuals *relinquish* those

273. 143 S. Ct. 1487 (2023).

274. *Id.* at 1553 (Thomas, J., dissenting).

275. *Id.* at 1498 (majority opinion).

276. See David A. Graham, *A New Era of Open Defiance*, ATLANTIC (Dec. 5, 2023), <https://www.theatlantic.com/ideas/archive/2023/12/alabama-and-georgia-defy-federal-courts-redistricting/676235/>.

277. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2277 (2022).

rights to the government for protection in exchange for other advantages the government alone affords. Under that theory, a second question arises: Whether individuals covered by the Constitution at some point relinquished control of their inherent rights either to (a) the federal government through the Constitution or (b) state legislatures for their *exclusive* protection against a national government; and if so, (c) how was that accomplished and recorded? Unlike naturalized citizens, Americans who secure citizenship at birth do not take any oath or test to satisfy prerequisites of U.S. citizenship. They are just “born” American. In theory, birthright citizenship somehow triggers a reciprocal agreement to abide by the terms of the Constitution and the rule of law in exchange for relinquishing individual rights that might conflict with those laws (such as the right to kill enemies at will).

But the Constitution does not explicitly cover all rights. The *Dobbs* majority seems to argue that whatever rights are left over after the Constitution’s text is exhausted must be protected by history and tradition and, barring that, by state legislatures—or not at all. But the Constitution protects rights against infringement *by the government*. State legislatures *are* the government. It must be, then, that individuals retain certain rights *against* the government (including state legislatures) even if they are not articulated in the Constitution. If that is the case, then it follows that those rights cannot be taken or impeded by the government through legislatures—even with electoral support (a concept that is akin to a substantive due process argument).

This Part accepts the inalienable rights theory and walks through the primary conceptual theories for securing unenumerated rights to illustrate the frailty of a federalism-heavy resolution of unenumerated rights questions. There are various possible sources of unenumerated rights—including history and tradition (otherwise known as the “*Glucksberg*” test)²⁷⁸ as well as natural law, religious canon, and positive law. A review of these alternatives suggests, at a minimum, that protected individual rights extend somewhere beyond written constitutional text.

A. *Legal History and Tradition—The Glucksberg Test*

Today, the leading theory for identifying unenumerated rights, adopted by the *Dobbs* majority, is the history and tradition test. Since 1977 in a case called *Moore v. City of East Cleveland*,²⁷⁹ and more prominently twenty years later in *Washington v. Glucksberg*,²⁸⁰ the Court has looked to “history and tradition” as a source of rights or, alternatively, as proof of the absence of

278. See *Washington v. Glucksberg*, 521 U.S. 702 (1997).

279. 431 U.S. 494 (1977).

280. 521 U.S. 702 (1997).

unenumerated rights.²⁸¹ It is this foray that the Court embraced fully in *Dobbs* as the touchstone for unenumerated constitutional rights moving forward. *Dobbs* offered no timeframe for confining this inquiry except to indicate that it is not limited to the time of ratification of the constitutional language in question. Indeed, Alito ventured far earlier than that, to thirteenth-century England, nearly 500 years before the Constitution was ratified.²⁸²

Oddly, moreover, the *Dobbs* Court's decision to select the history and tradition test as the new governing constitutional principle for substantive due process came after *Glucksberg* and *Griswold* coexisted for nearly a quarter century. A look back reveals that this shift was brewing among the Justices in dueling opinions for some time. And importantly, for purposes of Ninth Amendment doctrine, the rationale for relying on *Glucksberg* was familiar: Unenumerated rights are exclusively for state legislatures to decide.

Glucksberg involved a Washington State statute criminalizing assisted suicide and providing that “withholding or withdrawal of life-sustaining treatment’ at a patient’s direction ‘shall not . . . constitute a suicide.’”²⁸³ The plaintiffs, practicing physicians who occasionally treated terminally ill patients, sought a declaratory judgment that the statute was unconstitutional. The federal district court agreed that the statute “places an undue burden on the exercise of [that] constitutionally protected liberty interest.”²⁸⁴

The Supreme Court ultimately reversed, holding that the asserted “right” to assisted suicide is not a fundamental liberty interest protected by the Fourteenth Amendment’s Due Process Clause. Looking at the Nation’s “history, legal traditions, and practices,” the Court reasoned that almost every state makes it a crime to assist a suicide, and common law tradition had mostly either punished or disapproved of suicide and assisting suicide for over 700 years.²⁸⁵ Although advances in medicine and technology had shifted public concern enough that, by the time the statute was enacted, some states allowed “‘living wills,’ surrogate health-care decisionmaking [sic], and the withdrawal or refusal of life-sustaining medical treatment,” voters still rejected ballot initiatives that would lift the ban on assisted suicides in their respective states.²⁸⁶

The Court acknowledged the *Meyer v. Nebraska* line of cases holding that the Due Process Clause provides heightened protection against government interference with certain fundamental rights and liberty interests,

281. *Id.* at 721.

282. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2249 (2022).

283. *Glucksberg*, 521 U.S. at 707 (citation omitted).

284. *Id.* at 707–08 (quoting *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1465 (W.D. Wash. 1994)).

285. *Id.* at 710.

286. *Id.* at 710, 716.

and that the “‘liberty’ specially protected by the Due Process Clause includes the rights to marry, to have children, to direct the education and upbringing of one’s children, to marital privacy, to use contraception, to bodily integrity, and to abortion.”²⁸⁷ But presciently, it cautioned against expanding substantive due process protections to new rights or liberty interests—on the theory that such questions should be left to voters and legislatures.²⁸⁸ The proper question, it reasoned, is “whether the ‘liberty’ specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so.”²⁸⁹ If it does not, then Washington’s statute is subject to rational basis review.

Nine years earlier, however, the Supreme Court had taken a different approach to withdrawal of life support. In *Cruzan v. Director, Missouri Department of Health*,²⁹⁰ it held that competent patients have a right to remove life supporting medical treatment, so long as there is clear and convincing evidence of what they would want if they were in a position to make their own decisions. The parents of Nancy Cruzan asked her doctors to remove her feeding tube after a car accident left her in a persistent vegetative state.²⁹¹ The trial court found no right to refuse or direct the withholding of medical treatment, but the Supreme Court sided with the State of Missouri’s demand for clear and convincing evidence of her wish to die.²⁹² The unenumerated “right” stemmed from the common law rule that forced medication was a battery as well the legal tradition protecting the decision to refuse unwanted medical treatment—and thus was found to be consistent with the nation’s history and traditions.²⁹³

In *Glucksberg*, the Court distinguished *Cruzan*, noting that even though the decision to die by suicide with another’s help is “just as personal and profound,” it has never had similar legal protections.²⁹⁴ It also distinguished *Casey*, in which the Court identified a category of personal activities and decisions that are “so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment”—“though the abortion decision may originate within the zone of conscience and belief,” the *Glucksberg* Court noted, “it is more than a philosophic exercise.”²⁹⁵ With no liberty

287. *Id.* at 720 (citations omitted).

288. *Id.*

289. *Id.* at 723.

290. 497 U.S. 261, 269 (1990).

291. *Id.* at 266–67.

292. *Id.* at 285–87.

293. *Glucksberg*, 521 U.S. at 725 (citing *Cruzan*, 497 U.S. at 269).

294. *Id.* at 725.

295. *Id.* at 727 (emphasis removed) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992)).

interest in the “right” to assisted suicide, by contrast, the *Glucksberg* Court held—as it did later in *Dobbs* (contravening *Casey*)—that the statute prohibiting it must only pass only rational basis review.

The decision in *Glucksberg* has repeatedly been invoked by conservative justices and in support of conservative arguments,²⁹⁶ although *Dobbs* was the first case in which *Glucksberg* was applied to expressly and completely revoke a previously recognized unenumerated right. In *District Attorney’s Office for the Third Judicial District v. Osborne*,²⁹⁷ for example, the Court addressed whether the plaintiff, who had been convicted of sexual assault years earlier, had a right to access evidence for DNA testing to be conducted at his own expense. Chief Justice Roberts (joined by Justices Scalia, Kennedy, Thomas, and Alito) concluded that there is no constitutional right to post-conviction access to State’s evidence for DNA testing and that the *Brady* right to pretrial disclosure does not extend to the postconviction context.²⁹⁸ The majority determined that, regardless of actual guilt or innocence, the plaintiff had already received all the process he was due. Roberts cited *Glucksberg* to underscore both that the issue of post-conviction relief is one primarily for state legislatures and that the Court should be hesitant to expand substantive due process rights.²⁹⁹ Justice Stevens pointed out in dissent that an individual’s interest in “physical liberty is one of constitutional significance,” which “would be vindicated by providing

296. See *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (majority opinion by Alito, joined by Roberts, Scalia, Kennedy, and Thomas, incorporating Second Amendment decision in *Heller* to the states); *Kerry v. Din*, 576 U.S. 86 (2015) (majority opinion by Scalia advocating restraint in expanding “implied fundamental rights” and emphasizing “history and tradition”); *D.A.’s Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52 (2009) (majority opinion by Roberts joined by Scalia, Kennedy, Thomas, and Alito declining to extend *Brady* to postconviction proceedings and denying a fundamental right to access to evidence for testing in postconviction proceedings); *Gonzales v. Carhart*, 550 U.S. 124 (2007) (majority opinion by Kennedy joined by Roberts, Scalia, Thomas, Alito, upholding “partial birth abortion” ban, emphasizing state interest in integrity of the medical profession); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (Kennedy, joined by Rehnquist, dissenting); *Boumediene v. Bush*, 553 U.S. 723 (2008) (Roberts, joined by Scalia, Thomas, and Alito, dissenting); *United States v. Windsor*, 570 U.S. 744 (2013) (Alito, joined by Thomas, dissenting); Scalia, joined by Thomas, dissenting); *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (Thomas concurring; Scalia concurring); *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786 (2011) (Scalia, joined by Thomas, concurring); *Nat’l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134 (2011) (Scalia, joined by Thomas, concurring). *Glucksberg* was cited repeatedly in dissenting opinions by Justices Scalia and Thomas. See *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Kingsley v. Hendrickson*, 576 U.S. 389 (2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786 (2011); *Gonzales v. Oregon*, 546 U.S. 243 (2006); *Lawrence v. Texas*, 539 U.S. 558 (2003); *City of Chicago v. Morales*, 527 U.S. 41 (1999); *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (arguing majority applied an analysis rejected by *Glucksberg*). Additionally, every dissent in *Obergefell v. Hodges*, 576 U.S. 644 (2015), cited *Glucksberg*.

297. 557 U.S. 52 (2009).

298. *Id.* at 74–75.

299. See *id.* at 73–74.

postconviction access to DNA evidence, as would the State's interest in ensuring that it punishes the true perpetrator of a crime."³⁰⁰

Since *Glucksberg*, approximately ten Supreme Court cases include one or more opinions advocating for its approach—i.e., that substantive due process only protects fundamental rights that are “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.”³⁰¹ However, in several of these cases, the opinions citing *Glucksberg* only referenced “history and tradition” with no mention of “ordered liberty.”³⁰² Even when the concept of ordered liberty was included, it was either not discussed,³⁰³ was dismissed, was effectively treated as a throwaway line,³⁰⁴ was included as a second step if history was deemed inconclusive,³⁰⁵ or was identified only as an alternative to history and tradition.³⁰⁶ The exclusion of the concept of liberty in defining fundamental rights protected by the Fourteenth Amendment today seems counterintuitive, even under *Glucksberg*. But identifying historical treatments of unenumerated rights locks in a specific vision of rights doctrine, enabling the Court to downplay the intentionally expansive concept of “liberty” that is expressly protected by the Fourteenth Amendment.³⁰⁷

Cases expanding fundamental rights have generally avoided or rejected the strict application of *Glucksberg*, especially in the context of history and tradition, focusing instead on the “concept of liberty” component. For example, in holding Texas’s anti-sodomy law unconstitutional, the majority in *Lawrence v. Texas*³⁰⁸ stated that “history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”³⁰⁹

300. *Id.* at 99–100 (Stevens, J., dissenting).

301. *See supra* note 296.

302. *See* *City of Chicago v. Morales*, 527 U.S. 41, 102 (1999) (Thomas, J., dissenting); *Lawrence v. Texas*, 539 U.S. 558, 593–94 (2003) (Scalia, J., dissenting); *Nat’l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 161 (2011) (Scalia, J., concurring); *Obergefell v. Hodges*, 576 U.S. 644, 737 (2015) (Alito, J., dissenting).

303. *See, e.g.*, *United States v. Windsor*, 570 U.S. 744, 808 (2013) (Alito, J., dissenting); *Obergefell*, 576 U.S. at 695–98 (Roberts, J., dissenting).

304. *See* *Kerry v. Din*, 576 U.S. 86, 96 (2015) (after including both components, Justice Scalia states the relevant question is consistency with United States’ history and practice); *Windsor*, 570 U.S. at 794 (Scalia, J., dissenting).

305. *See* *Troxel v. Granville*, 530 U.S. 57, 100–01 (2000) (Kennedy, J., dissenting) (Justice Kennedy moves to the concept of ordered liberty after deciding the historical record was inconclusive).

306. *See* *McDonald v. City of Chicago*, 561 U.S. 742, 811 (2010) (Thomas, J., concurring).

307. *See, e.g.*, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2324–25 (2022).

308. 539 U.S. 558 (2003) (holding Texas’s anti-sodomy law to be unconstitutional based on the right to privacy).

309. *Id.* at 572 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

In *Obergefell v. Hodges*,³¹⁰ the Court held that the right of same-sex couples to marry was protected by the Fourteenth Amendment, with Chief Justice Roberts writing in his dissent that the majority in *Obergefell* “effectively overrule[d] *Glucksberg*.”³¹¹ This point was restated by the dissent in *Dobbs*, which pointed out that *Obergefell* “specifically rejected” the “claim, based on *Washington v. Glucksberg* that the Fourteenth Amendment ‘must be defined in a most circumscribed manner, with central reference to specific historical practices’—exactly the view today’s majority follows.”³¹²

Whether *Glucksberg* was or was not expressly rejected or effectively overruled in *Obergefell*, it was fully revived in *Dobbs*, which offered a clear indication of just how severe this reduction of the Fourteenth Amendment to “historical sentiment” can be.³¹³ Although *Dobbs* notes the history of exceptions in abortion bans when abortion is needed to “save the life of the mother,”³¹⁴ the majority opinion imposes no specific requirement on state laws to provide such an exception. Despite establishing “history and tradition” as the new touchstone for recognition and protection of individual rights against arbitrary or discriminatory governmental interference, the Court ignores the history of protections for mothers. (The majority’s callous approach to maternal health continued in 2024, when the Court on January 5 left in place Idaho’s strict abortion ban pending a decision on the merits of the question whether federal protections for emergency care under the Emergency Medical Treatment and Labor Act supersede the state law; in doing so, the Court overruled a stay of the Idaho abortion ban imposed by the U.S. Court of Appeals for the Ninth Circuit.)³¹⁵

B. Lockean Natural Law

The second theoretical grounding for unenumerated rights is the concept of natural law. The Declaration of Independence famously established the foundational tenets of American government, which it called “truths” that were “self-evident” yet radical when the document was signed on August 2, 1776: “that all men are created equal, that they are endowed by their Creator

310. 576 U.S. 644 (2015).

311. *Id.* at 702 (Roberts, C.J., dissenting).

312. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2326 (2022) (Breyer, J., dissenting) (quoting *Obergefell*, 576 U.S. at 671).

313. *McDonald v. City of Chicago*, 561 U.S. 742, 877 (2010) (Stevens, J., dissenting) (“The judge who would outsource the interpretation of ‘liberty’ to historical sentiment has turned his back on a task the Constitution assigned to him and drained the document of its intended vitality.”).

314. *See, e.g., Dobbs*, 142 S. Ct. at 2253.

315. *See Idaho v. United States*, No. 23-727, 2024 WL 61829 (U.S. Jan. 5, 2023) (mem.); *see also* Adam Liptak, *Supreme Court to Hear Challenge to Idaho’s Strict Abortion Ban*, N.Y. TIMES (Jan. 5, 2024), <https://www.nytimes.com/2024/01/05/us/politics/supreme-court-idaho-abortion-ban.html>.

with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”³¹⁶ None made their way into the Constitution.

However, at the Philadelphia Convention in September 1787, the question of enumerated rights was discussed. As Professor Michael McConnell has explained, the Framers’ failure to include enumerated rights in the original Constitution was “not because of any theoretical or jurisprudential opposition to the idea of a bill of rights.”³¹⁷ The Bill of Rights, elaborating on the idea of enumerated rights, instead came later, in 1791, and it included the Fifth Amendment’s Due Process Clause as well as the Ninth and Tenth Amendments, which ostensibly protected both States’ rights as well as those of “the people.”³¹⁸ In 1868, the Fourteenth Amendment was added to the Constitution, which expressly applied due process to the states, and contains the influential Equal Protection Clause. Of course, these amendments did not exhaust the list of individual rights conceivably covered by the U.S. Constitution, leaving the source of unenumerated rights—and the concept of ethereal “natural rights” as a theoretical and philosophical backdrop—in ongoing flux.

Influential thinkers like Hugo Grotius, Thomas Hobbes, and Samuel Pufendorf had long endorsed the idea of natural rights, which trace back to Aristotle in the fourth century B.C.³¹⁹ The Framers were particularly influenced by Enlightenment thinkers, including John Locke, who in the seventeenth century famously wrote of natural rights as those that every human being has in the state of nature, without the conventions of civil or political society.³²⁰ The state of nature, for Locke, was “a *state of perfect freedom* to order [one’s] actions, and dispose of [one’s] possessions and persons, as [each] think[s] fit, . . . without asking leave, or depending upon the will of any other man.”³²¹

In his *Second Treatise of Government*, Locke offered some structure to natural rights by specifying that “no one ought to harm another in his Life, Health, Liberty, or Possessions.”³²² According to Locke, natural rights are reciprocally confined by the laws of nature. “[E]very man has a *property* in

316. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

317. Michael W. McConnell, *Natural Rights and the Ninth Amendment: How Does Lockean Legal Theory Assist in Interpretation?*, 5 N.Y.U. J.L. & LIBERTY 1, 6 (2010).

318. See *supra* Section I.A.

319. NATURAL RIGHTS LIBERALISM FROM LOCKE TO NOZICK, at vii (Ellen Frankel Paul et al. eds., 2010).

320. McConnell, *supra* note 317, at 2.

321. JOHN LOCKE, TWO TREATISES OF GOVERNMENT bk. II § 4 (Thomas Hollis ed., 1764) (1690).

322. *Id.* § 6. See generally Sheldon Gelman, “Life” and “Liberty”: Their Original Meaning, Historical Antecedents, and Current Significance in the Debate Over Abortion Rights, 78 MINN. L. REV. 585 (1994) (discussing the historical meanings of life, liberty, and property).

his own *person*,” as well as the fruits of his labor, and each person must not infringe on the rights of others to person, property, and liberty.³²³ Locke also wrote that individuals give up their natural rights to use violence for purposes of punishing violations of their natural rights, handing over to the state the exclusive prerogative to use force and constrain liberty or even take life as a means of punishment.³²⁴ Each person “is to part also with as much of his natural liberty, in providing for himself, as the good, prosperity, and safety of the society shall require.”³²⁵

But what became of those natural rights that individuals do not relinquish specifically to the federal government? Were they wholesale handed to the States via the Ninth and Tenth Amendments? Or does the Ninth’s reference to “the people” mean that certain unenumerated natural rights remain with the people and are not susceptible to government coercion or intervention whatsoever? If so, how to identify them?

Of course, life and liberty appear in the Due Process Clause, which is the very text that gave rise to decades-long debates over abortion. Locke’s identification of the primary content of natural rights—the right to life, health, liberty, and property—thus does little to resolve the question of how to concretize unenumerated constitutional rights today. Inevitably, defining natural rights is an inherently subjective exercise, which hinges on individual beliefs and gives judges wide leeway to give subjective content to the Constitution.

Scholars have long debated whether the Ninth Amendment protects individual natural rights or just collective rights through state sovereignty.³²⁶ In considering this question, three categories of rights arise in an ordered democratic society: (1) positive rights under positive law, i.e., human-made, written rules that govern or oblige certain behavior and which are established by constitutions, treaties, common law, or legislatures (discussed further below); (2) relinquished rights that are delegated to federal and state legislatures for prospective protection (in the United States, that includes under the Constitution); and (3) retained or reserved rights—including those that, prior to *Dobbs*, were recognized by the Supreme Court as a matter of substantive due process. Individuals can protect their natural liberty by confining the rights of government through a defined bill of rights, but that does not address the problem of unenumerated natural rights unless, as

323. LOCKE, *supra* note 321, at bk. II § 27. People relinquish natural rights to the government in order to foster social goods, like public safety, as well. Rights that are “respected by civil governments,” Professor McConnell notes, are known as “human rights” or “positive law.” McConnell, *supra* note 317, at 2, 21.

324. LOCKE, *supra* note 321, at bk. II §§ 123, 128.

325. *Id.* § 130.

326. *See supra* Part I.

Professor McConnell has noted, “the founding generation, despite their high regard for ‘the natural rights of mankind,’ believed that in the absence of express constitutional protections, legislatures had the power (even if not the right) to infringe those rights.”³²⁷ That seems obviously wrong, as the Ninth Amendment’s language appears to confirm.

The assumption that state legislatures do in fact possess the power to infringe on individual rights absent some electoral pushback appears to be the rationale behind the *Dobbs*’s majority’s complete reliance on state sovereignty to protect them. This reading of the fate of natural rights under the Constitution collides with the Ninth Amendment’s specific reference to rights “retained by the people”—even if they are not enumerated. According to Professor McConnell:

Examples might include the right to control the upbringing of one’s children, the right not to kill other persons, the right to travel, the right to engage in nonprocreative sex, the right to read, the right to control one’s own medical care, the right to choose one’s own friends and associates, the right to pursue a job or profession, or the right of self-defense.³²⁸

Indeed, “[d]uring the Bill of Rights debates, reference was made to the right to wear a hat and to go to bed when one pleases.”³²⁹ These rights are natural rather than positive, retained rather than relinquished, and unenumerated rather than expressly articulated in the constitutional text.³³⁰

The question for the Supreme Court after *Dobbs*, then, is do these rights exist at all? For the current majority, they do not exist as a matter of due process, at least. The weight of scholarly authority—including by luminaries like Richard Posner, Erwin Chemerinsky, and Laurence Tribe—is that they exist somewhere.³³¹ The modern Court’s narrower view of retained rights

327. McConnell, *supra* note 317, at 17.

328. *Id.* at 19.

329. *Id.*

330. *Id.*

331. See, e.g., CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 258 (1993) (arguing that abortion is protected under the Equal Protection Clause); Richard A. Posner, *Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433, 441 (1992) (noting that the Ninth Amendment “does not identify any of the retained rights, or specify a methodology for identifying them” but, considered alongside due process and equal protection, “not only is there not enough textual support for unenumerated constitutional rights, there is too much textual support for them”); Frederick Schauer, *Constitutional Conventions*, 87 MICH. L. REV. 1407, 1454, 1461 (1989) (arguing that the Ninth Amendment does allow for unenumerated rights); Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 79 (2006) (arguing that the Ninth Amendment’s purpose is to protect natural rights retained by the people and not denied or disparaged by their public servants); Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1 (1988) (same); Daniel A. Farber, *Constitutional Cadenzas*, 56 DRAKE L. REV. 833, 834 (2008) (noting that state constitutions have Ninth Amendment equivalents that may be more amenable to recognizing fundamental rights);

reflected in *Dobbs* falls back upon the States as exclusive sovereigns for certain unenumerated rights unless there exists positive law protecting a particular right at the time of ratification or a subsequent, affirmative rejection—through the electoral process—of a State’s articulation of a right.³³² In that respect, the Court seemed to reject the concept of natural rights that are not grounded in a historical tradition of positive law.

C. Religious Canon

Religious canon provides an alternative reference point for natural rights and carries particular significance considering the ideological and religious bent of our current Supreme Court. Courts and scholars have repeatedly invoked natural law as a guise for imposing modern religious canon, and oftentimes without a noble purpose. As John Hart Ely wrote in 1980, “[n]atural law has been summoned in support of all manner of causes in this country—some worthy, others nefarious—and often on both sides of the same issue.”³³³ The merging of natural law with God’s law is a problem that undermines doctrinal reliance on natural law at all. Said Gerald Gunther in 1991: “I have warned over the years that if the liberals can use these unanchored notions to read their own views into the Constitution, what will happen to the Constitution when the conservatives get the methodology?”³³⁴ The idea of America as a Christian nation has nonetheless gained traction with the conservative wing of the current Supreme Court.

Justice Thomas has publicly stated, for example, his belief that the Constitution includes protection for natural, God-sanctioned rights: “Natural

Erwin Chemerinsky, *Real Discrimination*, 16 WASH. U. J. L. & POL’Y 97, 118 (2004) (arguing that “[t]he Constitution’s protection of rights long has been understood as the floor, the minimum liberties possessed by all individuals” and that “[t]he Ninth Amendment provides clear textual support for this view”); Laurence H. Tribe, *Soundings and Silences*, 115 MICH. L. REV. ONLINE 26, 51 (2016) (“Properly understood, the Ninth Amendment is a command, directed to all federal officials (including, of course, Supreme Court Justices), about how *not* to construe the rest of the Constitution’s text.”); Michael W. McConnell, *The Ninth Amendment in Light of Text and History*, 2009 CATO SUP. CT. REV. 13, 18 (arguing that “*natural rights control in the absence of sufficiently explicit positive law to the contrary*” and that “[t]his can be understood as a clear statement rule for abrogating unenumerated natural rights”); cf. John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 443 (1977) (arguing that the Ninth Amendment “might have been intended to make clear that despite the Bill of Rights Congress could create further rights, or that state legislatures (or common law courts) could do so, or that a state could choose to do so in its own constitution”).

332. McConnell, *supra* note 320, at 21 (“The historical evidence indicates that natural rights in the pre-constitutional world did *not* have the status we now ascribe to constitutional rights—meaning supreme over positive law.”).

333. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 181 (1980).

334. Ruth Marcus, *Thomas Doesn’t Fit Conservative Mold*, WASH. POST (July 7, 1991), <https://www.washingtonpost.com/archive/politics/1991/07/08/thomas-doesnt-fit-conservative-court-mold/fdf249c5-a421-464b-b6a8-8ecbbc7a4e7f/>.

rights and higher law arguments,” he once wrote, “are the best defense of liberty and of limited government.”³³⁵ Moreover, added Thomas, higher law “is the only alternative to the willfulness of both run-amok majorities and run-amok judges.”³³⁶ For Thomas, the source of natural rights is divine rather than Lockean. He has pointed as evidence to the Declaration of Independence, which invokes “the Laws of Nature and of Nature’s God,”³³⁷ and in 1987, to an article by “conservative businessman Lewis Lehrman” touting the inalienable right to life of the fetus as “a splendid example of applying natural law.”³³⁸ According to Elizabeth Dias for the *New York Times*, the push for official recognition of a Christian government is sweeping GOP political circles across the nation.³³⁹

Unlike in England, which in the sixteenth and seventeenth centuries recognized distinct sets of canons enacted by the clergy that were enforced by church courts with legal officers, the United States has exclusively employed secularized systems of law.³⁴⁰ Historical accounts at the time of the founding strongly suggest that the Framers and most other political leaders largely believed that governmental endorsements of religion would result in tyranny and persecution.³⁴¹ And the view that the new government should espouse Christianity was ultimately a losing one. There was a “concerted campaign” from the Anti-Federalists to “discredit the Constitution as irreligious, which for many of its opponents was its principal flaw,”³⁴² along with repeated attempts during the Constitutional Convention to add Christian language. The rejection of this effort demonstrates that the Framers instead intended constitutional secularity.³⁴³

Thus far, the emerging populist belief that America was founded as a Christian nation has not made its way into positive law since *Holy Trinity*

335. *Id.* See generally John S. Baker, Jr., *Natural Law and Justice Thomas*, 12 REGENT U. L. REV. 471 (2000).

336. Marcus, *supra* note 334.

337. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

338. Marcus, *supra* note 334.

339. Elizabeth Dias, *The Far-Right Christian Quest for Power: ‘We Are Seeing Them Emboldened,’* N.Y. TIMES (July 13, 2022), <https://www.nytimes.com/2022/07/08/us/christian-nationalism-politicians.html>.

340. Gerald Bray, *Canon Law and the Church of England*, in THE OXFORD HISTORY OF ANGLICANISM, VOL. 1: REFORMATION AND IDENTITY C. 1520-1662, at 168 (Anthony Milton ed., 2017).

341. Brooke Allen, *Our Godless Constitution*, NATION (Feb. 3, 2005), <https://www.thenation.com/article/archive/our-godless-constitution/>.

342. Isaac Kramnick & Laurence Moore, *God and the Constitution: The Under-Remembered Controversy of 1787-88*, CORNELL CHRON. (Sept. 17, 2007), <https://news.cornell.edu/stories/2007/09/god-and-constitution-under-remembered-controversy>.

343. Adam Lee, *The Godless Constitution and the Ratification Battle*, BIG THINK (Aug. 18, 2012), <https://bigthink.com/articles/the-godless-constitution-and-the-ratification-battle/>.

*Church v. United States*³⁴⁴ described America as “a Christian nation” in 1892. In *Holy Trinity*, the Court wrote:

If we examine the constitutions of the various states, we find in them a constant recognition of religious obligations. Every constitution of every one of the 44 states contains language which, either directly or by clear implication, recognizes a profound reverence for religion, and an assumption that its influence in all human affairs is essential to the well-being of the community

There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning. They affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons: they are organic utterances; they speak the voice of the entire people . . . [of] a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation.³⁴⁵

As Mokhtar Ben Barka has explained, attitudes towards religion at the time of the *Holy Trinity* opinion differed from those at the founding, mostly due to the fact that “nineteenth-century America was a mild form of Protestant theocracy. In this period, Protestantism was America’s *de facto* established religion” as Protestants overwhelmingly held power in the government.³⁴⁶ Thus, Justice Brewer in *Holy Trinity* was “representative of most nineteenth-century jurists for whom religion and the law were intimately connected.”³⁴⁷

Protestant organizations such as the National Reform Association unsuccessfully “pushed for a constitutional amendment that would add some type of endorsement of Christianity to the Constitution.”³⁴⁸ In 1864, it petitioned Congress to amend the Constitution to include “Almighty God as the source of all authority and power in civil government.”³⁴⁹ This petition “languished in Congress for years, occasionally being reintroduced,” and was finally killed in 1874 when the House Judiciary Committee voted against its adoption.³⁵⁰

In his 2007 dissenting opinion in *Zuni Public School District No. 89 v. Department of Education*,³⁵¹ Justice Antonin Scalia criticized the *Holy*

344. 143 U.S. 457 (1892).

345. *Id.* at 468–71.

346. Mokhtar Ben Barka, *The Christian Nation Debate and the U.S. Supreme Court*, 6 EUR. J. AM. STUD., no. 2, 2011, at 1, 6, <http://journals.openedition.org/ejas/8882> (quoting ROBERT BOSTON, WHY THE RELIGIOUS RIGHT IS WRONG ABOUT SEPARATION OF CHURCH AND STATE 97 (2003)).

347. *Id.*

348. *Id.* at 2.

349. *Id.* at 2–3.

350. *Id.* at 3.

351. 550 U.S. 81 (2007).

Trinity's declaration that America was a "Christian nation," observing that the Court has since "wisely retreated from" that decision.³⁵² As Robert Boston, Senior Adviser for Americans United for Separation of Church, has observed, cases such as *Holy Trinity* "are products of their time . . . and reflect cultural biases of the era, not solid constitutional law. Most have been relegated to forgotten volumes of legal history—where they belonged."³⁵³ But as a number of the Court's recent First Amendment cases suggest, in which the majority marginalized the interests protected by the Establishment Clause to claims of individual religious (specifically, Christian) interests,³⁵⁴ that could change.

D. Positive Law and the Laws of Nations

The most accessible source of cognizable "rights" for purposes of legal doctrine is positive law—i.e., human-made rules governing conduct contained in statutes enacted by a legislature, common law, treaties, constitutions, and the like.³⁵⁵ The written Constitution, which in Article VI declares itself the "supreme Law of the Land," is the ultimate manifestation of positive law under the American legal system, surpassing in authority state and federal legislatures as well as state constitutions.³⁵⁶ Whether the Constitution is a source of positive law for unenumerated rights obviously begs the question addressed in this paper—to wit, how to construe silence in the Constitution when it comes to individual rights—and as noted above, there is a question as to whether Congress can legislatively establish substantive rights that the Supreme Court has not recognized, or which are otherwise reserved for exclusive State sovereignty.³⁵⁷

Of course, common law or judge-made law can derive from other sources of positive law, such as state constitutions and statutes. Theories of positive law date back to Plato and Socrates, who both conceded that positive

352. *Id.* at 117, 108 (Scalia, J., dissenting).

353. Barka, *supra* note 246, at 8 (quoting BOSTON, *supra* note 346, at 103).

354. *See, e.g.*, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022) (holding that the Free Exercise and Free Speech Clauses of the First Amendment protect a high school football coach's right to kneel on the field after a game, and the Constitution neither mandates nor permits the government to suppress such religious expression).

355. Legal philosophers differ on the content and meaning of the term, positive law. *See* Jerome Hall, *Concerning the Nature of Positive Law*, 58 YALE L.J. 545, 545 (1949); *see also* Philippe Nonet, *What Is Positive Law?*, 100 YALE L.J. 667, 667 (1990) ("What is positive law? We may begin with the familiar account that the word 'positive' suggests immediately: positive law (Nietzsche calls it *Gesetz*) is law that exists by virtue of being posited (*gesetzt*), laid down and set firmly, by a will empowered so to will.").

356. U.S. CONST. art. VI.

357. Hall, *supra* note 355, at 549 (identifying legislation as an example of positive law as it has an "imperative aspect" but noting that "traditional or customary law also and equally has an 'imperative element'").

law is not always consistent with justice or virtue. Socrates stated that law can reflect “a city’s resolution” and “an evil resolution cannot properly be a law.”³⁵⁸ Plato wrote that people “must all agree that the laws are all good and of divine origin,” but also that “when those who make the laws miss the good, they have missed the lawful and the law.”³⁵⁹

This Article does not delve into the philosophical or theoretical underpinnings of positive law, instead focusing on the *absence* of positive law relating to unenumerated rights in the U.S. Constitution—which itself is the primary source of positive law in the United States. For the *Dobbs* majority, snippets of positive law at undetermined points in history can create rights that survive today even if unenumerated in the Constitution. Or put another way, past governments that existed at some point in history can have established a constitutionally unenumerated “right” through positive law that carries forward today. According to the *Dobbs* majority, then, the only alternative to *historical* positive law is positive law *created* by modern state legislatures. But as discussed below, another source of positive law exists that could provide guidance for the identification of inalienable rights under U.S. law: international law.

Justice Alito himself, in his July 22, 2022, speech in Rome, acknowledged that sources of international law substantively inform the question of whether religious liberty is and should be robustly protected.³⁶⁰ In particular, he mentioned Article 18 of the Universal Declaration of Human Rights, Article 9 of the European Convention on Human Rights, and the American Law Institute’s Restatements³⁶¹ as examples of positive law that bear on American law’s recognition and treatment of “inalienable rights”—words that Alito no doubt borrowed from the Declaration of Independence.

Keep in mind that international-law norms are not part of domestic U.S. law unless codified by Congress or through some sort of executive action, such as by regulation or treaty.³⁶² But if the Supreme Court were, as Alito suggests, to borrow from international law to give meaning to unenumerated constitutional rights, there are two relevant sources of positive international law to consider. The first is the Universal Declaration of Human Rights (“UDHR”), which is considered “a milestone document in the history of human rights . . . [d]rafted by representatives with different legal and cultural

358. *Id.* at 552 (quoting PLATO, MINOS 315, 316 (Lamb ed., 1927)).

359. *Id.* (first quoting PLATO, LAWS I, at 634 (Jowett ed., 1871); then quoting PLATO, GREATER HIPPIAS 284 E. (Fowler ed., 1926)).

360. Notre Dame Law School, *2022 Religious Liberty Summit: U.S. Supreme Court Justice Samuel Alito*, YOUTUBE (July 28, 2022), <https://www.youtube.com/watch?v=uci4uni608E>.

361. The Restatements and related publications like Model Codes do not include a volume on human, individual or inalienable rights, so those are not addressed here.

362. *See* Al-Bihani v. Obama, 619 F.3d 1, 9–10 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

backgrounds from all regions of the world.”³⁶³ In 1948, the United Nations General Assembly called it “a common standard of achievements for all peoples and all nations,” which is the first document to identify “fundamental human rights to be universally protected.”³⁶⁴

In his speech, Alito focused on Article 18, which recognizes “the right to freedom of thought, conscience and religion” and expressly “includes freedom to change his religion or belief.”³⁶⁵ The UDHR contains thirty articles in total, many of which mirror express protections under the U.S. Constitution, including free exercise of religion as well as the “right to life, liberty and security of person” under Article 3.³⁶⁶ Article 12 of the UDHR affirmatively provides that “[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence” and that “[e]veryone has the right to the protection of the law against such interference or attacks.”³⁶⁷ It is thus more expansive than the U.S. Constitution, seemingly codifying into positive law a version of *Griswold*.

The second is the European Convention on Human Rights (ECHR), which is designed to protect the rights of individuals who live in one of the forty-seven countries that belong to the Council of Europe, which was founded in 1949 after World War II to protect human rights, the rule of law and democracy. Initially proposed by Winston Churchill, the ECHR was based on the UDHR, signed in 1950, and went into effect in 1953.³⁶⁸ The ECHR has fifty-one detailed Articles, many of which have numerous subsections. (Alito mentioned Article 9, which provides that “[e]veryone has the right to freedom of thought, conscience and religion.”)³⁶⁹

The ECHR is particularly illuminating on reproductive rights. Although it contains no express reference to reproductive rights and protects the undefined “right to life,” the ECHR states in Article 8 that “[e]veryone has the right to respect for his private and family life, his home and his correspondence.”³⁷⁰ This reference starkly echoes *Griswold* and its progeny. Much like *Casey* balanced maternal and fetal interests regarding abortion, Article 8 contemplates restrictions on such rights “in accordance with the law and [a]s necessary in a democratic society in the interests of national security,

363. *Universal Declaration of Human Rights*, UNITED NATIONS, <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (last visited Jan. 19, 2024); see G.A. Res. 217 (III) A, *Universal Declaration of Human Rights* (Dec. 10, 1948).

364. G.A. Res. 217, *supra* note 363.

365. *Id.* art. 18.

366. *Id.* art. 3.

367. *Id.* art. 12.

368. See THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A LIVING INSTRUMENT (2022), https://www.echr.coe.int/documents/d/echr/Convention_Instrument_ENG.

369. European Convention on Human Rights, Aug. 1, 2021, E.T.S. No. 213.

370. *Id.* art. 2, 8(1).

public safety or the economic well-being of the country, . . . for the protection of health or morals, or for the protection of the rights and freedoms of others.”³⁷¹ Despite Alito’s rhetorical reliance on international positive law, it has played no meaningful part in construing ambiguity in the Constitution relating to unenumerated rights.

IV. THE NINTH AMENDMENT AND *MEYER V. NEBRASKA*: AN ALTERNATIVE TO EXCLUSIVE STATE SOVEREIGNTY OVER UNENUMERATED INDIVIDUAL RIGHTS

This Article has proceeded from the premise that the Constitution plays some role in protecting individual rights at the federal level beyond those specified in the text. Meanwhile, the Supreme Court has replaced substantive due process analysis with *Glucksberg*’s history and tradition test, leaving it to state legislatures and the political process to fill the void left by the Framers regarding unenumerated individual rights. Voters can always amend the Constitution to articulate rights with more specificity, following the examples of the UDHR and ECHR, but that is not feasible given the supermajorities required in the federal and state legislatures. Congress could pass laws with that same objective, assuming Democrats in the Senate could withstand a Republican filibuster (which they could not as a practical matter), but those laws would then face scrutiny in the Supreme Court as to the scope of underlying congressional authority under the Commerce Clause and Section 5 of the Fourteenth Amendment.

For now, *Dobbs* must be reckoned with, because if *Dobbs*, *Roth*, and the dissenting opinions in *Griswold* are considered together, the doctrinal threads produce an approach to unenumerated individual rights that is deeply troubling. That approach could proceed with four queries: *first*, whether a right is express in the Constitution (*Dobbs* step one); *second*, if not, whether history and tradition recognize the right (*Dobbs* step two); *third*, whether the power to regulate the right, regardless of whether it is expressly or historically grounded, is carved out for the federal government in the Constitution (*Roth*); and *fourth*, if the answer to the third question is no, then the right exists only if state legislatures decide it does. The Ninth Amendment could lend support to steps three and four, dismantling national federal protections of individual rights for legislative resolution instead by the States.

Most likely, the Supreme Court will continue to decide whether additional rights currently recognized as implied by the language of the Constitution must be diverted to state legislatures for protection—or not—in the coming decades. Deferring to state legislatures will not work to adequately protect individuals from government coercion, however. As a

371. *Id.* art. 8(2).

result of *Dobbs*, women with non-viable pregnancies who face substantial risks to their health are now having to leave restrictive abortion states like Texas to get basic, life-saving medical care.³⁷² The majority's assumption that state legislatures are a viable substitute for the federal Constitution is clearly and tragically wrong.

Coupled with *Dobbs*, therefore, the Ninth Amendment stands to potentially make matters worse. As the GOP Senators' questioning of Justice Jackson makes clear, the debate over whether the Ninth Amendment exists as a tool of federalism or as a substantive protection for individuals from governmental overreaching (including by state governments) endures. This Article has suggested that if the conservative-leaning Court were to adopt a federalism-forward interpretation of the Ninth Amendment, the Ninth Amendment could be used to justify further encroachments on individual rights, many of which most Americans consider essential and protected—such as the right to choose whom to marry (regardless of race or gender), the right to choose a profession, and the right to decide one's own health care.³⁷³

This Part argues for a more substantive, natural-rights reading of the Ninth Amendment which, doctrinally coupled with the list of unenumerated rights in *Meyer v. Nebraska*, would better operate to protect the panoply of unspecified rights that Americans assume are *de facto* covered by the Constitution. This alternative approach would also tie the Court's jurisprudence to traditionally-conservative values of limited government while inviting less judicial subjectivity than the *Dobbs* test in fact necessitates. Much like *Roe* and *Dobbs*, *Meyer* waded into some of the most politically treacherous issues of the time. Somewhat ironically, it was authored by a conservative justice and critiqued by a more liberal one in dissent, which suggests that the decision's grounding over the course of a century is less ideological and political than it is common-sensical.

A. *The Story Behind Meyer*

As Barbara Bennett Woodhouse has explained, *Meyer* and *Pierce* are the first cases in which the Supreme Court recognized the parental rights to custody and control of children, adding to the post-*Lochner* “list of substantive due process economic liberties the right ‘to marry, establish a home, and bring up children.’”³⁷⁴ The Supreme Court, at least as of her 1992

372. Katie Herchenroeder, *The Texas Supreme Court Rules Against Kate Cox Hours After She Announced She Fleed the State to Seek an Abortion*, MOTHERJONES (Dec. 11, 2023), <https://www.motherjones.com/politics/2023/12/kate-cox-flees-texas-to-seek-abortion/>.

373. See *supra* Part II.

374. Barbara Bennett Woodhouse, *Who Owns the Child? Meyer, Pierce, and the Child as Property*, 33 WM. & MARY L. REV. 995, 997 (1991) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

writing, “seem[ed] to accept *Meyer* and *Pierce* themselves as pure and uncomplicated, virtual products of an immaculate conception;” Justice Brennan remarked that ““I think I am safe in saying that no one doubts the wisdom or validity of those decisions.””³⁷⁵

Times have obviously changed. In 1992, reversal of *Roe* was unthinkable. But in light of the politics of today, Woodhouse’s recounting of the political debates underlying *Meyer* seem almost prescient. “The Court’s most inflexible ‘conservative,’ Justice James C. McReynolds, authored the decisions in *Meyer* and *Pierce*,” she writes, while “the ‘liberal’ Justice Oliver Wendell Holmes, Jr.” wrote a “cogent dissent.”³⁷⁶ McReynolds was “a legendary bigot who hated Germans, Catholics, and Jews” but endorsed “the notion of parental control as a God-given right.”³⁷⁷ Holmes, for his part, “would have voted to uphold the laws as a rational means to achieve the end of a common national language.”³⁷⁸

Meyer involved what was known as the “Siman law” named after its sponsor, Nebraska State Senator Harry Siman. Nebraska joined fifteen other states that enacted similar laws in 1919 alone, which mandated English as the sole language of instruction in all schools and prohibited the teaching of foreign languages in all primary grades.³⁷⁹ Woodhouse described the laws as rooted in “the struggle between cultural pluralism and the felt need to articulate a national identity, evident in the long-standing tensions between English-speaking settlers of the Midwest and the large German, Polish, and Scandinavian communities in these states.”³⁸⁰ To native-born Americans, these communities’ “failure to assimilate seemed at once a threat and a challenge for progressive reform.”³⁸¹

The volunteer for a test case challenging the Nebraska law was “Robert T. Meyer, a mild-mannered and God-fearing father of five, who taught in the white clapboard Evangelical Lutheran Church school in the farming community of Zion Corners, Nebraska,” and “was fined for instructing a ten-year-old child in the story of Die Himmelsleiter (Jacob’s Ladder) from a German Bible text, during a ‘recess’ that previously was devoted to formal studies.”³⁸² Especially remarkable about this story is how it parallels one of the most prominent fronts of the modern culture wars today—the

375. *Id.* at 997–98 (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 142 (1989) (Brennan, J., dissenting)).

376. *Id.* at 999.

377. *Id.* at 1002–03.

378. *Id.* at 1003.

379. *Id.* at 1003–04.

380. *Id.* at 1004.

381. *Id.*

382. *Id.* at 1013. The case began as one about religious liberty but morphed into one about constitutional protections for the right to control the upbringing of children. *Id.* at 1014.

conservative cause for ridding public schools of education around America's dark histories of human enslavement, racial discrimination, and LGBTQ+ intolerance, which began with outrage over masking and vaccination requirements during the COVID-19 pandemic.³⁸³ The fact that abortion rights were rooted not in *Griswold*, but instead in a case about parental rights to control the education of their children, is an ideological/political argument for taking the holding of *Meyer* seriously today.

At oral argument in the Supreme Court, counsel for Mr. Meyer argued that “the power of a legislative majority to take the child from the parent” is a “principle of the soviet.”³⁸⁴ Justice McReynolds was persuaded, drawing upon two prior opinions in writing for the majority on Mr. Meyer's behalf. First came *The Slaughter-House Cases*, in which Justice Bradley in dissent identified a right to life, liberty, and property as part of the right to pursue a chosen occupation. Bradley wrote that “[citizens'] right of choice is a portion of their liberty; their occupation is their property.”³⁸⁵ The second was *Allgeyer v. Louisiana*, in which Justice Beckham in 1897 identified the right to contract, to pursue an ordinary calling, and to acquire, hold, and sell property.³⁸⁶ To these McReynolds added the right “to acquire useful knowledge, to marry, establish a home and bring up children.”³⁸⁷ Woodhouse writes:

For authority, McReynolds cited a long line of precedents involving regulations burdening economic rights, challenged under either substantive due process or equal protection theories as deprivations of economic liberty or private property rights. None of the cited cases, however, provided any authority for a parental right to control the child, save by analogy to other models of private ownership.³⁸⁸

Hearing the tale behind *Meyer*, a case that formed the foundation of *Roe* long before *Griswold*, millions of contemporary Americans would undoubtedly be shocked and outraged to hear that the state is *not* textually precluded by the Constitution from managing and controlling the upbringing of children, including making choices about education. If tasked with applying *Dobbs* to the facts of *Meyer*, the modern Supreme Court would

383. See Kimberly L. Wehle, *He, She, They: The Pronoun Debate Will Likely Land at the Supreme Court*, POLITICO (October 1, 2023), <https://www.politico.com/news/magazine/2023/10/01/pronouns-schools-supreme-court-00118832>.

384. Woodhouse, *supra* note 374, at 1087 (citation omitted).

385. *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 116, 122 (1872) (Bradley, J., dissenting); see also Woodhouse, *supra* note 374, at 1087.

386. *Allgeyer v. Louisiana*, 165 U.S. 578, 591 (1897); see also Woodhouse, *supra* note 374, at 1087.

387. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); see also Woodhouse, *supra* note 374, at 1087.

388. Woodhouse, *supra* note 374, at 1087–88.

undoubtedly find a way to protect unenumerated rights like education.³⁸⁹ (Consider how, in 2022, it held in *Carson v. Makin*³⁹⁰ that the First Amendment’s Free Exercise Clause required the State of Maine to make school vouchers available to parents wanting to send their children to conservative schools that banned homosexual teachers and students.)

Meyer has been cited in a deluge of cases since 1923 on the meaning of “liberty” under the Fourteenth Amendment’s Due Process Clause. At the time of this writing, courts referenced *Meyer* in approximately 3,000 cases, including *Dobbs*. Predictably, however, *Meyer* has had the strongest hold in cases involving parental rights. *Pierce v. Society of Sisters*, decided two years later, extended *Meyer* to strike down a law requiring children to attend public schools on the rationale that it interfered with a parent’s prerogative to make decisions regarding the upbringing and education of their child.³⁹¹

Recognition of an individual liberty interest in parental decision-making arose again in *Moore v. East Cleveland*³⁹² (finding an Ohio ordinance unconstitutional for prohibiting a grandmother from living with her grandchild), *Prince v. Massachusetts*³⁹³ (holding that parental authority is not absolute and can be restricted for the welfare of the child), *Stanley v. Illinois*³⁹⁴ (holding that fathers of children born out of wedlock had a fundamental right to parent), *Wisconsin v. Yoder*³⁹⁵ (finding that states cannot impose compulsory education on Amish children past the eighth grade), *Quilloin v. Walcott*³⁹⁶ (holding that Illinois was barred from taking custody of an unmarried father’s children absent a hearing and a finding that he is an unfit parent), *Parham v. J.R.*³⁹⁷ (rejecting a due process claim brought by children under treatment at a Georgia state mental hospital), *Santosky v. Kramer*³⁹⁸ (establishing due process rights for revocation of parental rights), *Troxel v. Granville*³⁹⁹ (identifying a fundamental right for a parent to oversee the care, custody and control of a child), *Washington v. Glucksberg*⁴⁰⁰ (citing *Meyer* but finding that the right to assisted suicide is not constitutionally

389. See *supra* note 148 and accompanying text.

390. 142 S. Ct. 1987 (2022).

391. See *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925).

392. 431 U.S. 494 (1977).

393. 321 U.S. 158 (1944).

394. 405 U.S. 645 (1972).

395. 406 U.S. 205 (1972).

396. 434 U.S. 246 (1978).

397. 442 U.S. 584 (1979).

398. 455 U.S. 745 (1982).

399. 530 U.S. 57 (2000).

400. 521 U.S. 702 (1997).

protected), and of course *Griswold v. Connecticut*,⁴⁰¹ to name a few. *Meyer* has been a cornerstone for parental rights—why not *all* unenumerated rights?

Meyer specifically held up “education and acquisition of knowledge” (although those values are not enumerated in the Constitution’s text) as the sort of things that the government has no business dictating to individuals, even if it can come up with a rational basis to justify an intrusive law. However, the Court listed seven other rights that extend far beyond education:

- freedom from bodily restraint,
- the ability to contract,
- the ability to engage in any of the common occupations of life,
- the ability to marry,
- the ability to establish a home and bring up children,
- the ability to worship God according to the dictates of his own conscience, and
- the ability generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.⁴⁰²

As discussed below, several of these concepts directly support protections for the right to choose to terminate a pregnancy. They also establish protections for other rights that *Dobbs*’s federalism test puts in jeopardy, including gay and biracial marriage and contraception. Furthermore, because the *Meyer* Court proceeded from the point of view of constraining government overreach—rather than from the standpoint of expanding an inherent basket of rights afforded certain categories of individuals—its list of protections is inherently narrower than an open-ended approach to natural rights as a matter of substantive due process.

*B. Natural Rights, Limited Government, and a Constrained Judiciary:
Toward a Better Test*

Borrowing from *Meyer*’s list of rights, this Section presents an alternative approach to unenumerated rights doctrine that takes into account both the spirit of *Griswold* and a natural-rights reading of the Ninth Amendment—that is, the idea that “liberty” has a substantive meaning beyond the rights expressly articulated in the Constitution’s text—but also acknowledges concerns that an unfettered power to recognize new constitutional rights dangerously aggrandizes the power of judges with insufficient restraint. The proposed approach instead fastens unenumerated rights in an example of positive law—the Court’s nearly centuries-old

401. 381 U.S. 479 (1965).

402. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

decision in *Meyer v. Nebraska*—which itself recognizes that respecting some categories of individual rights beyond the Constitution’s text is necessary to carry out the spirit of the founding document.

Moreover, it proceeds from the point of view of constraining government power rather than from the standpoint of the individual who is impliedly empowered with a basket of rights against the government. The latter perspective, which animated *Roe*, sets up a sort of zero-sum game, as if enhancing the rights of marginalized or disempowered groups somehow diminishes the rights already enjoyed by other categories of people. An approach to individual rights doctrine that instead aims to constrain the powers of government, which are inevitably abused absent guardrails, takes the Court out of that competitive frame.

Justice Alito recognized in his majority opinion’s opening phrase that abortion is a moral dilemma, yet he eschewed any meaningful discussion of the rights of individuals who can become pregnant, focusing almost exclusively on the interests of states in constraining access to abortion to protect fetal life. The majority thus weighed a binary choice between lodging power in the federal government and lodging power in state governments—as if these two actors operate as alternate holders or protectors of unenumerated rights. This framing of the scope of the right to terminate a pregnancy was a central error in *Dobbs* because it ignored a third “governmental” actor: the individual.⁴⁰³ If one assumes that confining government power is a prerogative of a representative government—whether that power be lodged in state legislatures, the federal government, or municipalities—then the binary choice between federal or state legislatures is inevitably insufficient to protect individual rights.

Additionally, the Ninth Amendment expressly refers to rights “retained by the people,” suggesting that individuals do have rights that stand separate and apart from whether some form of elected government has decided to recognize and protect them.⁴⁰⁴ In Justice Goldberg’s concurring opinion in *Griswold*, he emphatically wrote that the government does not have “the power to experiment with the fundamental liberties of citizens,” adding that “I cannot agree that the Constitution grants such power *either to the States or to the Federal Government*.”⁴⁰⁵ Justice Goldberg offered a law-school-type hypothetical to prove his point:

Surely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born to them.

403. See *supra* notes 204–206 and accompanying text.

404. See *supra* Part I.

405. *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring) (emphasis added) (quoting *Pointer v. Texas*, 380 U.S. 400, 413 (1965) (Goldberg, J., concurring)).

Yet by their reasoning such an invasion of marital privacy would not be subject to constitutional challenge because, while it might be ‘silly,’ *no provision of the Constitution specifically prevents the Government from curtailing the marital right to bear children and raise a family.*⁴⁰⁶

Many people are surprised to learn that abortion is not an outlier built on a privacy sandcastle but, rather, part of a bundle of unenumerated rights bearing on some of the most intimate aspects of life, such as marrying at all and having a family, choosing how to care for one’s health, making career choices, and deciding whether and how to educate one’s children. None of this is in the Constitution’s text, and if one works hard enough, history and tradition will likely produce inconsistent results as to whether these rights were legally protected over the course of American history—and, if *Dobbs* is the template, at some arbitrary point in medieval British history.⁴⁰⁷

Step one of *Dobbs* assumed away the vast swath of personal boundaries that are not mentioned in the Constitution as by definition beyond constitutional protection, inevitably calling into question spheres of personal choice like marriage and contraception. Yet under a natural-rights reading of the Ninth Amendment, there exist unenumerated rights that the Constitution’s silence cannot be construed to deny. The text fails, however, to provide guidance as to where to find those rights. The Supreme Court has not drawn upon positive international law for guidance,⁴⁰⁸ so the abstract question of natural law only begs the question of the content of natural law—the same, circular problem posed by unenumerated rights in the Constitution. *Griswold* came up with a notion of “privacy,” but that was ultimately derived from the concept of “liberty”—also a term that has little textual or original meaning aside from restraining the government’s ability to restrict an individual’s liberty without some sort of process, or a hearing. Which brought the Court to *Glucksberg* and, more saliently, to federalism.

In step two, *Dobbs* tossed protections for decisions relating to pregnancy terminations to state legislatures to do away with—an outcome that flies in the face of the Ninth’s Amendment’s promise that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”⁴⁰⁹ As *Dobbs* has already shown, the state-only remedy is insufficient to manifest the promise of the Ninth Amendment.⁴¹⁰

406. *Id.* at 496–97 (emphasis added). *But see* *Buck v. Bell*, 274 U.S. 200 (1927) (permitting the involuntary sterilization of women considered to be intellectually disabled).

407. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2236 (2022) (discussing “great common-law authorities like Bracton, Coke, Hale, and Blackstone [who] all wrote that a post-quickening abortion was a crime”).

408. *See supra* Section III.D.

409. U.S. CONST. amend IX.

410. *See supra* Part I.

The anecdotal evidence to date of how certain conservative states responded to *Dobbs* speaks for itself. In January 2024, a research letter in *JAMA Internal Medicine* estimated that 64,565 pregnancies were caused by rape in the fourteen states in which abortion has been banned since *Dobbs*.⁴¹¹ For low-income women who cannot afford to leave the state, the implications of this statistic are especially dire.

The *Dobbs* majority opinion instead cavalierly assumed that fundamental liberties will be cared for at the state level, that state legislatures are a legitimate proxy for the individual as *parens patriae*, and that state legislatures will always strike the appropriate balance between governmental power and individual autonomy at the proper place—that is, that they will take care of the individual like a caring parent or guardian, obviating the need for constitutional red lines around zones of individual, inalienable rights. Of course, this notion strains logic. State legislatures are as capable as federal actors of abusing power and marginalizing categories of people, such as members of a certain race or people with uteruses who can become pregnant. As Part II.F made clear, the Court’s hostility to voting rights, which are not protected as a federal constitutional right in the Constitution’s original text, makes the state sovereignty answer to individual rights deeply unsatisfying.

Although the majority held that restrictive pregnancy termination laws still must pass the rational basis test, Justice Goldberg in *Griswold* went on to explain why rational basis is insufficient for protecting unenumerated rights defined by state legislatures:

While it may shock some of my Brethren that the Court today holds that the Constitution protects the right of marital privacy, in my view it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts. *Yet, if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid.*⁴¹²

It would come as no surprise to Goldberg, then, if *Dobbs* produces other reversals in cases recognizing unenumerated rights that Americans take for granted.⁴¹³

411. See Samuel L. Dickman et al., *Rape-Related Pregnancies in the 14 US States with Total Abortion Bans*, *JAMA INTERNAL MED.*, Jan. 24, 2024, at E1.

412. *Id.* (emphasis added).

413. See Kimberly L. Wehle, *What Roe Could Take Down with It*, *ATLANTIC* (Dec. 3, 2021), <https://www.theatlantic.com/ideas/archive/2021/12/what-roe-could-take-down-it/620892/>.

Consider instead an analytical and theoretical lens that begins from the premise that government must be constrained to preserve individual liberty; that it is human nature to amass, entrench, and abuse power; and that such predilections have nothing to do with federalism—and thus cannot be countered by sending rights protections to state legislatures. This point of view aims to confine government power rather than focus on enhancing the collection of rights attached to certain categories of people. This approach would look to *Meyer* and its progeny to identify certain foundational spheres of personal life that are simply not contingent on government protection or regulation.⁴¹⁴ *Meyer* offers a list of those spheres of individual autonomy that cannot be destroyed by state legislatures.

The Court's decision in *Meyer v. Nebraska* thus provides a doctrinally workable compromise between a substantive approach to unenumerated rights and a more restrained one. It also applies a libertarian lens to questions of government power vis-à-vis the individual, proceeding from the premise that an overbearing government itself is what the rule of law exists to protect against. That concern does not evaporate at the state legislature's door. And because *Meyer*'s list of protected individual spaces is both time-tested and circumspect, it offers a manageable standard for rights analysis without taking sides on ideology or creating the perception that the enhancement of rights for one category of people automatically diminishes the rights of others.

Meyer itself underscored this frame by stating: "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect."⁴¹⁵ The "guise of protecting the public interest" is a key phrase here because it underscores the commonsense truth—recognized by the Framers—that the State is intrinsically hungry for power and control, and that in that pursuit, it can always generate a facially valid excuse for what could amount to interference in "the orderly pursuit of happiness by free men" (and women).⁴¹⁶ To push against that instinct is what constitutions are for.

Consider how *Roe* would fare under a test that couples a natural-rights, libertarian reading of the Ninth Amendment with *Meyer*. At least three of the areas of due process protection identified in *Meyer* are implicated in individual decisions about continuing a pregnancy: the freedom from bodily

414. See Tribe, *supra* note 331, at 48 (distinguishing "(a) gaps or silences in the Constitution's description of how the federal branches relate to one another and to the states, from (b) gaps or silences in the Constitution's description of the rights protected against each level or branch of government").

415. *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923).

416. *Id.* at 399.

restraint (as forced pregnancy and birthing a child are exceptionally restraining and constraining physically), the ability to engage in a common occupation (as forced pregnancy and birthing a child confine professional choices), and the ability make decisions about establishing a home and bringing up children (as deciding to have a child is a pivotal decision in any individual's life). *Dobbs* is not about whether to terminate a pregnancy, but who should make that choice. The majority offered two options: the federal government, which through the Constitution under *Roe* chose a twenty-four-week cutoff, or state legislatures. Because both federal and state actors are government actors, *Dobbs* failed to protect against the concern underlying *Meyer*—government overreach per se. Had the Court instead operated from the *Meyer* list, it could have readily upheld an individual right to terminate a pregnancy based on long-established precedent that recognizes a confined cluster of natural rights that are beyond the scope of government intrusion and abuse.

To be sure, the Court in *Meyer* identified the items on the list without reference to positive law, religion, Enlightenment thinkers, or natural law. It seemed to pull the list out of thin air, based on intrinsic notions of common sense and a hearty skepticism of overbearing government. But as suggested above, defining natural rights is an inherently elusive exercise because there is no objective or empirical source to turn to.

In *Dobbs*, the majority reacted to this problem by rejecting substantive due process and unfettered notions of ordered liberty as a means of filling that void, pointing instead to state legislatures and halting the expansion of rights by judges.⁴¹⁷ But in doing so, the Court established a new test that fails to protect individuals from governmental overreach while offering no meaningful temporal constraints under the “history and tradition” part of the test. By contrast, *Meyer* operates with the former objective in mind, and thus has the potential to both constrain judicial activism and protect individuals from government coercion. It also stands as established precedent that is deserving of deference, so the Court could treat it as referential of history and tradition. Moreover, the contents of the *Meyer* list find support in international positive law sources like the UDHR and ECHR.⁴¹⁸

To be sure, it is unrealistic to expect the current Supreme Court majority to double back on its stunning decision in *Dobbs*, which not only upset abortion rights, substantive due process doctrine, and stare decisis, but also left the future of constitutional protections for unenumerated individual rights vulnerable and in flux. But its suggestion that state legislatures are a fair alternative to constitutionally recognized rights deserves scrutiny and

417. See *supra* notes 204–206 and accompanying text.

418. See *supra* Section III.D.

critique. Additionally, if, as this Article warns, the Court takes up Republican Senators' seeming endorsement of a reading of the Ninth Amendment as a rule of construction to protect state sovereignty, the dissolution of substantive due process for abortion rights could lead to further enhancement of state legislatures' control of other rights—from education to marriage to health care—effectively paving the way for counter-majoritarian government and a patchwork of protections that depend on one's place of residence rather than the written Constitution.

CONCLUSION

From a textualist perspective, reconciling the Declaration of Independence and the language of the Ninth and Tenth Amendments should ineluctably mean that individuals do retain some form of inalienable rights. Yet even after *Dobbs*, several time-tested open questions remain, including the proper source(s) for identifying those rights, and how to limit judicial power to define their scope. *Dobbs* did not answer them, instead disavowing blanket constitutional recognition of rights that are not enumerated and deferring to state legislatures for their content. But that analysis ignores the language of the Ninth Amendment referring to “the people” as distinct from the states, as well as the empirical problems with relying on elections as guarantees of individual liberty.

This Article argued that the conservative-leaning Supreme Court majority could go even further than it did in *Dobbs* by employing the Ninth Amendment to minimize the role of the federal government and reciprocally enhancing State power. The instinct towards federalism is old, pre-dating the Civil War. It was debated in dueling opinions in *Griswold* and became evident again during Justice Brown Jackson's confirmation hearings. The *Griswold* decision—like the success of the Republican party of Lincoln—sided with the individual, not the States, in that debate. But *Dobbs* suggests that the calculus is about to change.

From the standpoint of confining government power, the proper approach to unenumerated rights doctrine should not focus on the individual as possessing a bundle of goods, as the Court did in *Roe*. Instead, as laid out in *Meyer*, courts should accept that certain foundational spheres of personal life are simply not for government regulation. Government coercion is, in truth, a universal threat, and one that the Constitution was uniquely designed to manage. This is a very different frame from the fetus-versus-mother fight that produced *Dobbs*, which misleadingly assumes that the State is the steady and honorable *parens patriae* that will presumptively strike the proper balance for both sides—and that such a balance will be reflected and made accountable through voter choice.

The Article began by discussing the current doctrine of unenumerated rights in the context of the Ninth and Tenth Amendments, the Privileges and Immunities Clause, equal protection, the Commerce Clause, and substantive due process. It went on to critique the solution to unenumerated rights embraced by *Dobbs*—protection of individual rights by state legislatures—in light of numerous foundational problems with electoral accountability, many of which stem from the Court’s own voting and election law jurisprudence.

The Article then explored various theories for sourcing unenumerated rights and argued against employing the Ninth Amendment as a means of giving states exclusive control over them. Instead, it suggested a revised approach to rights analysis that is based on positive law—specifically, the nearly hundred-year-old Supreme Court decision in *Meyer v. Nebraska*. Although an imperfect metric for natural law, *Meyer* ostensibly sprung from a desire to confine government power rather than empower the individual. Its recognition of core, inalienable rights is also conceptually consistent with norms of international law, which even Justice Alito—the author of *Dobbs*—has argued are pertinent to ascertaining and shoring up universal human rights through judicial interpretation of texts like the Constitution. *Meyer* thus offers a workable, albeit confined, doctrinal approach to protections against any governmental overreach into individual spheres of life, including by state legislatures. The path forged by *Dobbs* is deeply fraught by comparison.