

FINDING A NEW HOME FOR THE ABORTION RIGHT UNDER THE NINTH AMENDMENT

Allison N. Kruschke*

ABSTRACT

This essay advocates locating the foundation of the constitutional right to an abortion in the Ninth Amendment. Using the Ninth Amendment to recognize the right to an abortion, this article argues, is a better path than using the Fourteenth Amendment because it takes the determination of whether an abortion is a protected right outside the moral realm. The analysis under the Fourteenth Amendment of whether a right is “deeply rooted in the tradition” of the United States inevitably stirs a debate about whether the public considers abortion morally acceptable. In recognizing the right to an abortion under the Ninth Amendment, no such analysis is necessary. The text of the Ninth Amendment allows the U.S. Supreme Court to recognize this protected right without an inquiry into historical tradition. Instead, the Court can use natural law principles, as contemplated by the Founders, to recognize that private conduct is worthy of constitutional protection and acknowledge that the Ninth Amendment affords these rights to the people.

The Ninth Amendment states that “the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”¹ This provision of the Constitution recognizes that citizens of the United States have rights that are not expressly contemplated in the text of the Constitution.² The Supreme Court has acknowledged this concept throughout its history, most notably in its recognition of a right to privacy that encompasses fundamental and

* J.D. 2020, Michigan State University College of Law; B.A. 2013, Marquette University. The author would like to thank Professor Michael A. Lawrence for his guidance and encouragement in advising this paper.

1. U.S. CONST. amend. IX.
2. *Id.*

other protected rights such as childrearing, procreation, contraception, and abortion.³ In doing so, however, the Court has usually found that these unenumerated rights are protected by the Due Process Clause of the Fourteenth Amendment, not “retained by the people” under the Ninth Amendment.⁴

Despite the fact that the Ninth Amendment gives courts the authority to recognize unenumerated fundamental rights, the Court has been reluctant to use, analyze, or even acknowledge the Ninth Amendment and its implications.⁵ The landmark case discussing the Ninth Amendment is *Griswold v. Connecticut*, where Justice Arthur Goldberg argued in his concurring opinion that the Ninth Amendment housed a free-standing right of privacy encompassing the right of married couples to use contraception.⁶ Since *Griswold*, the Court has mentioned the Ninth Amendment on approximately twenty occasions, but has not addressed the amendment in depth nor decided any case exclusively on Ninth Amendment grounds.⁷

Eight years after *Griswold*, the Court established the right to choose an abortion, perhaps the most controversial protected right, in *Roe v. Wade*.⁸ In *Roe*, and nineteen years later in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court held that the right to an abortion was protected under the Due Process Clause of the Fourteenth Amendment.⁹ In these foundational cases, and in other abortion-related cases since *Casey*, the Court has consistently held that the right to privacy, and therefore the right to an abortion, is housed within the Fourteenth Amendment.¹⁰ Despite the Ninth Amendment’s express guarantee that there are unenumerated fundamental and other protected rights “retained by the people,” the Court has chosen to engage in the cumbersome

3. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 441 (1972); *Loving v. Virginia*, 388 U.S. 1, 8 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Pierce v. Society of Sisters of the Holy Name of Jesus and Mary*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

4. See, e.g., cases cited in note 3.

5. See Chase J. Sanders, *Ninth Life: An Interpretive Theory of the Ninth Amendment*, 69 IND. L.J. 759, 764–69 (1994). Sanders discusses how the Court spent little time discussing the Ninth Amendment before *Griswold* and says that “[t]he judiciary’s treatment of the Ninth Amendment divides neatly into two eras:” before and after the *Griswold* decision.

6. See *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965).

7. See Sanders, *supra* note 5, at 769–70.

8. See generally *Roe v. Wade*, 410 U.S. 113 (1973).

9. *Id.* at 166; *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846–47 (1992).

10. *Casey*, 505 U.S. at 846–47.

analysis required to recognize fundamental and other protected rights under the Fourteenth Amendment time and time again.¹¹ The Court has used this Fourteenth Amendment analysis to recognize not only the abortion right, but all rights related to private conduct found worthy of heightened constitutional protection.¹²

While the analysis the Court uses to determine whether a right should be considered a protected right under the Due Process Clause is not without merit, housing the abortion right within the Fourteenth Amendment unnecessarily complicates abortion jurisprudence. Indeed, the Court already has the express authority to recognize unenumerated rights under the Ninth Amendment, including abortion.¹³ The recognition of the right to an abortion is consistent with other unenumerated rights the Court has recognized, from the use of contraception to the right to procreation.¹⁴

Using the Ninth Amendment to recognize the right to an abortion is a better path than using the Fourteenth Amendment because it takes the determination of whether an abortion is a protected right outside the moral realm.¹⁵ The analysis of whether a right is “deeply rooted in the tradition” of the United States inevitably stirs a debate about whether the public considers abortion morally acceptable.¹⁶ In recognizing the right to an

11. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 441 (1972); *Loving v. Virginia*, 388 U.S. 1, 8 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Pierce v. Society of Sisters of the Holy Name of Jesus and Mary*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

12. See, e.g., cases cited in note 11.

13. See *Sanders*, *supra* note 5, at 764–69.

14. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965). While the right to an abortion has generally been considered the most important of a wide array of rights related to sex and protection, some argue that abortion is *sui generis* in that it takes the life of another and therefore involves another set of rights outside those of the mother. The argument generally is that because abortion “involves the purposeful termination of a potential life,” the abortion decision “must therefore be recognized as *sui generis*, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy.” See *Harris v. McRae*, 448 U.S. 297, 325 (1980); see also *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 792 (1986) (White, J., dissenting). For these reasons, those opposing abortion argue that while either the Fourteenth or Ninth Amendments may allow for the recognition of unenumerated fundamental rights, abortion should not be one of those rights because it deals with the taking of life.

15. See Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. BALT. L. REV. 169, 189–90 (2003) (“The substantive due process doctrine’s lack of textual constitutional support persuades judges to limit the scope of rights granted under it. Conservative jurists ascribed to this ironic rights-limiting view of the rights-expanding substantive due process doctrine as a mechanism for identifying and protecting only those rights or liberties that have a firm foundation in the murky legal, historical, moral or ethical tradition of Britain or the United States.”).

16. See, e.g., *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (stating that the Due Process

abortion under the Ninth Amendment, no such analysis is necessary.¹⁷ The text of the Ninth Amendment allows the Court to recognize this protected right without an inquiry into whether it is “deeply rooted in historical tradition.”¹⁸ Instead, the Court can use natural law principles, as contemplated by the Founders, to recognize that private conduct is worthy of constitutional protection and acknowledge that the Ninth Amendment affords these rights to the people.¹⁹

Part I of this Essay discusses the ratification of the Ninth Amendment and its subsequent jurisprudential history, as well as different interpretive theories scholars use to dissect the Ninth Amendment.²⁰ Part II of this Comment discusses the Supreme Court’s abortion jurisprudence under the Substantive Due Process Clause and the Ninth Amendment.²¹ Part III of this Essay analyzes the Court’s decision to house the abortion right under the Fourteenth Amendment instead of the Ninth Amendment and argues that this decision was an erroneous overcomplication of abortion jurisprudence.²² The Essay concludes by affirming the Court’s need to re-evaluate its abortion and privacy jurisprudence using the Ninth Amendment.

I. THE NINTH AMENDMENT AND ITS JURISPRUDENTIAL HISTORY

When the Founders drafted the Ninth Amendment, it was considered an important compromise that allowed for the ratification of the Bill of Rights.²³ Since then, however, courts have afforded the Ninth Amendment little attention.²⁴ Until the Supreme Court decided *Griswold v. Connecticut* in 1965, it only mentioned the Ninth Amendment on rare occasions.²⁵ Since *Griswold*, the Court has given the Ninth Amendment

Clause affords only those protections “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”) *See also* *Griswold*, 381 U.S. at 501 (stating that the Court’s jurisprudence reflects “continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society”).

17. *See* Schmidt, *supra* note 15, at 170.

18. *See id.*

19. *See id.*

20. *See infra* Part I.

21. *See infra* Part II.

22. *See infra* Part III.

23. *See* Sanders, *supra* note 5, at 764–65.

24. *See id.* at 769.

25. *See id.*

only slightly more attention.²⁶ Legal scholars, on the other hand, are starting to explore how best to interpret the Ninth Amendment.²⁷

A. *The Ratification of the Ninth Amendment*

The text of the Ninth Amendment reads: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”²⁸ This amendment and the rest of the Bill of Rights were the result of vigorous debate among the Constitutional Founders about whether enumerating certain rights within the Constitution was necessary to protect citizens’ “unalienable” rights.²⁹ The Founders, many of whom were disciples of John Locke, believed that men were born into a “perfect state of freedom” but divested themselves of certain rights by forming government and entering into the “social compact” for the greater good of humanity.³⁰ In forming this social compact, the Founders believed that men only forfeited those rights necessary for effective government.³¹

The debate over whether to include a Bill of Rights in the Constitution, including the Ninth Amendment, occurred against this backdrop.³² While proponents of the Bill of Rights argued that omitting an enumerated Bill of Rights would fail to protect people’s freedoms from the newly formed federal government, Federalists responded with two points.³³ First, Federalists argued that Article I limited the federal government’s powers to those enumerated in the Constitution.³⁴ Based on

26. *See id.*

27. *See, e.g., id.*

28. U.S. CONST. amend. IX.

29. *See Sanders, supra* note 5, at 764–65.

30. *See id.* at 765; *see also* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 8 (1764) (C.B. Macpherson ed., rev. ed. 1980). Locke theorized that all people were equal in the sense that they were born with certain “unalienable” rights, including the rights to life, liberty, and property. Accordingly, Locke said that citizens created governments to better enforce the natural rights that “no one ought to harm another in his life, health, liberty, or possessions.” *See id.* The protection of these rights required men to voluntarily enter into a “social compact” to give up certain natural rights in order to protect others. *Id.* For those reasons, some scholars theorize that the Founders felt that the “natural rights” as discussed by Locke were the ones that were most deserving of Ninth Amendment protection. *See id.* Indeed, “Alexander Hamilton indicated similar beliefs: ‘The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole volume of human nature, by the hand of the divinity itself; and can never be erased or obscured by mortal power.’” *See Sanders, supra* note 5, at 802.

31. *See Sanders, supra* note 5, at 764–65.

32. *See id.*

33. *See id.*

34. *See id.*

Article I, Congress could only take action that the Constitution expressly authorized, which did not include interfering with man's natural rights.³⁵ Second, Federalists argued that a Bill of Rights, which would inevitably be imperfect, would forfeit those rights not enumerated within it.³⁶ For this reason, some felt that the enumeration of rights would be dangerous.³⁷

The Ninth Amendment was the product of this debate.³⁸ Two years after the ratification of the original Constitution, the states ratified a Bill of Rights that included the Ninth Amendment, which expressly stated that citizens had other rights not enumerated in the Constitution.³⁹ This language was the compromise that satisfied both Federalists and Anti-Federalists and allowed for the ratification of the Bill of Rights in 1791.⁴⁰

B. *The Court's Interpretation of the Ninth Amendment*

The Supreme Court's interpretation of the Ninth Amendment can be divided into two distinct eras: the time period before *Griswold v. Connecticut* and the time period after *Griswold*.⁴¹ Up until 1965, the Court discussed the Ninth Amendment in fewer than ten cases.⁴² After Justice Goldberg's concurring opinion in *Griswold*, the Ninth Amendment got more attention than it ever had before.⁴³ However, the Court still appears to be reluctant to interpret the Ninth Amendment.⁴⁴

35. See *id.* at 765. Alexander Hamilton expressed this view when he asked, "[W]hy declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" THE FEDERALIST NO. 84, at 513–14.

36. See Sanders, *supra* note 5, at 765. Famed Anti-Federalist Patrick Henry, in arguing that a Bill of Rights was essential to ordered liberty, said: "[Y]ou have a bill of rights to defend you against the state government, which is bereaved of all power, and yet you have none against Congress, though in full and exclusive possession of all power." *Id.* Conversely, Federalists argued that an enumeration of "exceptions to powers which [were] not granted . . . would afford a colorable pretext to claim more than were granted." *Id.*

37. See *id.*

38. See *id.* at 769.

39. See *id.* at 768–69.

40. See *id.* at 769.

41. See *id.* ("Justice Goldberg's concurring opinion in the famous *Griswold v. Connecticut* decision of 1965 marks the turning point from what may be called the B.C. era to, correspondingly, the A.D. era. In the B.C. (Before the Concurrence) era, the Ninth Amendment hid like a neglected child among its more popular sibling amendments in the Bill of Rights.")

42. See *id.*

43. See Sanders, *supra* note 5, at 769.

44. See *id.* at 770.

1. Before *Griswold v. Connecticut*

Prior to *Griswold*, the Court spent almost no time examining the Ninth Amendment.⁴⁵ The Court made only a handful of references to the amendment, and those references were all brief and relatively superficial.⁴⁶ The only instance where the Court dedicated considerable space to discussion of the Ninth Amendment prior to *Griswold* was in *United Public Workers of America v. Mitchell*, where the Court discussed the breadth of the Ninth Amendment as it related to political speech afforded to federal government employees.⁴⁷

In *Mitchell*, the United Public Workers challenged certain provisions of the Hatch Act, which made it unlawful for federal employees to engage in certain political activities.⁴⁸ The workers claimed the Act violated their Ninth Amendment rights because it interfered with their rights to act as a leader or member of a political party in furtherance of their own respective political views.⁴⁹ In rejecting the United Public Worker's constitutional challenge, the Court said:

The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.⁵⁰

Despite these explicit mentions of the Ninth Amendment, the Court declined to discuss how these rights fit within the Ninth Amendment or what an intrusion upon Ninth Amendment rights may look like.⁵¹ Instead, the Court essentially equated the protections afforded by the Ninth Amendment with those afforded by the Tenth and did not inquire into the scope of its constitutional protection or other rights it may have encompassed.⁵² After *Mitchell*, the Court was essentially silent about the

45. See *id.* at 769. Before *Griswold*, the Court briefly mentioned the Ninth Amendment in fewer than ten cases. *Id.*

46. See *id.*

47. See *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947).

48. *Id.* at 75–76.

49. *Id.* at 94 (“The right claimed as inviolate may be stated as the right of a citizen to act as a party official or worker to further his own political views.”).

50. *Id.* at 95–96.

51. See *id.*

52. See *Sanders*, *supra* note 5, at 770 (“Justice Reed obviously considered the Ninth

Ninth Amendment until 1965, when it handed down its opinion in *Griswold*.⁵³

2. Justice Goldberg's Concurrence in *Griswold v. Connecticut*

In *Griswold v. Connecticut*, the Court was faced with determining the constitutionality of a Connecticut statute that prohibited citizens from using contraceptives.⁵⁴ The Court struck down the statute as unconstitutional based on a “right of privacy” that was found not explicitly within the Bill of Rights, but within its “penumbras.”⁵⁵ The Court said that these penumbras created certain “zones of privacy” the government could not enter.⁵⁶ Accordingly, it held that the statute was unconstitutional because it intruded on citizens’ right of privacy.⁵⁷ The Court went on to discuss how it had previously recognized other unenumerated rights, such as childrearing and educating children that had undertones of rights enumerated in the Constitution.⁵⁸ It felt that the right to privacy was no different than these other rights.⁵⁹

Justice Goldberg concurred in the judgment but declined to find that the right to use contraception was protected on Fourteenth Amendment or

Amendment to be no more than an echo of the Tenth. The Ninth Amendment’s guarantee, whatever it was, was not offended if Congress had acted pursuant to a delegated power. Thus, the Court’s first reading of the Ninth Amendment not only failed to undertake, but largely precluded, an inquiry into its central mysteries—the nature of, and the extent of constitutional protection for, the other rights ‘retained by the people.’”).

53. *See id.*

54. *See Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) (noting that the state statutes provided that: “Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned,” and that “[a]ny person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.”).

55. *See id.*

56. *See id.* at 484 (“The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy.”).

57. *See id.* (“The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers ‘in any house’ in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the ‘right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.’ The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.”).

58. *See id.* at 481–82.

59. *See id.*

Bill of Rights penumbral grounds.⁶⁰ Instead, he held that the right to privacy, and therefore the right to use contraception free from government interference, was found in the Ninth Amendment.⁶¹ Like the majority, Justice Goldberg felt that the concept of liberty included more than what was enumerated within the Constitution.⁶² Goldberg, however, felt that the Ninth Amendment was the appropriate home for the right of privacy because it expressly acknowledged that citizens have rights not contemplated by the Constitution.⁶³ In acknowledging that the right to privacy within the marital relationship was fundamental, Goldberg stated that while privacy was not expressly mentioned in the Constitution, denying these types of relationships constitutional protection would produce an absurd result.⁶⁴ In Goldberg's view, this right was one of those rights "retained by the people" under the Ninth Amendment.⁶⁵

While Goldberg believed that the Fifth and Fourteenth Amendments protected rights not explicitly enumerated in the Constitution, he felt that the language and history of the Ninth Amendment lent strong support to the idea that citizens had fundamental rights other than those listed in the first eight amendments.⁶⁶ In arguing so, he said:

While the Ninth Amendment—and indeed, the entire Bill of Rights—originally concerned restrictions upon federal power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And, the 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

60. *See Griswold*, 381 U.S. at 493.

61. *See id.*

62. *See id.*

63. *See id.* Goldberg concluded that "the Ninth Amendment simply lends strong support to the view that the 'liberty' protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments." *Id.*

64. *See id.* at 495–96.

65. *See id.* ("The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family—a relation as old and as fundamental as our entire civilization—surely does not show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgment by the Government though not specifically mentioned in the Constitution.").

66. *See id.* at 493 ("The Ninth Amendment simply lends strong support to the view that the 'liberty' protected by the Fifth and Fourteenth Amendments from infringement by the federal government or the states is not restricted to rights specifically mentioned in the first eight amendments.").

other fundamental personal rights, now protected from state, as well as federal, infringement.⁶⁷

From Goldberg's perspective, the Founders intended for the Ninth Amendment to protect citizens from government overreach and to ensure that they retained other "natural rights" not enumerated in the Constitution.⁶⁸

Some have criticized the *Griswold* Court for employing tenuous reasoning to find privacy as a right protected by the penumbras of the Bill of Rights.⁶⁹ According to one scholar, the Court's majority opinion in *Griswold* was "an indefensible leap in reasoning" that "pushed the Court to make a methodical change in textual interpretation."⁷⁰ Furthermore, others have suggested that Justice Goldberg was unable to secure a majority using this reasoning because he used an interpretation of the Constitution that harkened back to the Founders' original intent in drafting the Ninth Amendment.⁷¹ In avoiding applying Goldberg's "original intent" reasoning, some argue that the Court fell back on amorphous language that allowed it to use its own judgment to pinpoint what rights were worthy of constitutional protection.⁷²

Goldberg's concurrence in *Griswold* was the first time a Justice used the Ninth Amendment to recognize a fundamental or otherwise-protected right not enumerated in the Constitution, and the first opinion that discussed the Ninth Amendment in detail.⁷³ Since then, the Court has mentioned the Ninth Amendment approximately twenty times, but its references continue to be trivial, and the Court has not decided any decisions solely on Ninth Amendment grounds.⁷⁴ Overall, the Court still

67. *See id.*

68. *See id.*

69. *See* Derek Alexander Pope, *A Constitutional Window to Interpretive Reason: Or, in Other Words . . . the Ninth Amendment*, 37 *HOW. L.J.* 441, 443 (1994) ("Justice Douglas then discussed an array of cases that protected rights not mentioned in the Constitution. He later noted that '[w]ithout those peripheral rights the specific rights would be less secure.' Then, in an indefensible leap in reasoning, Douglas framed the infamous basis of contention.").

70. *See id.*

71. *See id.*

72. *See* Pope, *supra* note 69, at 446–47 ("In this century, numerous cases have spoken in such amorphous terms when attempting to pinpoint exactly those rights endemic to human existence. The Court's attempt to clarify the inarticulable has saddled it with incomplete expressions such as, 'implicit in the concept of ordered liberty,' 'fundamental,' and 'immutable principles of justice' as conceived by a civilized society.").

73. *See* Sanders, *supra* note 5, at 769–70.

74. *See id.* at 772. ("The Amendment, moreover, has appeared in some of the Court's most famous A.D.- [after *Griswold*] era cases, including *Planned Parenthood v. Danforth*, *Buckley v. Valeo*, and *Bowers v. Hardwick*.").

appears to be uninterested in how and when to interpret the Ninth Amendment.⁷⁵

C. *Interpretive Theories of the Ninth Amendment*

There are many theories of constitutional interpretation that scholars, judges, and legal professionals use to decipher the Ninth Amendment. These approaches include: original intent theory; the textualist approach; and theories describing the Constitution as a “living document.”⁷⁶ The theories discussed in this Section offer some insight into how the Court has thought about the Ninth Amendment, or how it may think about it in the future.

1. Original Intent

Some scholars argue that the Ninth Amendment shows the Founders’ intent to recognize that other rights may exist that were not enumerated in the Constitution.⁷⁷ According to Professor Randy Barnett, “[t]he Founders very firmly intended that the Ninth Amendment would include fundamental, morally based rights from their generation that should continue to be followed by succeeding generations. In short, they contemplated that their original intent regarding rights would be adhered to by succeeding generations.”⁷⁸ This approach points to an interpretation of the Ninth Amendment that emphasizes the Founders’ adherence to natural rights and desire for those rights to be constitutionally protected, even if unenumerated in the Constitution.⁷⁹

75. *See id.*

76. *See Sanders, supra note 5, at 782–83.*

77. *See Duane L. Ostler, Rights Under the Ninth Amendment: Not Hard to Identify After All, 7 FED. CTS. L. REV. 35, 46–47 (2013) (“Jefferson favored the idea that the unchangeable laws of nature—such as those embodied in the Ninth Amendment—controlled each generation, even if the constitution each generation formed had expired.”). *See also* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TX. L. REV. 1, 5 (2006) (arguing that “the way a member of the public would today read the Ninth Amendment—before being exposed to a more ‘sophisticated’ interpretation—was also its original public meaning at the time of its enactment.”).*

78. *See Barnett, supra note 77, at 50.*

79. *See id.* at 50–51 (“The Ninth Amendment is steeped in natural rights and social compact theory. Interestingly, most scholars who discuss the Ninth Amendment agree that it was meant to secure natural rights as understood by the founding generation . . . [but] these are points that are not very popular today. It is more fashionable to try and change the Ninth Amendment to fit with the times, turning the Founders’ clear meaning into something more socially acceptable in a world where moral values have become secondary.”).

2. The Textualist Approach

Strict textualists take the Ninth Amendment's language at face value and find that the Ninth Amendment protects unenumerated rights from government intrusion.⁸⁰ Some textualist scholars invoke the Constitution's structure, historical context, and jurisprudential trends in attempting to find meaning in the Ninth Amendment, but contend that these sources should only be applied when the text of the Constitution causes an ambiguity.⁸¹ Critics of these scholars argue that there is no ambiguity in the Ninth Amendment—the document itself states that there are unenumerated rights retained by the people.⁸² As one scholar noted:

The Ninth Amendment's meaning cannot be compromised by peripheral legal arguments. While a strong smoke screen can be established through these positions, one need look no further than the text of the amendment to dissipate the cloud of smoke. A brief reading of the amendment leads to a simple and obvious conclusion—individuals retain unenumerated rights outside the enumerated rights in the Constitution. Unless the Ninth Amendment is repealed or altered through a constitutional amendment, courts have a duty to give full effect to its term.⁸³

For textualists, there is no need to determine what the Ninth Amendment actually means—that meaning is clear.⁸⁴ The only question that remains is how to determine what rights are protected by the Ninth Amendment.⁸⁵

3. The Constitution as a Living Document

Proponents of the theory that the Constitution is a living document see the Ninth Amendment as an open-ended clause that requires judicial interpretation in order to discern how it applies to modern constitutional issues.⁸⁶ To this end, the Ninth Amendment allows for the constitutional protection of individual rights that may develop over time—i.e., rights

80. See Schmidt, *supra* note 15, at 191–92. See also Akhil Reed Amar, *Textualism and the Bill of Rights*, 66 GEO. WASH. LAW REV. 1143, 1143 (“Is it even possible to deduce the spirit of a law without looking at its letter?”).

81. See Schmidt, *supra* note 15, at 192–93.

82. See *id.*

83. See *id.*

84. See *id.*

85. See *id.*

86. See *id.* at 194 (“The Ninth Amendment acknowledges these restrictive problems and suggests that the Constitution is capable of adapting to societal change.”).

that an evolving society will recognize as fundamental that the Founders may not have contemplated.⁸⁷ Scholars who view the Constitution as a living document ask whether asking what the Founders intended from the Constitution makes sense in a modern context.⁸⁸

In sum, the Ninth Amendment was largely ignored in Supreme Court jurisprudence prior to *Griswold*.⁸⁹ Even after *Griswold*, the Court's references to the Ninth Amendment have been minimal.⁹⁰ Legal scholars, however, have given the amendment more attention. In doing so, scholars have discussed various theories of interpretation to examine the Ninth Amendment.⁹¹ Whether the Court will follow legal scholars' lead in interpreting the Ninth Amendment as it relates to certain fundamental and otherwise-protected rights such as abortion remains to be seen.

II. ABORTION JURISPRUDENCE UNDER SUBSTANTIVE DUE PROCESS AND THE NINTH AMENDMENT

The Supreme Court's abortion jurisprudence can be boiled down to two seminal cases: *Roe v. Wade*, decided in 1973, and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, decided in 1992.⁹² In each of these cases, the Court found that the right to an abortion was protected by the Due Process Clause of the Fourteenth Amendment. Neither case discussed the implications of the Ninth Amendment on the discussion of whether the right to an abortion was protected by the Constitution.

A. *An Overview of the Court's Abortion Jurisprudence Under Substantive Due Process*

The Court decided both *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* under the Substantive Due Process Clause of the Fourteenth Amendment.⁹³ The *Casey* Court affirmed the central holding of *Roe* that the abortion right was protected by the Fourteenth Amendment.⁹⁴ The Ninth Amendment was only briefly cited

87. *See id.*

88. *See id.*

89. *See* *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965).

90. *See* Sanders, *supra* note 5, at 769–70.

91. *See, e.g.,* Schmidt, *supra* note 15, at 192–93.

92. *See generally* *Roe v. Wade*, 410 U.S. 113 (1973); *see also* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

93. *See* *Roe*, 410 U.S. at 152; *Casey*, 505 U.S. at 846.

94. *See* *Casey*, 505 U.S. at 846.

in *Casey*, when the majority opinion used it to support the assertion that the Fourteenth Amendment should protect rights both enumerated and unenumerated within the Constitution.⁹⁵

1. *Roe v. Wade*

The Court first recognized the right to obtain an abortion free from government interference in *Roe v. Wade*.⁹⁶ In *Roe*, the Court held that a woman's right to an abortion was rooted in the right to privacy, which protected the most sacred decisions regarding marriage, childrearing, and sexual activity.⁹⁷ In holding that the right to privacy, and therefore the right to an abortion, was protected by the Constitution, the Court acknowledged that the document did not explicitly recognize a right to privacy.⁹⁸ Instead, the Court held that the right to privacy was housed within the Substantive Due Process Clause under the Fourteenth Amendment.⁹⁹

The *Roe* Court refined the rule regarding personal privacy that it set forth in *Griswold*, where it recognized the right to marital privacy under the Due Process Clause of the Fourteenth Amendment and certain penumbras of the Bill of Rights.¹⁰⁰ Within the Fourteenth Amendment context, the Court said that women had a right to obtain an abortion and that the abortion right fell within the right of privacy.¹⁰¹ The Court noted, however, that the right was not absolute and was subject to some degree of state regulation.¹⁰² The Court in *Roe* did not address the Ninth

95. *See id.* at 847 (“It is . . . tempting . . . to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified.”).

96. *See Roe*, 410 U.S. at 152.

97. *See id.* at 153 (“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 or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent.”).

98. *See id.* at 152 (“The Constitution does not explicitly mention any right to privacy.”).

99. *See id.*

100. *See id.* (“In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford* . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment . . . in the Fourth and Fifth Amendments . . . in the penumbras of the Bill of Rights [in] *Griswold v. Connecticut* . . . in the Ninth Amendment [in Goldberg’s concurrence in *Griswold*]; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment.”).

101. *See id.*

102. *See id.* at 154 (“We, therefore, conclude that the right of personal privacy includes the

Amendment as a possible vehicle for the right of privacy or the right to an abortion; in fact, it outright dismissed the lower court's assertion that the right to privacy was housed in the Ninth Amendment.¹⁰³

2. *Planned Parenthood of Southeastern Pennsylvania v. Casey*

In *Casey*, the Court upheld the central holding in *Roe* but adopted the “undue burden” standard instead of the strict scrutiny applied in *Roe*.¹⁰⁴ The Court also discarded the trimester framework set forth in *Roe*. This new rule set forth in *Casey* said that states may regulate abortion so long as those regulations do not place an undue burden on women seeking abortions prior to viability.¹⁰⁵ A regulation may place an undue burden on women seeking abortions when it creates a substantial obstacle to obtaining an abortion prior to viability.¹⁰⁶ The Court created this test in order to avoid the pseudo-legislative aspect of the trimester framework set forth in *Roe*.¹⁰⁷

The *Casey* Court affirmed that the right to privacy, and therefore the right to abortion, was housed within the Due Process Clause of the Fourteenth Amendment.¹⁰⁸ In placing the right to privacy and the abortion right squarely within the Due Process Clause, the Court noted that, while the Due Process Clause applies first and foremost to rights enumerated within the Bill of Rights, it applies to unenumerated rights as well.¹⁰⁹ The Court spent an extensive amount of time in *Casey* discussing the use of the Due Process Clause to protect unenumerated rights.¹¹⁰ In doing so, the Court noted that the Due Process Clause had never been read to protect only those rights enumerated in the Constitution.¹¹¹ Further, the Court

abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.”).

103. *See id.* at 153.

104. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 845-467 (1992) (“After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of stare decisis, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.”).

105. *See id.* at 874.

106. *See id.* at 877.

107. *See id.*

108. *See id.* at 846 (“Constitutional protection of the woman’s decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall ‘deprive any person of life, liberty, or property, without due process of law.’ The controlling word in the cases before us is ‘liberty.’”).

109. *See id.* at 847-48.

110. *See id.*

111. *See id.*

noted that the Constitution did not limit unenumerated rights to those that would have been contemplated by the Founders when the Constitution was drafted.¹¹²

Interestingly, in its discussion of why it felt that the right to privacy and, therefore, the abortion right, were housed under the Fourteenth Amendment, the Court actually cited the Ninth Amendment.¹¹³ The majority opinion in *Casey* noted 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,” and then cited the Ninth Amendment as support.¹¹⁴ The *Casey* Court appears to cite the Ninth Amendment not to say that the right to privacy or the right to abortion could be protected by the Ninth Amendment, but to acknowledge that there are, in fact, unenumerated rights that are protected by the Constitution.¹¹⁵ In *Casey*, the Court cited the Ninth Amendment not as a protector of rights in and of itself, but as an express authority for the Court to recognize unenumerated rights as being protected under the Fourteenth Amendment.¹¹⁶

Furthermore, the Court noted in *Casey* that an analysis under the Fourteenth Amendment requires the Court to exercise its subjective judgement against the “deeply rooted” standard.¹¹⁷ In doing so, the Court noted that:

[T]he inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office.¹¹⁸

112. *See id.* at 847 (“It is . . . tempting . . . to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified.”).

113. *See id.* at 848.

114. *See id.*

115. *See id.*

116. *See id.*

117. *See id.* at 849.

118. *See id.*; *see also* *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (“[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This ‘liberty’ is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the

Overall, the Court held that the Fourteenth Amendment housed the rights to privacy and to abortion.¹¹⁹ Since *Casey*, states have used the undue burden standard to determine if abortion regulations violate people's Fourteenth Amendment rights.

B. The Lower Court's Examinations of Abortion as a Ninth Amendment Right: The Northern District of Texas's Opinion in Roe v. Wade

Prior to the Supreme Court's decision in *Roe v. Wade*, lower courts examined several constitutional challenges to abortion regulations.¹²⁰ Interestingly, the lower court's ruling in *Roe* relied heavily on the Ninth Amendment in determining that the abortion regulation in question was unconstitutional.¹²¹ The Supreme Court later rejected this ruling when it decided the case.¹²²

The Northern District of Texas relied on the Ninth Amendment to find the Texas abortion laws at issue unconstitutional.¹²³ In doing so, the court used Justice Goldberg's concurring opinion in *Griswold* as the starting point for determining whether a right was encompassed within the Ninth Amendment.¹²⁴ The court acknowledged that the summation of jurisprudence surrounding abortion and other rights related to childbearing and rearing showed that there was an area of personal privacy into which the government could not intrude.¹²⁵ The court felt that this jurisprudence supported the assertion that the right to engage in private conduct, such as choosing whether to have children, and therefore the right to an abortion, was protected by the Ninth Amendment.¹²⁶

right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.”).

119. See *Casey*, 505 U.S. at 915, Stevens, J. concurring (“The woman’s constitutional liberty interest also involves her freedom to decide matters of the highest privacy and the most personal nature.”).

120. See *Roe v. Wade*, 314 F. Supp. 1217, 1221 (N.D. Tex. 1970).

121. See *id.*

122. See *Roe v. Wade*, 410 U.S. 113 (1973).

123. See *Roe*, 314 F. Supp. at 1221 (“On the merits, plaintiffs argue as their principal contention that the Texas Abortion Laws must be declared unconstitutional because they deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children. We agree.”).

124. See *id.* at 1221–22.

125. See *id.* at 1222.

126. See *id.*

Unlike in later opinions, the Northern District of Texas saw the Ninth Amendment as a better home for unenumerated rights than the Fourteenth Amendment.¹²⁷ While the court acknowledged the importance of protecting rights that “bear in a fundamental manner on the privacy of individuals,” the court did not seem to hold that the abortion right was fundamental *only* because it constituted private conduct.¹²⁸ Instead, the court seemed to acknowledge the abortion right as a freestanding right under the Ninth Amendment.¹²⁹ After the Supreme Court rejected this characterization of the abortion right when it decided the case in 1973, courts have not attempted to place the abortion right under the Ninth Amendment, and no one has challenged an abortion regulation under Ninth Amendment grounds.¹³⁰

In sum, the Court’s landmark abortion cases, *Roe* and *Casey*, establish a right to privacy—and therefore, a right to an abortion—within the Due Process Clause of the Fourteenth Amendment.¹³¹ This finding in *Roe* was a departure from the Northern District of Texas’s opinion in the same case, which found that the right to an abortion was secured by the Ninth Amendment.¹³² Since *Casey*, the Court has consistently recognized the right of privacy and abortion to be found within Substantive Due Process.¹³³

127. See *id.* See also Tom C. Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOY. L.A. L. REV. 1, 8 (1969) (“The result of these decisions is the evolution of the concept that there is a certain zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person’s marriage, home, children and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution.”).

128. See *Roe*, 314 F. Supp. at 1221.

129. See *id.* at 1219. The court describes the abortion right as the right of women, “secured by the Ninth Amendment, to choose whether to have children.” *Id.* While the court discusses the “zone of individual privacy” from *Griswold*, the court does not acknowledge “privacy” as a freestanding right, but as a characteristic of the conduct courts have found worthy of constitutional protection. *Id.*

130. See *id.*

131. See *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

132. See *Roe*, 314 F. Supp. at 1221.

133. See, e.g., *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 60–61 (acknowledging the Court’s opinion in *Roe* that the abortion right was housed within the Fourteenth Amendment).

III. RELOCATING THE ABORTION RIGHT TO THE NINTH AMENDMENT

The Court has relied on the Fourteenth Amendment in its abortion jurisprudence.¹³⁴ However, the Fourteenth Amendment may not be the ideal home for this right. The Court should use the Ninth Amendment to recognize fundamental and other protected rights, including abortion.¹³⁵ Using the Fourteenth Amendment to recognize the abortion right unnecessarily complicates abortion jurisprudence.¹³⁶ For that reason, the Ninth Amendment is the most appropriate home for the abortion right.¹³⁷

A. *The Ninth Amendment is Severely Underutilized in Supreme Court Jurisprudence*

The Supreme Court essentially ignored the Ninth Amendment until Justice Goldberg's concurrence in *Griswold*.¹³⁸ Since *Griswold*, the Court's references to the Ninth Amendment have been sparse.¹³⁹ Many commentators have suggested that the Court has avoided use of the Ninth Amendment because it does not know how to effectively interpret it.¹⁴⁰

134. See *Roe*, 410 U.S. at 153; *Casey*, 505 U.S. at 847.

135. See Sanders, *supra* note 5, at 838. .

136. See *id.* See also Schmidt, *supra* note 15, at 169–70 (“In contemporary constitutional discussions, the analytical process generally requires sifting through a tremendous amount of material to reach a result. The Ninth Amendment is almost the direct opposite.”).

137. See Schmidt, *supra* note 15, at 169–70.

138. See Sanders, *supra* note 5, at 769.

139. See *id.* at 772.

140. See *id.* at 771 (stating that, while the Court has mentioned the Ninth Amendment in at least twenty cases since *Griswold*, “the Court has never figured out exactly what to do with the curious treasure it discovered in *Griswold*”). For example, Professor Kurt Lash has argued that the natural rights theory of the Ninth Amendment is a misreading of the history of the amendment. See Kurt Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L.R. 331, 401 (2004). According to Lash, the key to determining how to interpret the Ninth Amendment rests not on whether the unenumerated rights “afforded to the people” are “natural rights,” but on the idea that the Ninth Amendment affords states the right to enact certain legislation that may not be contemplated within the Constitution itself. See *id.* Accordingly, Lash argues that:

Contemporary assumptions about rights and powers, however, appear to have played an even greater role in masking the historical roots of the Ninth Amendment. If one assumes that the Ninth Amendment is about individual rights, while the Tenth is about government power, the state convention precursors to the Ninth Amendment disappear from view: None of the proposed drafts of the Ninth Amendment from the state conventions used the language of rights. Instead, the state conventions proposed a rule of construction limiting the interpretation of federal power. A historian who assumes that the Ninth Amendment was about unenumerated individual rights

Indeed, there are numerous constitutional theories to use in interpreting the Ninth Amendment, and each can proffer a different, and often competing, result.¹⁴¹ However, criticisms that the Ninth Amendment is difficult to interpret, and therefore an ineffective medium for recognizing fundamental and other protected rights, are misguided.¹⁴²

There are strong arguments, textually, historically, and otherwise, that demonstrate how to correctly use the Ninth Amendment as a tool to protect these rights.¹⁴³ Textually, as noted by Professor Randy Barnett, the Ninth Amendment “means what it says.”¹⁴⁴ The amendment clearly expresses that there are other rights reserved to the people that are not enumerated in the Constitution.¹⁴⁵ Historically, there is a great deal of evidence that the Founders intended the Ninth Amendment to ensure that all fundamental rights would be recognized by the courts, not just those that were enumerated in the Bill of Rights.¹⁴⁶ If a reader is willing to consider the original intent of the Founders in interpreting the Ninth

and not government power would overlook these provisions and either erroneously focus attention on proposed amendments dealing with individual rights or assume that there were no state precursors to the Ninth Amendment at all.

Id. at 423. To this end, Lash’s argument rests on the idea that interpretations focusing on the natural rights theory are an error both courts and legal scholars are guilty of making. *Id.*

141. See *supra* Part I (describing competing theories of interpretation used to interpret the Ninth Amendment).

142. See Sanders, *supra* note 5, at 789.

143. See Jordan J. Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231, 237 (1975) (“It seems clear from the language of the [N]inth [A]mendment that certain rights exist even though they are not enumerated in the Constitution, that these rights are retained by the people, and that by express command these unenumerated rights are not to be denied or disparaged by any governmental body.”).

144. See Barnett, *supra* note 77, at 5 (arguing that “the way a member of the public would today read the Ninth Amendment—before being exposed to a more ‘sophisticated’ interpretation—was also its original public meaning at the time of its enactment.”).

145. See *id.*; see also Pope, *supra* note 69, at 448 (“On one level, the Ninth Amendment is one of the few examples the Constitution offers indicating how the document is to be read. The command of the amendment tells us exactly how the Constitution ‘shall not be construed.’ In fact, both the Ninth and Tenth Amendments are ‘guides to a structural understanding of the Constitution’s enumeration of governmental powers and personal rights, [and] guides to the actual construction of a document which itself was plainly intended to enjoy the status of positive law.’ In addition to being a mandate of interpretation, the Ninth Amendment seems to incorporate individual rights as well.”). *But see* Lash, *supra* note 140, at n.14 (“In his most recent book, *Restoring the Lost Constitution*, Ninth Amendment scholar Randy Barnett points out the importance of considering amendments proposed by the states in determining the original meaning of the Constitution [citation omitted]. Barnett does not, however, discuss any version of the Ninth Amendment proposed by the states.”).

146. See Sanders, *supra* note 5, at 788–89.

Amendment, the historical context of the amendment's passage appears to give courts broad discretion in construing it.¹⁴⁷

Additionally, the Court has consistently recognized rights that are not enumerated in the Constitution, which is essentially what the Ninth Amendment mandates.¹⁴⁸ The Court is already recognizing that there are unenumerated fundamental and other protected rights, it is just using the more unwieldy Substantive Due Process analysis to do so.¹⁴⁹ The Court should not shy away from using the Ninth Amendment because it serves as a clear-cut way to recognize these rights. In fact, the Ninth Amendment may be a better home for certain rights, such as the right to an abortion, that the Court has previously housed under the Fourteenth Amendment.

B. Housing Abortion Rights Under the Fourteenth Amendment Unnecessarily Complicates Abortion Jurisprudence

While the analysis the Court uses to determine whether a right should be considered fundamental or otherwise protected under the Due Process Clause is not without merit, the Court already has the express authority to recognize unenumerated rights under the Ninth Amendment.¹⁵⁰ Furthermore, not only does the Ninth Amendment give the Court the authority to exercise its judgment as to what constitutes a protected right, it also serves as an independent source of rights.¹⁵¹ As one scholar noted, “[t]he Ninth Amendment is an authoritative source guaranteeing the zone of privacy, not a persuasive source supporting the constitutional recognition of a zone of privacy through a provision of another amendment” as the Court did in *Roe*.¹⁵² Indeed:

147. *See id.*

148. *See, e.g.,* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846–47 (1992).

149. *See id.*; *see also* Schmidt, *supra* note 15, at 169–70.

150. *See* Schmidt, *supra* note 15, at 170 (“The plain meaning of the amendment sanctions its authority to adjudicate whether an unenumerated right exists warranting constitutional recognition. This contradicts current jurisprudence adopting a substantive due process component in the Fourteenth Amendment.”).

151. *See id.* at 179.

152. *See id.* at 177. For example, in *Griswold*:

The Court does not explain or state anything else in reference to the Ninth Amendment. Its text is left dangling before the curious reader's eyes as though awaiting some explanation. The reason no explanation exists is because the Court cannot give one. It cannot explain how the Ninth Amendment can support recognizing a zone of privacy under the liberty component of the Fourteenth Amendment because the text and meaning of the Ninth Amendment precludes that conclusion. The specific guarantee under the Ninth Amendment

A Ninth Amendment-only jurisprudence to determine whether an unenumerated right exists follows the Constitution's text . . . This entirely text-based apparatus streamlines the jurisprudence through a credible constitutional foundation that eliminates the ability of judges to inaccurately alter the issue before them to reach a legal result that does not conform to constitutional language.¹⁵³

Using the Ninth Amendment, as opposed to the Fourteenth Amendment, to house certain rights related to privacy provides a streamlined approach to determining which rights are constitutionally protected.¹⁵⁴ A more streamlined approach to determining what constitutes a fundamental or other protected right is necessary in order to ensure that those rights extended protection are those that ensure the greatest protection of private rights to the people, and not simply those that are politicized for being "moral" or "immoral." This method would remove certain rights, such as the right to an abortion, outside the realm of complicated Substantive Due Process jurisprudence.

C. The Ninth Amendment is the Best Place Within the Constitution to House the Abortion Right

The Ninth Amendment expressly acknowledges the Court's authority to recognize unenumerated fundamental and otherwise-protected rights, and the right to abortion is one of those rights.¹⁵⁵ The recognition of a woman's right to an abortion is consistent with other unenumerated rights the Court has recognized, from the use of contraception to the right to procreation.¹⁵⁶ There is no need to go through a complicated Substantive Due Process analysis to recognize the abortion right.¹⁵⁷ The Ninth Amendment already allows for the recognition of

is that the people retain unenumerated rights. Therefore, the Ninth Amendment recognizes the zone of privacy that encompasses a marital couple's choice to use contraceptive devices.

Id. at 175.

153. *See id.* at 178–79.

154. *See id.*

155. *See Sanders, supra* note 5, at 788–89.

156. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 481 (1965).

157. *See Schmidt, supra* note 15, at 185 ("The topsy-turvy nature of recent substantive due process methodology seems to conform to the result needed, depending upon which ideological block forms a majority. It has become based on more tradition and history, thereby, limiting the recognition of rights, while still expanding to contain more flexible and evolving principles when recognizing the existence of a fundamental right. These inconsistent analytical means undoubtedly promote the possibility of judicial legislation due to substantive due process's lack of a textual origin.")

unenumerated, fundamental or otherwise-protected, rights that are “retained by the people.”¹⁵⁸

Using the Ninth Amendment to recognize the right to an abortion is a better path than using the Fourteenth Amendment because it takes the determination of whether an abortion is a protected right outside the moral realm.¹⁵⁹ The analysis of whether a right is “deeply rooted in the tradition” of the United States inevitably stirs a debate about whether the public considers abortion morally acceptable.¹⁶⁰ In recognizing the right to an abortion under the Ninth Amendment, no such analysis is necessary.¹⁶¹ The text of the Ninth Amendment allows the Court to recognize this protected right without an inquiry into whether it is deeply rooted in historical tradition.¹⁶² Instead, the Court can simply recognize that the right involves private conduct, which it has consistently recognized is worthy of constitutional protection, and acknowledge that the Ninth Amendment affords this right to the people.¹⁶³ This technique would ensure that a controversial and politicized right such as abortion would not be exempted from constitutional protections just because reasonable minds could differ as to whether an act is deeply rooted enough in our collective consciousness.

From this perspective, the Court does not necessarily need to recognize a stand-alone right to privacy in order to recognize the right to an abortion.¹⁶⁴ Under the Ninth Amendment, the abortion right can be recognized as fundamental or otherwise protected in and of itself.¹⁶⁵ Instead of recognizing a protected right to privacy that encompasses the right to an abortion, the Court could choose to affirmatively recognize the right to an abortion that is protected because it involves objectively private

158. *See id.*

159. *See id.* at 189–90.

160. *See, e.g.,* *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (stating that the Due Process Clause affords only those protections “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”). *See also* *Griswold*, 381 U.S. at 501 (stating that the Court’s jurisprudence reflects “continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society.”).

161. *See* *Schmidt*, *supra* note 15, at 232 (“An objective reading of the Ninth Amendment should lead to an almost universal conclusion - unenumerated rights exist outside those enumerated in the Constitution. But it is amazing how the legal community creates complex issues. Instead of following the Ninth Amendment’s text, the United States Supreme Court created the substantive due process tall-tale, and it continues to this day.”).

162. *See id.*

163. *See id.* at 175.

164. *See* *Griswold*, 381 U.S. at 484.

165. *See, e.g.,* *Roe v. Wade*, 314 F. Supp. 1217, 1221-22 (N.D. Tex. 1970).

conduct.¹⁶⁶ To this end, the Northern District of Texas was correct in holding that the abortion right was housed under the Ninth Amendment.¹⁶⁷ The court correctly acknowledged that abortion can be a stand-alone right under the Ninth Amendment.¹⁶⁸ Furthermore, the court acknowledged that the summation of jurisprudence surrounding abortion and other rights related to childbearing showed that there was a zone of privacy into which the government could not intrude.¹⁶⁹ Unlike in other later opinions, the Northern District of Texas saw these rights as being protected under the Ninth Amendment.¹⁷⁰ The Supreme Court's departure from this reasoning in its decision in *Roe* was an error.

As a practical matter, it may be less cumbersome for the Court to continue to recognize a right of privacy encompassed by the Ninth Amendment and acknowledge that, as objectively private conduct, abortion should be considered a right protected by the Ninth Amendment.¹⁷¹ For that reason, the standard the court should use to determine if certain conduct is worthy of constitutional protection should be whether the conduct falls within the realm of natural rights.¹⁷² Natural rights theory is based on the principle that neither individuals nor government can take action that would cause harm to another citizen's life, property, health, liberty, or possessions.¹⁷³ In turn, citizens must voluntarily engage in a social compact to give up certain rights in order to ensure that the state can protect other rights and run efficiently.¹⁷⁴ Under this understanding of natural rights theory, the right to an abortion is clearly a right that should be afforded constitutional protection. The decision of whether to have an abortion implicates the personal liberty of pregnant people. It can also implicate health and life in cases where carrying the pregnancy to term may threaten it. Allowing the government to regulate private conduct affecting health, life and liberty would run afoul of natural rights theory. Indeed, all of these values are those contemplated by natural rights theory, and are therefore appropriate to afford constitutional protection.

166. *See id.*

167. *See id.*

168. *See id.*

169. *See id.* at 1222.

170. *See id.*; *see also* Clark, *supra* note 127, at 8.

171. *See Roe*, 314 F. Supp. at 1222.

172. *See* Schmidt, *supra* note 15, at 207.

173. *See* LOCKE, *supra* note 30, at 8.

174. *See id.*

Furthermore, an interpretation of the Ninth Amendment that allows for the constitutional protection of rights within the natural rights umbrella is consistent with several competing theories of interpretation of the Ninth Amendment.¹⁷⁵ Using natural rights theory as the measuring stick for what constitutes an unenumerated right is consistent with a historical understanding of the Ninth Amendment, which was steeped in natural rights theory.¹⁷⁶ However, it also allows for the flexibility to protect natural rights that may not have been contemplated by the Founders but are still important to the ethical and efficient functioning of modern society.¹⁷⁷ While it is unlikely that the Founders thought about the right to an abortion when enacting the Ninth Amendment—or any other issue related women’s sexuality or autonomy, for that matter—the overall concept of natural Rights allows for the Court to protect those rights that fall under this relatively broad umbrella. To this end, the Court can determine whether the conduct is within the same or similar character of other natural rights—rights that involve personal liberty, autonomy, privacy, life or health—and extend constitutional protection accordingly.

Opponents of abortion criticize the idea that abortion could be protected by the Ninth Amendment or considered a natural right.¹⁷⁸ As one scholar argues, under both natural rights theory and other philosophical mechanisms such as the harm principle, abortion is contrary to the law of nature because it involves the taking of life.¹⁷⁹ Accordingly, he argues that:

[F]or the Founders if there was a conflict between a man-made law and the laws of nature, the latter should prevail. Simply put, whatever the common law had to say about abortion is significantly subordinate to natural law. To say that the common law should prevail in respect to abortion is to elevate the trivial over the essential.¹⁸⁰

175. See Barnett, *supra* note 77, at 2 (“The purpose of the Ninth Amendment was to ensure that all individual natural rights had the same stature and force after some of them were enumerated as they had before; and its existence argued against a latitudinarian interpretation of federal powers.”).

176. See *id.*

177. See *id.*

178. See Ostler, *supra* note 77, at 75.

179. See *id.* (“Hence, natural law writers Burlamaqui, Grotius, and Pufendorf—who were heavily relied on by the Founders—were in agreement that abortion at any stage of pregnancy was contrary to the law of nature, and that the unborn should be protected from the moment of conception.”).

180. See *id.* at 77.

This argument is similar to other anti-abortion arguments that abortion is *sui generis* and different from other rights that implicate privacy because it involves the taking of life.¹⁸¹

This argument does not hold up to careful scrutiny, however, because the very essence of natural rights theory actually allows for the protection of abortion, despite the fact that it acts upon a fetus.¹⁸² Imposing state control on the decision whether to have an abortion would amount to an infringement upon the liberty of the pregnant person, which would arguably be contrary to natural law. Furthermore, the prohibition of abortion would, in many circumstances, directly affect the health or life of pregnant women, which would also go against natural law principles.¹⁸³ Natural law principles do not have to stand for the proposition that unborn life must be preserved in spite of the liberty of pregnant women, whose autonomy was likely not contemplated by the Founders or philosophers the Founders admired.¹⁸⁴ An interpretation of natural law theory that takes into account its historical importance but also recognizes its place in a modern context can serve as a mechanism to protect the abortion right under the Ninth Amendment.

In sum, the Court should use the Ninth Amendment to recognize fundamental and other-protected rights, including that of abortion.¹⁸⁵ Using the Fourteenth Amendment to recognize the abortion right unnecessarily complicates abortion jurisprudence, and rights that fall under the natural rights umbrella can be effectively protected by the Ninth Amendment.¹⁸⁶ The Ninth Amendment is the most appropriate home for the abortion right.¹⁸⁷

181. See *id.*; see also Mattei Ion Radu, *Incompatible Theories: Natural Law and Substantive Due Process*, 54 *VIL. L. REV.* 247, 276 (“Consequently, abortion is never morally acceptable if the being destroyed by the act is in fact an innocent human person. It is beyond the scope of this Article to answer fully that extremely important moral question. It is enough to point out that an overwhelming majority of current natural law thinkers agree that abortion is the killing of an innocent human person and is therefore illicit.”).

182. See *The Whole Women’s Health v. Hellerstedt Oral Argument: A Roundtable Discussion with Members of NYU Law Students for Reproductive Justice*, 41 *HARBINGER* 155, 163 (2016).

183. See *id.* at 157.

184. See Sanders, *supra* note 5, at 788–89.

185. See *id.*

186. See *id.*; see also Schmidt, *supra* note 15, at 169–70.

187. See Schmidt, *supra* note 15, at 105.

CONCLUSION

The Ninth Amendment expressly grants the Supreme Court authority to recognize fundamental and other-protected rights that, while not found within the text of the constitution, are “retained by the people.”¹⁸⁸ Despite this grant of authority, the Court has been reluctant to use or interpret the Ninth Amendment. Instead, the Court has relied on the Due Process Clause of the Fourteenth Amendment to house protected rights related to privacy, as well as a free-standing right to privacy itself. The analysis of whether a right should be afforded constitutional protection under the Substantive Due Process Clause requires the Court to engage in a cumbersome analysis of whether a right is deeply rooted in our nation’s tradition. This analysis inevitably requires the Court to wade into the murky waters of whether a right is considered moral by the American public.

To this end, the Court’s findings in *Roe* and *Casey* that the right to an abortion is encompassed by a right of privacy that is housed within the Fourteenth Amendment are erroneous. The Ninth Amendment is the more appropriate home for the abortion right. Under the Ninth Amendment, the abortion right can be recognized as a protected right in and of itself. Indeed, the Court can use natural law principles, as contemplated by the Founders, to recognize that private conduct is worthy of constitutional protection and acknowledge that the Ninth Amendment affords these rights to the people. Using this analysis would ensure that the most important of our natural rights, including the right to an abortion, are afforded constitutional protection.

188. See U.S. CONST. amend. IX.