STUDENT NOTE

THE NINTH AMENDMENT AND PERSONAL RIGHTS

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The Ninth Amendment has gone from playing a crucial role in interpretation, to being forgotten about, to finding its way back to the spotlight. Similarly, the right to abortion has found its way into the spotlight with the overturning of Roe v. Wade by Dobbs v. Jackson Women's Health. This decision brought about a whirlwind of emotions and protests across the United States. Using the Ninth Amendment's "Natural Law Test" as a supplement to the "Substantive Due Process" analysis, the right to abortion may find a permanent home under the Ninth Amendment and the Fourteenth Amendment.

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I. INTRODUCTION

The Ninth Amendment has a volatile history, full of ups and downs, at times the Ninth Amendment has been in the spotlight, and other times it has been forgotten. Upon the Founding of the United States and the creation of the Bill of Rights, there was disagreement among the Founding Fathers about the Ninth Amendment. Alexander Hamilton and the Federalists insisted the Ninth Amendment was not needed because the Constitution of the United States granted the federal government "only enumerated powers."[1] James Madison and the Anti-Federalists supported the Ninth Amendment and viewed it as necessary.[2]

The right to abortion has a similarly volatile history. With the decision of the Supreme Court case *Dobbs v. Jackson Women's Health* causing chaos throughout the United States as it overturned the constitutional right to abortion.[3] Women across the nation reacted with anger and fear, wondering how this right, which seemed so sure and steady, could be taken away?[4] How could women today have fewer rights than some of their mothers and grandmothers did?[5] Additionally, women and health professionals fear there will be an uptick in deaths from illegal abortions.[6] Between 81,000 and 89,000 abortions occurred between July and September of 2023, a number higher than during the months preceding *Dobbs*.[7]

This note seeks to establish a right to abortion using the Ninth Amendment as a supplement to the Fourteenth Amendment Substantive Due Process analysis. In Part II of this note, the tumultuous history of the Ninth Amendment will be discussed, with the views of legal scholars put

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[1] Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 4 (1988).

[2] Sanford Levinson, *Symposium on Interpreting the Ninth Amendment: Constitutional Rhetoric and the Ninth Amendment*, 64 CHI-KENT L. REV. 131, 141 (1988).

[3] Austyn Gaffney, et al., *How Women Who Support Abortion Rights are Reacting to the News*, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/2022/06/24/us/abortion-rights-roe-women.html#:~:text=Women%20across%20the%20nation%20react,%E2%80%9Cnation%20is%20on%20fire.%E2%80%9D&text=Our%20reporters%20are%20speaking%20with,Wade.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Alison Durkee, *Abortion Rates Have Been 'Consistently Elevated' Since Supreme Court Overturned Roe V. Wade, Study Finds*, FORBES (Feb. 28, 2024), https://www.forbes.com/sites/alisondurkee/2024/02/28/abortion-rates-have-been-consistently-elevated-since-supreme-court-overturned-roe-v-wade-study-finds/?sh=78bd818863c0.

in contrast.[8] In Part III, the history of the right to abortion will be examined, with a quick review of relevant Supreme Court cases, including *Roe v. Wade*. In Part IV, interpretations of the Ninth Amendment will be discussed, followed by a possible analysis for the Ninth Amendment in Part V. Finally, in Part VI, the analysis put forth in Part V will be used to find a right to abortion under the Ninth and Fourteenth Amendments.[9]

II. HISTORY OF THE NINTH AMENDMENT

From its inception, the Ninth Amendment has been a source of controversy.[10] Introduced in 1789, the controversy surrounding this Amendment began when the Founders were trying to ratify the Constitution.[11] George Mason refused to sign the Constitution because it did not include a bill of rights.[12] There was fear among the Anti-Federalists that the failure to recognize the limits on government "would serve as a future warrant" for the increase of government power.[13] Alexander Hamilton and the Federalists insisted the Ninth Amendment was not needed because the Constitution granted the federal government "only enumerated powers."[14] Thus, the federal government could not exercise any power that was not enumerated.[15] Additionally, the Federalists argued, "by enumerating particular exceptions to enumerated grants of power" the Bill of Rights would disparage "those rights which were not placed in the enumeration, and it might follow by implication that those rights which were not singled out . . . were insecure."[16] Madison argued this risk could be mitigated[17] because

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[8] *See* Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597 (2005); *see also* Barnett, *supra* note 1.

[9] *See* Allison N. Kruschke, *Finding a New Home for the Abortion Right Under the Ninth Amendment,* 12 CONLAWNOW 128, 128 (2020); *see also* Robert M. Hardaway, Miranda K. Peterson & Cassandra Mann, *The Right to Die and the Ninth Amendment: Compassion and Dying After Glucksberg and Vacco*, 7 GEO. MASON L. REV. 313, 333–36 (1999).

[10] Lash, *supra* note 8, at 601.

[11] Levinson, *supra* note 2, at 141.

[12] *Id.* at 140.

[13] *Id.*

[14] Barnett, *supra* note 1, at 4.

[15] *Id.*

[16] Levinson, *supra* note 2, at 141.

[17] *Id.*

the Ninth Amendment was the guard.[18] Ultimately, Madison's argument prevailed, and the Ninth Amendment was subsequently ratified in 1791.[19]

From 1789 to 1964, the Ninth Amendment was integral to "some of the most important constitutional disputes in our nation's history, including the ratification of the Bill of Rights, the constitutionality of the Bank of the United States . . . the constitutionality of the New Deal, and the legitimacy and scope of the Incorporation Doctrine."[20] However, the Ninth Amendment was seemingly "forgotten" and unused until Justice Goldberg once again brought it back into the spotlight in the Supreme Court case *Griswold v. Connecticut* in 1965.[21] Kurt T. Lash provides three time periods which help explain the volatile life of the Ninth Amendment thus far.[22]

The first time period Lash discusses is the Founding of the United States to the Civil War.[23] During this time period, the Court interpreted the Ninth Amendment as Madison intended, as "a tool for preserving state autonomy," rather than a source of individual rights.[24] Slave and free states were attempting to use the Ninth Amendment to defend local laws regarding slavery, rather than "a source of individual rights on behalf of the enslaved."[25]

The second time period begins with Reconstruction and ends with the New Deal.[26] During this time period, the Ninth Amendment was used in tandem with the Tenth Amendment. The two amendments worked together to guard state autonomy.[27] The Tenth Amendment states "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."[28] Additionally, during this second time period, the Ninth

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[18] *Id.*

[19] *Amend. 9.2: Historical Background on Ninth Amendment*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt9-2/ALDE_00013642/. *See also* U.S. CONST. amend. IX.

[20] Lash, *supra* note 8, at 600.

[21] *Id.* at 602. *See also* Griswold v. Connecticut, 381 U.S. 479 (1965) (Goldberg, J., dissenting).

[22] Lash, *supra* note 8, at 601.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] U.S. CONST. amend. X.

Amendment was used to "limit the interpretation of Fourteenth Amendment Rights."[29]

The final time period spans from Post-New Deal to *Griswold v. Connecticut* in 1965.[30] During the Post-New Deal time period, *United States v. Darby* was decided. *Darby* reduced the Tenth Amendment to a truism and, because the Ninth Amendment was tied to it at the time, reduced the Ninth Amendment to a truism as well.[31] As a result, post-*Darby* cases in the Supreme Court "expanded the scope of federal power without regard to the impact on the state regulatory economy."[32] Thus, the Ninth Amendment was "forgotten" until *Griswold*, when Justice Goldberg utilized it in his concurrence.[33] In *Griswold*, a physician and the executive director of Planned Parenthood League of Connecticut were convicted of giving married couples information and medical advice on how to prevent conception and subsequently giving the wife a contraceptive device.[34] This action went against a Connecticut statute which made it a crime for any person to use any drug or article to prevent conception.[35]

As a result of the Ninth Amendment's fraught history, the purpose of the Ninth Amendment is unclear.[36] There are primarily two competing views, Kurt T. Lash's "rights-powers" view and Randy E. Barnett's "power-constraints" view.[37] Under Lash's view, the Ninth and Tenth Amendments are meant to work together to protect state powers, not individual rights.[38] Conversely, Barnett would interpret the Ninth Amendment as creating a presumption of liberty which places the burden on the government to "justify its infringements on individual liberties."[39] First, Lash's view will be further discussed, then Barnett's will receive a deeper review. The two academics have clashed over the years, with Barnett even attempting to compromise with Lash.[40]

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[29] Lash, *supra* note 8, at 601.

[30] *Id.* at 602.

[31] *Id.*

[32] *Id.*

[33] *Id*; *See also* Griswold v. Connecticut, 381 U.S. 479 (1965) (Goldberg, J., dissenting).

[34] Griswold v. Connecticut, 381 U.S. 479, 480 (1965).

[35] *Id.*

[36] Barnett, *supra* note 1, at 35.

[37] *See* Lash, *supra* note 8; *see also* Barnett, *supra* note 1.

[38] Seth Rokosky, *Denied and Disparaged: Applying the "Federalist" Ninth Amendment*, 159 PA. L. REV. 275, 277 (2010).

[39] *Id.* at 277.

[40] *Id.* at 290–92.

Lash proposes the Ninth Amendment and the Tenth Amendment work together as follows: "The Tenth Amendment reserves powers to the states"[41] and the Ninth Amendment prohibits interpretations of enumerated powers that disparage those states' rights.[42] This is otherwise known as the "rights-powers interpretation," viewing delegated powers and constitutional rights as "logically complimentary."[43] According to Lash's rights-powers interpretation, Madison drafted the Ninth Amendment in response to concerns made by the states that the federal government would "interpret its powers in a way that would infringe on their rights."[44] Under Lash's rights-powers interpretation, or the Federalism Model, the Ninth Amendment, though not incorporated through the Fourteenth Amendment and thus applicable to the states, would be limited by it "insofar as it precluded states from infringing on rights that were incorporated" to the states through the Fourteenth Amendment.[45] In this way, the Ninth Amendment rights retained by the people are no different than the powers reserved to the states in the Tenth Amendment.[46]

Barnett disagreed with Lash's rights-powers interpretation[47] because if the Ninth Amendment is essentially an extension of the Tenth Amendment, there was no need for an additional amendment to state the same idea.[48] Other scholars have similar interpretations as Barnett, saying the Ninth Amendment and Tenth Amendment should not be tied together because the "Tenth Amendment refers to powers, not rights."[49] If the federal government has been given power to legislate in certain areas, it may be able to do so even if it is violating individual rights.[50] This power is different than the Ninth Amendments' protection of individual rights by "limiting the means that can be chosen by the national government to achieve even those powers that are quite clearly within the province of that government."[51]

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[41] *Id.* at 293.

[42] *Id.*

[43] Barnett, s*upra* note 1, at 5.

[44] Rokosky, *supra* note 38, at 293.

[45] *Id.* at 294.

[46] *Id.* at 293.

[47] Barnett, *supra* note 1, at 5.

[48] *Id.* at 6.

[49] Levinson, *supra* note 2, at 142.

[50] *Id.*

[51] *Id.*

In Barnett's view, the Ninth Amendment created a presumption of liberty that placed the burden on the government to "justify its infringements on individual liberties."[52] Additionally, Barnett thought the rights-powers interpretation of the Ninth Amendment rendered the Ninth Amendment "inapplicable to any conceivable case or controversy."[53] Instead, Barnett proposes the "power-constraint interpretation," which views rights and powers as "*functionally* complimentary," rather than "*logically* complimentary."[54] Under this interpretation, enumerated rights could "potentially limit . . . the exercise of powers delegated by other provisions of the Constitution."[55] In Barnett's words,

> If one concedes that rights enumerated in the Constitution are actual limitations on delegated powers, you cannot apply the rights-powers approach to the Ninth because you would be applying a different conception of Constitutional rights to the retained rights of the Ninth than applies to the enumerated rights, which Madison included in the retained rights of the Ninth.[56]

The fear with Barnett's power-constraint view is it will open a "Pandora's Box" of rights.[57]

Lastly, Barnett argues the Ninth Amendment has been incorporated to the states through the Fourteenth Amendment and protects all rights retained by the people.[58] As an example, Barnett utilizes the Supreme Court case *Griswold*. Barnett states when the Supreme Court used the Ninth Amendment as "a source of a penumbra creating a zone of privacy," it somewhat used this model.[59] Additionally, Justice Goldberg, in his concurring opinion in *Griswold*, says

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[52] Rokosky, *supra* note 38, at 277.

[53] *Id.* at 6.

[54] *Id.* at 9 (emphasis added).

[55] *Id.* at 11.

[56] *Id.* at 14.

[57] *Id.* at 22.

[58] Barnett, *supra* note 1, at 9. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) .

[59] Rokosky, *supra* note 38, at 294.

> [T]o hold that a right . . . so deeprooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.
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> . . . .
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> [T]he Ninth Amendment . . . is surely relevant in showing the existence of other fundamental personal rights, now protected from the state, as well as federal, infringement.[60]

For purposes of this note, Barnett's power-constraint view of the Ninth Amendment is the interpretation taken.[61] Before exploring the possibility of using this view to possibly find a home for the right to abortion under the Ninth Amendment, the history of the right to abortion will be discussed.

III. HISTORY OF THE RIGHT TO ABORTION

The Constitutional right to abortion was not officially recognized until *Roe* was decided in 1973.[62] However, the Supreme Court case *Griswold* was an important catalyst for this right to be recognized, and the Justices used the Ninth Amendment to help reach their conclusion.[63]

In *Griswold*, decided in 1965, the Supreme Court recognized that specific guarantees in the Bill of Rights have "penumbras formed by emanations that help give them life and substance."[64] For *Griswold*, the penumbras of the First Amendment, Third Amendment, Fourth Amendment, Fifth Amendment, and Ninth Amendment create a zone of privacy that encapsulated the marital relationship.[65] Reproductive rights were a logical progression from *Griswold,* which led to the Supreme Court decision in *Eisenstadt v. Baird* in 1972, and *Roe* quickly followed in 1973.[66]

In *Roe*, the Supreme Court found the right to abortion was fundamental using the Substantive Due Process analysis found in *Washington v. Glucksberg*; i.e., the right to abortion was found to be "deeply rooted in this Nation's history and tradition" and essential to this Nation's scheme of

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[60] *Id.* at 295; *Griswold*, 381 U.S. at 491–93 (Goldberg, J., concurring).

[61] Barnett, *supra* note 1, at 9.

[62] Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health, No. 19-1392, slip op. (June 24, 2022).

[63] *Griswold*, 381 U.S. 479.

[64] *Id.* at 484.

[65] *Id.* at 484–86.

[66] *Id. See* Eisenstadt v. Baird, 405 U.S. 438, 454–55 (1972); *see also Roe,* 410 U.S. 113.

"ordered liberty."[67] The Court concluded the word 'person' did not include the unborn..[68] The Supreme Court in *Planned Parenthood v. Casey* upheld *Roe's* central holding when it was decided in 1992, and up until 2022, *Casey* was the law.[69]

However, in 2022, the Supreme Court decided *Dobbs*, overturning *Roe* and *Casey*.[70] Despite using the same Substantive Due Process analysis used in *Roe*, the Court came to the opposite conclusion.[71] The right to abortion was not fundamental to this nation's history and tradition nor essential to this nation's scheme of ordered liberty.[72] In fact, the Court said abortion was historically criminalized and there was an "unbroken tradition of prohibiting abortion."[73] The Court further explained the people of the different states may evaluate the interests essential to a scheme of ordered liberty differently.[74]

Thus, the right to abortion has a volatile history and is now not considered a constitutional right at all. The task this note takes on is to find a new home for the right to abortion, possibly under the Ninth Amendment. However, before this can be done, possible interpretations of the Ninth Amendment must be discussed.

IV. INTERPRETING THE NINTH AMENDMENT

There are multiple modalities of constitutional interpretation, but here, only two of those modalities will be used to attempt to interpret the Ninth Amendment - textual and historical.[75] When interpreting using the textual modality, the plain meaning of the words as they are found in the Constitution are examined.[76] When using the historical modality, the intentions of the Framers, "who contributed to making the words" of the Constitution legally binding, are examined.[77]

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[67] *See Roe*, 410 U.S. at 152–53; Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

[68] *Roe*, 410 U.S. at 158.

[69] Planned Parenthood v. Casey, 505 U.S. 833, 845–46 (1992). *See* Roe, 410 U.S. at 164–66.

[70] *See* Dobbs v. Jackson Women's Health, No. 19-1392, slip op. 1, 5 (June 24, 2022).

[71] *Id.*; *see Roe*, 410 U.S. at 113.

[72] *Dobbs*, slip op at 5.

[73] *Id.* at 23.

[74] *Id.* at 31.

[75] Levinson, *supra* note 2, at 137.

[76] *Id.*

[77] *Id.*

The Ninth Amendment is hard to interpret by its text as anything other than the idea that "[C]onstitutional rights should not be limited to those enumerated in the Constitution; rather, they should include 'others retained by the people.'"[78] The Ninth Amendment can be pulled apart to be interpreted textually in the following way:[79] Enumeration refers to "the legitimate powers of the federal government [that] are all enumerated in the Constitution."[80] The clause "of certain rights," in the Ninth Amendment refers to the individual rights enumerated in the Constitution.[81] "Shall not be construed," is a "declaration against a type of explanation or interpretation."[82] To "'deny' a right," is to disregard that right or fail to accept that it exists.[83] To "'disparage' an unenumerated right," means to "injure it or place it into an inferior condition, even while recognizing its existence, in part because it was not one of the rights listed in the Constitution."[84] "Retained" rights refers to "those [rights] unenumerated that the people did not dismiss, and still [retained], after the Constitution was drafted."[85] "By the people," means the citizens of the Several States.[86]

Interpreting the Ninth Amendment using a historical interpretation is not as easy as it seems.[87] For example, Barnett's power-constraints view relies heavily on historical interpretation, using the meaning of the Founders at the time of ratification as well as Supreme Court cases, such as *Griswold*, to establish his viewpoint.[88]

Some argue the Ninth Amendment "lacks legal stature and is 'the stepchild of the Constitution.'"[89] However, Tejshree Thapa argues, how is

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[78] *Id.* at 139.

[79] Joseph F. Kadlec, *Employing the Ninth Amendment to Supplement Substantive Due Process: Recognizing the History of the Ninth Amendment and the Existence of Nonfundamental Unenumerated Rights*, 48 B.C. L. REV. 387, 394–96 (2007). The Ninth Amendment states in full "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

[80] *Supra* Kadlec note 79 at 394.

[81] *Id.* at 395.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *See* Lash, *supra* note 8; *see also* Barnett, *supra* note 1; Rokosky, *supra* note 38.

[88] *See* Barnett, *supra* note 1, at 32.

[89] Tejshree Thapa, *Expounding the Constitution: Legal Fictions and the Ninth Amendment*, 78 CORNELL L. REV. 139, 139 (1992).

it that other Amendments "generate rights that might appear extraneous from the text[,]" but the Ninth Amendment does not?[90]

As examined in Part II, the majority in *Griswold* finds that specific guarantees in the Bill of Rights have "penumbras, formed by emanations from those guarantees that help give them life and substance."[91] The Ninth Amendment is even included as one of the amendments the Court has found as having a penumbra.[92] The Ninth Amendment has been used to assert a right of privacy, challenge prevailing textbooks, protect against conscription, and claim the right to a healthful environment.[93] Yet, the Ninth Amendment is still not viewed as a solid basis "from which to glean individual rights."[94]

The reason the Ninth Amendment has not been seen as a way to glean individual rights is because it is so hard to interpret textually.[95] The Ninth Amendment explicitly refers to other rights "retained by the people,"[96] which, as mentioned in Part I, could open a "Pandora's Box from which rights would proliferate endlessly."[97] "[T]he Ninth Amendment brings to mind the image of a door that can be opened only by being unhinged and that, once off the frame, cannot easily be closed."[98] Essentially, the fear is the Ninth Amendment is uncontrollable, once one right is found under the Ninth Amendment, any right can be found under it.[99]

However, if this is truly the biggest issue with finding rights under the Ninth Amendment, there are other potentially uncontrollable clauses, such as the Liberty Clause.[100] The Liberty Clause of the Fourteenth Amendment is in the same sentence as the Due Process Clause of the Fourteenth Amendment, and states "nor shall any State deprive any person of life, *liberty*, or property, without due process of law."[101] According to Barnett, the governmental structure of the United States is the first line of defense against the "pandora's box," with the tribunals serving as the second line

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[90] *Id.* at 140.

[91] Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

[92] *Id.*

[93] Thapa, *supra* note 89, at 151.

[94] *Id.*

[95] Levinson, *supra* note 2, at 139.

[96] Barnett, *supra* note 1, at 21

[97] Thapa, *supra* note 89, at 156.

[98] *Id.* at 155–56.

[99] *See id.* at 148.

[100] *Id.* at 156.

[101] U.S. CONST. amend. XIV, § 1 (emphasis added).

of defense.[102] The tribunals were meant to enforce these rights, and "[w]ithout judicial review of government interference with the unenumerated rights retained by the people, the legislature would be the judge in its own case[,]" which is not permitted when enumerated rights are at issue.[103] Additionally, the Court's legal fictions occur when the Court pretends "a given fact exist[s]" to enable it "to arrive at the desired result under the existing laws[,]"[104] as it has shown in many instances, including the creation of penumbras in *Griswold*.[105] Thus, the Court could simply "create" this interpretation itself.[106]

The final hoop the Ninth Amendment must jump through is whether it is incorporated to the States or not. The answer is no, the Ninth Amendment has not been incorporated to the States through the Fourteenth Amendment.[107] However, that does not mean the Ninth Amendment does not apply to the states.[108]

The Ninth Amendment applies to the States because the Fourteenth Amendment needs it to perform its function.[109] The Fourteenth Amendment is "not an independent source of unenumerated natural or privacy rights."[110] Both the Ninth Amendment and the Fourteenth Amendment were meant to codify the natural rights views of the Founders.[111] According to Barnett, the "immunities" referred to in the Fourteenth Amendment must refer to the rights retained by the people in the Ninth Amendment.[112] Further, the Ninth Amendment protects "that residuum of natural liberty, which is not required by the laws of society to be sacrificed to public convenience[.]"[113] Thus, the Ninth Amendment, on its own, "'incorporates' certain unenumerated rights into the Constitution and directly protects

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[102] Barnett, *supra* note 1, at 22.

[103] *Id.* at 20.

[104] *See* Thapa, *supra* note 89, at 143.

[105] *Id.* at 143; Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

[106] Thapa, *supra* note 89, at 143.

[107] *See* Kyle Alexander Casazza, *Note: Inkblots: How the Ninth Amendment and the Privileges and Immunities Clause Protect Unenumerated Constitutional Rights*, 80 S. CAL. L. REV. 1383 (2007).

[108] *See id.*

[109] *See id.* at 1409.

[110] *Id.*

[111] *Id.*

[112] *Id.* at 1411.

[113] *Id.* at 1412.

those rights from state action."[114] These protected rights are then applied to the States through the Fourteenth Amendment.[115] Additionally, the Ninth Amendment does not refer to the Federal Government specifically.[116] Instead, the Ninth Amendment announces a "general *principle* of construction: enumerations of limitations should not be read as announcing a negative pregnant – that which is not specifically limited is therefore permitted."[117] In other words, just because the right is not enumerated does not mean the right does not exist.[118] Though the Ninth Amendment was originally applied to Article I, section 9 of the Constitution, which applies only to the Federal Government, the general principle of the Ninth Amendment "points to the incompleteness of [Article I] section 10 just as surely as it does to that of section 9."[119]

Thus, the Ninth Amendment has teeth of its own and may be applied to the States to protect the natural rights that are unenumerated.[120] Additionally, the "Pandora's Box" can be guarded against using the governmental structure of the United States and through the application of the Ninth Amendment to the States.[121] The next task is to find a right to abortion under the Ninth Amendment.

V. ESTABLISHING AN ANALYSIS FOR THE NINTH AMENDMENT

This note discusses two possible methods to establish a right to abortion under the Ninth Amendment. The first method is the Natural Law Test, and the second method is to supplement the Fourteenth Amendment's Substantive Due Process analysis with the Ninth Amendment.[122] This note proposes a combination of the two tests, using the Natural Law Test of the Ninth Amendment as a supplement to the Substantive Due Process analysis.[123]

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[114] Lawrence E. Mitchell, *The Ninth Amendment and the 'Jurisprudence of Original Intention*, 74 GEO. L.J. 1719, 1731 (Sept. 2007).

[115] *Id.*

[116] Levinson, *supra* note 2, at 143.

[117] *Id.* at 143–44.

[118] *See id.*

[119] *Id.*

[120] *See id. See also* Casazza, *supra* note, 107; Barnett, *supra* note 1; Mitchell, *supra* note, 114.

[121] Barnett, *supra* note 1, at 22.

[122] *See* Kadlec, *supra* note 79, at 412; Michael Raven, *Unenumerated Rights, State Supreme Court Decisions and the Ninth Amendment: Toward a New Interpretation of the Inkblot*, 69 U. KAN. L. REV. 647, 653 (2021).

[123] *See* Kadlec, *supra* note 79; Raven, *supra* note 122.

The Natural Law Test refers to the natural rights retained by the people.[124] As mentioned before, the purpose of the Ninth Amendment was "to protect those rights that . . . might someday still be abridged by government, although they were not specifically enumerated."[125] When attempting to discern what rights might have been in the Founders' minds, the tradition and history of unenumerated rights must be examined, as Kadlec proposes.[126] For the Founders, Constitutional grants of power were second to natural rights retained by the people – "rights that were understood . . . as being pre-political and above even the Constitution itself[.]"[127] According to Duane L. Ostler, the Ninth Amendment is an "incorporation by reference clause," meaning it must reference something that already exists.[128] According to Ostler, the Ninth Amendment was meant to protect natural law rights.[129] Additionally, Ostler argues the intention of the Ninth Amendment was to protect natural rights as understood by the founding generation.[130] However, this is incorrect, as[131] people's understanding of the natural law can evolve.[132] The development in women's rights since the Founding is so drastic, it would make no sense to take an originalism approach.[133] For example, post-Founding natural rights include the right to retain American citizenship, the right to receive equal protection, the right to vote, the right to enjoy a zone of privacy, the right to educate one's children, and more.[134]

The next method is using the Ninth Amendment to supplement the current Substantive Due Process analysis because the Substantive Due Process analysis, as it stands now, is incomplete.[135] According to Kadlec, the Substantive Due Process analysis "lacks guideposts for responsible decision making in the area of unenumerated rights" and focuses only on

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[124] Duane L. Ostler, *Rights Under the Ninth Amendment: Not Hard to Identify After All*, 7 FED. CTS. L. REV. 35, 42 (2013).

[125] *Id.* at 40.

[126] Kadlec, *supra* note 79, at 415.

[127] Ostler, *supra* note 124, at 42.

[128] *Id.* at 46.

[129] *Id.* at 40.

[130] *Id.* at 50.

[131] *See id.*

[132] *Id.*

[133] Kruschke, *supra* note 9, at 139, 152.

[134] *See* Ostler, *supra* note 124, at 54–66.

[135] Kadlec, *supra* note 79, at 413.

fundamental rights.[136] For example, the Supreme Court cases of *Bowers v. Hardwick* and *Lawrence v. Texas* provide unclear guideposts because they rest on the ground that if the "asserted liberty interest is merely defined differently by a later Court, the results may be overruled."[137] *Lawrence* overturned *Bowers*.[138] According to Kadlec, the Ninth Amendment can help complete the Substantive Due Process analysis because the "Ninth Amendment's history provides the history and tradition as to unenumerated rights generally that current [S]ubstantive [D]ue [P]rocess lacks, and it comes directly from the Constitution's [F]ounders."[139] The Court should look to the purposes behind the addition of the enumerated rights in the Bill of Rights and the Ninth Amendment.[140] Additionally, the Court should look to the history of the Ninth Amendment.[141] In sum, the purpose of the Ninth Amendment was to ensure the Bill of Rights was not treated as exhaustive.[142] The Founders, both Federalist and Anti-Federalist, all knew and agreed "not all valid rights could be enumerated."[143]

The Ninth Amendment should be interpreted this way because this is what the Ninth Amendment was meant to do.[144] "If the Ninth Amendment is held to show that the Constitution requires some unenumerated rights test," courts may then move to determine whether Substantive Due Process is the proper test.[145] To do this, Joseph Kadlec proposes the following test as a supplement to the Substantive Due Process analysis. First, though courts may still narrowly define an asserted liberty interest, they should look to both the "legal traditions and history about that right *and* the traditions and history of unenumerated rights generally, by way of the Ninth Amendment and its ratification history."[146] If the asserted right is determined to be fundamental or is not a right at all within these historical and traditional guideposts, the court should proceed under the general structure of the Substantive Due Process analysis from *Glucksberg*.[147] If the asserted interest is a valid right but is not found to be fundamental, the

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[136] *Id.*

[137] *Id.* at 417–18.

[138] *Id.* at 417.

[139] *Id.* at 415.

[140] *Id.* at 416.

[141] Kadlec, *supra* note 79, at 416.

[142] *Id.* at 417.

[143] *Id.*

[144] *Id.* at 427.

[145] *Id.* at 420.

[146] *Id.* at 422.

[147] Kadlec, *supra* note 79, at 422–23.

court "should require the government to show that it has a rational basis for *infringing* [on] that right."[148] In the latter test, the initial burden would be on the person asserting the right because the government has the presumption of constitutionality.[149]

The addition of the Natural Law Test to the first step of Kadlec's test, finishes rounding out the Substantive Due Process analysis.[150] In this addition to Kadlec's test, courts would use the Ninth Amendment first to determine whether the asserted right is a natural right.[151] Natural rights are premised 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."[152] In return, the people give up certain rights to ensure the state can protect other rights.[153] Christopher Schmidt provides a three-step test to determine whether a right should be considered a natural right.[154] First, judges must determine whether the asserted right is governed by another provision of the Constitution.[155] If the asserted right is not governed by another provision in the Constitution, judges must determine "by a preponderance of evidence, whether the alleged right was considered a right retained by the people at the enactment of the Constitution, or if it has evolved into a right that is currently retained by the people."[156] The court would then proceed to step two of Kadlec's analysis.[157]

Applying these combined approaches, a possible analysis of the Ninth Amendment as a supplement to the Substantive Due Process analysis would look like the following. First, a judges would perform the three-step test to determine whether the right being asserted should be considered a natural right.[158] This would include looking to both the "legal traditions and history about that right *and* the traditions and history of unenumerated rights [more] generally, by way of the Ninth Amendment and its ratification history."[159] If the asserted right is determined to be

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[148] *Id.* at 423.

[149] *Id.*

[150] Raven, *supra* note 122, at 653.

[151] *See id.* at 654.

[152] Kruschke, *supra* note 9, at 151.

[153] *Id.*

[154] *See* Raven, *supra* note 122, at 654.

[155] *Id.*

[156] *Id.*

[157] Kadlec, *supra* note 79, at 422–23.

[158] Raven, *supra* note 122, at 654.

[159] Kadlec, *supra* note 79, at 422.

fundamental or is not a right at all within these historical and traditional guideposts, courts (or judges like said above) should proceed with the general structure of the Substantive Due Process analysis.[160] If the asserted interest is a valid right, but is not found to be fundamental, courts (or judges) should "require the government to show that it has a rational basis for *infringing* [on] that right."[161] In the latter instance, the initial burden would be on the person asserting the right because the government has the presumption of constitutionality.[162]

This approach would be a preferable application of the Ninth Amendment because it does not uproot the entire Substantive Due Process analysis. This is a realistic approach that would be easier for courts to apply because it would not throw out the entire Substantive Due process analysis altogether. In Part VI, this application will be put to the test regarding the right to abortion.

VI. APPLICATION

Starting with Schmidt's three-step test, abortion falls under the right to privacy but is not, on its own, protected by another provision in the Constitution.[163] Looking to the legal traditions and history of the right to abortion, though it was not a right retained by the people at the time of the Founding, it is a right that should currently be retained by the people.[164] *Roe* was decided in 1972, and *Dobbs* was decided in 2022.[165] Women had the constitutional right to choose an abortion for *fifty years*.[166] The right to have an abortion was not seen as though it could be taken away.[167] Next, personal rights are exactly the kinds of rights the Ninth Amendment was designed to protect.[168] The choice "to have an abortion

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[160] *Id.* at 422–23.

[161] *Id.* at 423.

[162] *Id.*

[163] Raven, *supra* note 122, at 654.

[164] *See id.* at 654.

[165] *See* Roe v. Wade, 410 U.S. 113, 113 (1973), *overruled by* Dobbs v. Jackson Women's Health, No. 19-1392, slip op. at 5 (June 24,2022).

[166] *See Roe*, 410 U.S. at 113; *see also Dobbs*, slip op. at 5. Nina Totenberg & Sarah McCammon, *Supreme Court Overturns Roe v. Wade, Ending Right to Abortion Upheld for Decades*, NPR (June 24, 2022), https://www.npr.org/2022/06/24/1102305878/supreme-court-abortion-roe-v-wade-decision-overturn#:~:text=Hourly%20News-,Supreme%20Court%20overturns%20Roe%20v.%20Wade%2C%20ending%20right%20to%20abortion,right%20to%20obtain%20an%20abortion (emphasis added).

[167] *See* Gaffney, *supra* note 3.

[168] Hardaway, *supra* note 9, at 352.

implicates the personal liberty of pregnant people."[169] Additionally, the decision can "implicate health and life in cases where carrying the pregnancy to term may threaten it."[170]

> 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. An interpretation of natural law theory 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.[171]

Thus, because the right to privacy is a natural right, and abortion falls within the right to privacy, abortion is a natural right under the Natural Law Test and falls within the protection of the Ninth Amendment as a natural right. Therefore, the right to abortion is fundamental and the courts should apply strict scrutiny to all government action regarding this personal right.[172]

VII. CONCLUSION

From being considered a vital part of constitutional disputes in its early days, to being "forgotten," in Justice Goldberg's concurrence in *Griswold*, the Ninth Amendment's history has been a volatile one.[173] It is now time for the Ninth Amendment to be recognized and utilized to assist in finding a home for the constitutional right to abortion.

The Ninth Amendment is the proper vehicle to find a right to abortion because....[174] Using Schmidt's three-step Natural Law Test, the right to abortion is a natural right because it is a right that should currently be retained by the people, as women have been relying on the *Roe* holding for over fifty years.[175] Additionally, under Kadlec's two-step test, abortion is a fundamental right protected by the Ninth Amendment and the Fourteenth Amendment.[176] Thus, when courts are reviewing government

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[169] Kruschke, *supra* note 9, at 151.

[170] *Id.*

[171] *Id.* at 153.

[172] Kruschke, *supra* note 9, at 160; Hardaway, *supra* note 9, at 330.

[173] *See supra* Part II.

[174] Kruschke, *supra* note 9, at 150.

[175] *See supra* Part VI.

[176] *See supra* Part V.

action being taken towards a woman's right to abortion, strict scrutiny is the proper standard.[177]

Ultimately, by supplementing the Substantive Due Process analysis with the Natural Law Test of the Ninth Amendment, the constitutional right to abortion finds its home.

[177] *See* Kadlec, *supra* note 79, at 391, 422–23 (citing Washington v. Glucksberg, 521 U.S. 702, 719–22 (1997)).