PERHAPS NOT DEEPLY ROOTED, BUT DEEPLY FUNDAMENTAL: GROUNDING UNENUMERATED RIGHTS IN A POST-*DOBBS* WORLD

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ABSTRACT

In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court solidified its position on determining the validity of unenumerated rights. The Court asked whether these rights are deeply rooted in the history and tradition of the United States, and essential to our ordered liberty. This inquiry is not new, but the push-and-shove between a substantive due process doctrine and historically, deeply rooted rights has appeared to go both ways in the past century. What does the Court's firm stance mean for fundamental rights that are not mentioned anywhere in the Constitution? Unenumerated rights that have previously been acknowledged and protected under the idea of substantive due process now seemingly stand on the precipice of legal decay. By overturning *Roe v. Wade*, the Supreme Court has proved it is no longer interested in finding support for these unenumerated rights in either the Due Process Clauses of the 5th and 14th Amendments, or in the penumbras of other amendments where a right to privacy has been inferred.

My thesis is that determining which rights are fundamental based on whether they are deeply rooted in America's history and tradition is antithetical to the very idea of the Equal Protection Clause and the intent of the Civil War Amendments. In order to remedy the long history of misogyny, racial discrimination, and homophobia in this country, fundamental rights that may not have existed at either the Founding or immediately after the Civil War are nevertheless still fundamental to ordered liberty. In a sense, to promote the very vision of the Equal Protection Clause, these rights are *owed* to individuals, whether they are enumerated or not. I argue that these fundamental rights must be re-enumerated in the absence of their place in the Constitution.

In Part I, this Essay examines the flaws of privacy and the Due Process Clause as a justification for unenumerated rights such as marriage equality, abortion access, and the right to contraception. Part II explores current state initiatives that seek to protect unenumerated rights at the state level, and explains how state constitutions can be a place to enshrine fundamental rights. Part III proposes solutions to protecting unenumerated rights at the federal level, including renewing Congressional focus on the Equal Rights Amendment.

INTRODUCTION

In *Dobbs*, the Supreme Court determined that its legal inquiry must examine whether an unenumerated right is "deeply rooted in [our] history and tradition" and whether it is essential to our Nation's "scheme of ordered liberty."[1] The Court has used this analysis for some time, and

[1] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 237 (2022).

its roots can be traced back to the 1930s.[2] Yet, the Court never seemed to fully overrule the doctrine of substantive due process rights. Now, that could all be changing. In his *Dobbs* concurrence, Justice Clarence Thomas argued that the Court should reconsider all of its substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.[3] He argued that, "apart from being a demonstrably incorrect reading of the Due Process Clause, the 'legal fiction' of substantive due process is particularly dangerous."[4] Time will tell whether these other unenumerated rights to contraception, marriage equality, etc. will fall to the same flawed "history and tradition" test the Supreme Court now seems to rely so heavily on.

Dobbs may initially appear to make abortion a more democratic issue as it gives state legislatures the deciding opinion on whether or not to ban abortion. However, this idea of democracy is misleading. By abandoning the constitutional protection for women to determine their own destiny regarding reproductive healthcare, "the Court delegated to the electorate the right to define when life begins."[5] This is problematic because the *Dobbs* majority "ignores systemic distortions in state legislatures caused by gerrymandering and other factors."[6] Without addressing the issues that democratic institutions at the state level face, state legislatures are always at risk of codifying laws that reflect only select viewpoints. In fact, some scholars argue

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[2] *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937) (examining fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed"); Moore v. Cleveland, 431 U.S. 494, 503 (1977) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition"); Bowers v. Hardwick, 478 U.S. 186, 194 (1986) ("to claim that a right to engage in [consensual sodomy] is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious"); Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("We have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty'"); McDonald v. City of Chicago, 561 U.S. 742, 767 (2010) ("We must decide whether the right to keep and bear arms is fundamental to our scheme of ordered liberty, or as we have said in a related context, whether this right is 'deeply rooted in this Nation's history and tradition'"); Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) ("A Bill of Rights protection is incorporated… if it is 'fundamental to our scheme of ordered liberty,' or 'deeply rooted in this Nation's history and tradition'").

[3] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 332 (2022) (Thomas, J., concurring). *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that an implied right of privacy exists within the Bill of Rights that prohibits states from preventing married couples from using contraception); Lawrence v. Texas, 539 U.S. 558 (2003) (holding that the Due Process Clause of the Fourteenth Amendment includes a right to liberty that encompasses individuals' decisions concerning the intimacies of their physical relationships); Obergefell v. Hodges, 576 U.S. 644 (holding that under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, states must issue marriage licenses and recognize lawful out-of-state marriages for same-sex couples).

[4] *Dobbs*, 597 U.S. at 333 (Thomas, J., concurring).

[5] Terri Day & Danielle Weatherby, *The Dobbs Effect: Abortion Rights in the Rear-View Mirror and the Civil Rights Crisis that Lies Ahead*, 64 WM. & MARY L. REV. ONLINE 1, 18 (2022).

[6] David Landau & Rosalind Dixon, *Dobbs, Democracy, and Dysfunction*, 2023 WISC. L. REV. 1569 (2023). *But see* Zachary Mullinax, *Saying the Quiet Part Out Loud: Unenumerated Rights After Justice Thomas's Dobbs Concurrence*, 74 MERCER L. REV. 661, 670, 681 (2023) (arguing that the Court should resolve its "methodological dilemma" by applying the history and tradition test to all unenumerated rights claims because that test preserves the Court's "institutional legitimacy by limiting recognized unenumerated rights to those with a firm historical basis, rather than those on the forefront of social, political, and legal evolution."). Mullinax would likely agree with the *Dobbs'* majority, seeing the history and tradition test as a way to ensure that "decisions about important social, political, and economic issues could be shaped by the democratic process rather than unelected federal jurists with scant accountability." *Id*. at 675.

that "the Court should not have rejected a right that it has recognized for fifty years, thereby leaving the issue to the mercy of deeply dysfunctional legislative processes that are almost certain to produce strange, countermajoritarian results out of step with public opinion."[7] As Part II will discuss, if the majority in *Dobbs* was serious about making abortion access (and other unenumerated rights) more democratic, the best way to ensure such holistic democratic participation on these issues is state ballot initiatives and referendums. These options offer a chance to enshrine unenumerated rights in state constitutions. However, even these initiatives are not completely immune from anti-democratic hurdles such as burdensome voting laws.

In this paper, I argue that determining which rights are fundamental based on whether they are deeply rooted in America's history and tradition is antithetical to the very idea of the Equal Protection Clause and the intent of the Civil War Amendments. Unenumerated rights are no less deserving than enumerated rights of being labeled "fundamental." From describing some of the Court's early flawed rationales for establishing unenumerated rights in Part I, to highlighting state-level initiatives to enumerate rights in Part II, and finally to discussing federal solutions to ground unenumerated rights in Part III, this paper aims to provide an overview of how unenumerated rights remain deeply fundamental to our nation, despite not being deeply rooted in America's unfair and unequal history.

I. The Flaws of Privacy and the Due Process Clause as Justifications for Unenumerated Rights

Grounding unenumerated rights has never been an easy process for the Supreme Court. Led oftentimes by a desire to label certain unenumerated rights as "fundamental," the Court has struggled to then legally justify them. As Michele Goodwin and Erwin Chemerinsky speak to in their piece, *Abortion: A Woman's Private Choice,* "the constitutional protection of abortion rights is made more difficult by the failure of the Court to provide a persuasive explanation for why reproductive autonomy should be deemed a fundamental right."[8] Neither a right to privacy nor the Due Process Clause have seemed enough to rationalize these unenumerated rights.

Yet, is there truly a distinction between enumerated and unenumerated rights in the Constitution? The late legal philosopher Ronald Dworkin did not seem to think so. He claimed, "the distinction between enumerated and unenumerated constitutional rights… is bogus."[9] Constitutional lawyers use "unenumerated rights" as a "collective name for a particular set of recognized or controversial constitutional rights, including the right of travel; the right of

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[7] *Id.* at 1609. *See also* Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728 (contesting that *Roe* and *Casey* disrupted ongoing democratic deliberation on the abortion issue and arguing that *Dobbs'* conception of democracy was both internally inconsistent and extraordinarily limited).

[8] Michele Goodwin & Erwin Chemerinsky, *Abortion: A Woman's Private Choice*, 95 TEX. L. REV. 1189, 1200 (2017).

[9] Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled*, 59 U. CHI. L. REV. 381 (1992). *But see* Mullinax, *supra* note 6, at 684-85 ("It is one thing to apply enumerated constitutional guarantees, like the Equal Protections Clause or the Nineteenth Amendment, to new, unforeseen circumstances and another thing entirely to recognize a right without historical or textual support and update it to fit the Court's perception of new circumstances").

association; and the right to privacy from which the right to an abortion, if there is such a right, derives."[10] Dworkin argued that "the distinction between enumerated and unenumerated rights, as it is commonly used in constitutional theory, makes no sense, because it confuses reference with interpretation."[11] His theory of "law as integrity" imagined that the general structure of the Bill of Rights enables it to be far-reaching, "such that any moral right as fundamental as the right of procreative autonomy is very likely to have a safe home in the Constitution's text."[12]

Dworkin argued that "a state may not curtail liberty, in order to protect an intrinsic value, (1) when the decisions it forbids are matters of personal commitment on essentially religious issues, (2) when the community is divided about what the best understanding of the value in question requires, and (3) when the decision has very great and disparate impact on the person whose decision is displaced."[13] It is easy to see how "personal commitment on essentially religious issues" can cover a wide range of unenumerated rights relating to interracial marriage, gay marriage, and reproductive health. Even the idea of a "great and disparate impact" on certain people can highlight a constitutional equality imbalance. Many Supreme Court Justices over the past century may have agreed with Dworkin that the Bill of Rights was more expansive than its plain text, yet they still felt a need to attempt to legally ground these unmentioned rights somewhere in the Constitution.

A. The Right to Privacy

Unenumerated rights were first grounded in a piecing together of various Constitutional ideas in *Griswold v. Connecticut* in 1965.[14] Even then, the seven majority Justices could not agree on the legal basis for their decision that the Constitution prohibits a state from preventing married couples from using contraception. The Justices discussed several theories, including: "(1) the penumbra theory emanating from the First, Third, Fourth, and Fifth Amendments, protecting certain rights not mentioned in the Constitution, described as an 'implied right of privacy;' … (2) the Ninth Amendment's language and history support the theory that the Framers of the Constitution believed that there were additional fundamental rights beyond the first eight rights expressly stated in the Bill of Rights…; (3) the theory that there are certain basic values 'implicit in the concept of ordered liberty' and protected under the Due Process Clause of the Fourteenth Amendment… and (4) the theory that there is a liberty interest protected under

[10] Dworkin, *supra* note 9, at 386.
[11] *Id.* at 390. *See generally* Tribe, *infra* note 39.
[12] Dworkin, *supra* note 9, at 418-19. *See also* Eric Segall, *A Modest Proposal: Why the Supreme Court Should Enforce Unenumerated Fundamental Rights*, HARV. L. REV. BLOG (Mar. 26, 2019), https://perma.cc/P3FL-D9DE (arguing that the reality of historical jurisprudence is that much of constitutional law "is both invisible and unwritten."). For example, Segall points out that "nowhere in the Constitution does the text say or even suggest that the federal government cannot be sued without its consent, yet the Court has held exactly that." Furthermore, he argues that "our formal textual commitment to the 'freedom of speech,' as well as most other constitutional aspirations are fleshed out by a method of common law decision-making not text-bound analysis." *Id*.
[13] Dworkin, *supra* note 9, at 415.
[14] 381 U.S. 479 (1965).

the Due Process Clause of the Fourteenth Amendment related to matters within the realm of family life, upon which the State cannot infringe absent substantial justification."[15]

The Court found the right to privacy to initially be protected under the "penumbra" and "emanations" of the Bill of Rights,[16] an approach which resulted in scrutiny and ridicule after the decision. As Michele Goodwin and Erwin Chemerinsky put it, "[p]enumbras and emanations are a flimsy foundation for fundamental rights, which is why they never again have been mentioned by the Court."[17] The Court was well intentioned, acknowledging the intimacy of marriage and the private decisions that couples make: "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life."[18] However, the implied right of privacy was not long lasting in its initial form.

In 1973, the Court ruled in *Roe v. Wade* that the constitutional right to privacy protected a woman's right to choose to have an abortion.[19] In *Roe*, "the Court did not find privacy, as Justice Douglas did in *Griswold*, in the penumbra of the Bill of Rights, but instead as part of the liberty protected under the Due Process Clause."[20] This version of the right of privacy was grounded in a different Constitutional basis, yet was still flawed. *Roe*'s main downfall was its trimester framework, which categorized the tension between a woman's privacy interest and compelling state interests in each trimester.[21] The majority determined " the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester."[22] During the first trimester, a woman's privacy right, allowing her to choose to have an abortion, controlled over any state interests in protecting the life of the mother or the life of the child. After the first trimester, a woman's right to privacy was not absolute.[23] Her right to privacy, and therefore her right of freedom of choice, became second to legitimate state interests after the "compelling point" at the end of the first trimester.[24]

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[15] Day, *supra* note 5, at 8-9.
[16] *Griswold*, 381 U.S. at 484 (Precedent suggests "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.").
[17] Goodwin, *supra* note 8, at 1202.
[18] *Griswold*, 381 U.S. at 486.
[19] Roe v. Wade, 410 U.S. 113, 153 (1973) ("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.").
[20] Goodwin, *supra* note 8, at 1204.
[21] *Id*. at 1211 (describing how "dividing a woman's pregnancy into three segments, each of three months, seemed arbitrary and based on little except nine being divisible by three"). When reproductive rights are simply based on the months of pregnancy, and not on any scientific or psychological reasoning, the rationale for upholding these rights as fundamental is shaky at best.
[22] *Roe*, 410 U.S. at 163.
[23] *Id.* at 154 ("We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.").
[24] *Id.*

If *Roe* had wanted to cement a "right to privacy" as a credible justification for unenumerated rights, it should not have limited the rights of women based on the trimester framework. A woman's right to privacy should have been left absolute at all stages of pregnancy. By conditioning the right to privacy on an arbitrary timeline, the Court set the justification for grounding the right to abortion access on rocky grounds.

Roe's weakness with the trimester framework did not take long to be questioned. By 1992, the Supreme Court had overruled the trimester framework in favor of an "undue burden" standard in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[25] The new "compelling" point where a state's interests trumped those of a pregnant woman's was viability.[26] The majority in *Casey* questioned whether the right to an abortion was in fact "fundamental," as the *Roe* court had seen it. They argued that none of the cases *Roe* had used to reason a right of privacy from "endorsed an all-encompassing 'right of privacy,' as *Roe* claimed."[27] Beginning with *Griswold*'s penumbra approach, continuing with *Roe*'s limitation of a woman's privacy right, and ending with *Casey*'s further diminishment of that privacy right, grounding unenumerated rights in "privacy" has never been the most structurally sound argument to make.

B. Issues with Defining Substantive Due Process Rights

Even at the turn of the twentieth century, the Supreme Court had begun to explore grounding unenumerated rights within the "liberty" interest of the Due Process Clause. In *Lochner v. New York*, the Court examined substantive Due Process economic rights that were unenumerated. There, the Court held unconstitutional a New York law that limited the number of hours bakers could work.[28] It ruled that a state may not regulate the working hours mutually agreed upon by employers and employees because this violated their 14th Amendment right to contract freely under the Due Process Clause.[29] The Court never doubted that the right to contract was legitimate, despite it not being enumerated in the Constitution. Due to the fact that the right to contract and sell your labor was a liberty right, it was unconstitutional for the state to seek to deprive people of that liberty interest.

Lochner faced harsh criticism after being decided, because it "deployed a dubious doctrine, known to lawyers as 'substantive due process,' that gave judges vast discretion to ignore laws they simply didn't like on substantive policy grounds."[30] In 1937, *Lochner* was overturned by *West Coast Hotel Co. v. Parrish*.[31] Whereas the *Lochner* court had seen the

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[25] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 834 (1992).
[26] *Id.*
[27] *Id.* at 839.
[28] Lochner v. N.Y., 198 U.S. 45 (1905).
[29] *Id.* at 53 ("The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer.").
[30] Akhil Reed Amar, *Why Liberal Justices Need to Start Thinking Like Conservatives*, TIME (June 30, 2022), https://perma.cc/4NWF-D2Y8.
[31] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

"liberty" interest as far-reaching, the *West Coast Hotel* court determined that the "liberty" interest was not absolute. The majority in *West Coast Hotel* wrote, the "Constitution does not recognize an absolute and uncontrollable liberty."[32] The doctrine of economic substantive due process therefore met its end.

Where unenumerated economic rights may have failed, non-economic rights fared better. In *Meyer v. Nebraska*, *Pierce v. Society of the Sisters*, and *Poe v. Ullman*, the Supreme Court recognized the importance of fundamental liberty rights that were not enumerated in the Constitution. In *Meyer*, a case dealing with a state law criminalizing teaching any subject to any person in any language other than English, the Court found that the "liberty" guaranteed by the Due Process Clause was fairly broad. Liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[33]

Therefore, the right of teachers to instruct students in languages other than English, and the right of parents to have their children educated in other languages, fell under this expansive view of liberty. In *Pierce*, the Court ruled that requiring children to be educated only by public instruction violated the 14th Amendment of the Constitution.[34] In the same vein as *Meyer*, the Justices agreed that the 14th Amendment protected the liberty of parents and guardians to direct their children's education.[35]

In *Poe v. Ullman*, the majority declined to discuss the liberty interest at stake when they examined the constitutionality of Connecticut state statutes that prevented the use of contraceptive devices, even by married couples.[36] However, Justice Douglas, in dissent, argued that the Connecticut laws deprived couples " of 'liberty' without due process of law, as that concept is used in the Fourteenth Amendment."[37] Douglas believed the Bill of Rights encompassed a broader range of fundamental rights than were actually enumerated: "Though I believe that 'due process' as used in the Fourteenth Amendment includes all of the first eight Amendments, I do not think it is restricted and confined to them."[38] In similar fashion, Justice Harlan dissented, arguing that "the 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

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[32] *Id.* at 391.
[33] Meyer v. Neb., 262 U.S. 390, 399 (1923).
[34] Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925).
[35] *Id.* at 535 ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only."). *See also* Day, *supra* note 5, at 22 ("The early substantive due process cases recognized an implied parental right to make decisions about children's upbringing and education without unreasonable or arbitrary government interference. According to those Court decisions, this parental right was protected as a liberty interest under the Due Process Clause of the Fourteenth Amendment.").
[36] Poe v. Ullman, 367 U.S. 497 (1961).
[37] *Id.* at 514.
[38] *Id.* at 516.

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 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."[39]

Douglas and Harlan's broad view of "liberty" protecting unenumerated fundamental rights would be challenged in the decades following *Poe*.[40] However, in *Lawrence v. Texas*, the tide seemed to change. The Court ruled that the Due Process Clause of the 14th Amendment included a right to liberty in individual decisions concerning the intimacies of their physical relationship, thereby constitutionally protecting homosexual sex.[41] Justice Kennedy began the opinion stating: "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places… Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[42] *Lawrence*, however, was not without its weaknesses. First, the majority attempted to deeply root homosexual sex as a fundamental liberty by applying the same "history and tradition" test that the Court had used since *Palko v. Connecticut* in 1937. Justice Kennedy started this inquiry by saying: "in our tradition the State is not omnipresent in the home."[43] It does not seem such a leap to argue for a right to privacy that the Court had previously found in *Griswold*, but it was a leap to "find" a new substantive due process right within the home without more to ground it historically.

Second, the majority attempted to ground the right to consensual sodomy on the fact that "laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private,"[44] and that "far from possessing 'ancient roots,' American laws targeting same-sex

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[39] *Id*. at 543 (emphasis added). *See also* Laurence H. Tribe, *Reflections on Unenumerated Rights*, 9 J. OF CONST. L. 483, 496 (Jan. 2007) (noting that Harlan's dissent in *Poe v. Ullman* argued that the Fourth Amendment's search and seizure related protections for "the right of the people to be secure in their... houses, would make little or no sense but for an underlying solicitude to protect the privacies of the life within.").

[40] *See* Bowers v. Hardwick, 478 U.S.186 (1986) (holding that homosexual sex was not implicit in the concept of ordered liberty or deeply rooted in our nation's history and tradition and therefore could not be considered a fundamental constitutional right); Michael H. v. Gerald D., 491 U.S. 110 (1989) (holding that the right of a potential natural father to assert parental rights over a child born into a woman's existing marriage with another man is not traditionally recognized in historical jurisprudence and therefore not a fundamental right protected by the Due Process Clause of the Fourteenth Amendment.); Washington v. Glucksberg, 521 U.S. 702 (1997) (holding that the right to physician-assisted suicide is not a constitutionally-protected liberty interest under the Due Process Clause of the Fourteenth Amendment.).

[41] Lawrence v. Tex., 539 U.S. 558 (2003).

[42] *Id.* at 562. *See also* Tribe, *supra* note 39 (proposing "four principal ways in which [unenumerated] rights may be extracted from, or defined with reference to" constitutional text and history: geometric, geodesic, geological, and monster-barring or slippery-slope avoiding.). Tribe draws a parallel between the conclusions the Court drew in *Lochner* and *Lawrence*: "neither decision could point to any textual or historic referent more determinate than the open-ended word "liberty" as its constitutional compass; and both decisions rested on quite specific, and manifestly controversial, normative theories about the sorts of limits on freedom that will, in the long run, advance human liberty and dignity and the sorts that will instead prove oppressive." *Id*. at 489.

[43] *Lawrence*, 539 U.S. at 562.

[44] *Id.* at 569.

couples did not develop until the last third of the 20th century."[45] Yet the attempt at Originalism here built up this unenumerated right on shaky grounds. Merely pointing out that *laws* criminalizing sodomy themselves were not deeply rooted in the history and tradition of our country would not make the *right* deeply rooted.

Seeming to realize this point, the Court attempted to ground unenumerated rights in a new approach: "emerging awareness." Rather than focusing on history, the Court emphasized looking to recent social attitudes. Justice Kennedy wrote, "we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. '[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.'"[46] Kennedy's push to move away from an arbitrary, and oftentimes unfair, "history and tradition" test opened the gates to finding more equitable substantive due process rights.

Indeed, in *Obergefell v. Hodges*, the Court built off the rationale in *Lawrence* to rule that same sex marriage was a fundamental, unenumerated constitutional right.[47] Writing for the majority again, Justice Kennedy pushed once more for an adaptive version of the Constitution. He noted, "the nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."[48] Scholars Alyssa Fox and Annabelle Crawford describe Justice Kennedy's sentiments as "a vital principle of constitutional scholarship, highlighting that while the Constitution is indeed intentionally ambiguous, it is the responsibility of each generation to learn the meaning of liberty."[49] But as Justice Thomas would later fear in *Dobbs*, drawing a line and determining what could be considered a fundamental liberty right could almost be too expansive and overwhelming with this approach.[50]

The return in *Dobbs* to the "history and tradition" test to determine what rights could be deemed fundamental highlighted the Court's unwillingness to accept any other test to determine rights. Even a test such as "emerging awareness" that seems more culturally and socially on point for equality purposes has not appealed to the Court. It would appear going forward that unenumerated rights can continue only to be grounded as substantive due process rights when their longstanding history can clearly be established, no matter how fundamental they may seem to the idea of "liberty."

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[45] *Id.* at 570.
[46] *Id.* at 571-72 (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 833, 857 (1998)).
[47] Obergefell v. Hodges, 576 U.S. 644 (2015).
[48] *Id.* at 664.
[49] Alyssa Fox & Annabelle Crawford, *Is History Repeating Itself? The Role of the Supreme Court in Protecting Minority Rights*, 37 BYU PRELAW REV. 75, 92 (Apr. 2023).
[50] *Dobbs*, 597 U.S. at 333 (Thomas, J. dissenting) ("In practice, the Court's approach for identifying those 'fundamental rights' unquestionably involves policymaking rather than neutral legal analysis.").

II. Current Initiatives to Protect Unenumerated Rights at the State Level

A. Background

Even before *Roe v. Wade* guaranteed a federal right to abortion access in 1973, states were already experimenting with abortion ballot measures. In 1970, Washington became the first state to introduce an abortion referendum.[51] Washington Referendum 20, known as the "Abortion Legalization to Four Months Measure," legalized abortion for women up until four months from conception.[52] The ballot passed with 56.49% approval.[53] In 2012, Washington also successfully codified same sex marriage in Washington Referendum 74.[54] The bill stated that it would "allow same-sex couples to marry, preserve domestic partnerships only for seniors, and preserve the right of clergy or religious organizations to refuse to perform, recognize, or accommodate any marriage ceremony."[55] In 1972, Michigan and North Dakota also had abortion ballot initiatives that aimed to legalize abortion up to twenty weeks, but both were defeated.[56] The following subsections highlight recent ballot initiative successes in the wake of *Dobbs*.

B. California

California Proposition 1, the Right to Reproductive Freedom Amendment, was on the ballot in November 2022.[57] The measure, which passed with overwhelming support, amended the California Constitution to establish a right to reproductive freedom, defined to include a right to an abortion and to choose or refuse contraceptives. The amendment stated, "The state shall not deny or interfere with an individual's reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives."[58] California previously took measures to protect reproductive rights in 2002, when the legislature passed the Reproductive Privacy Act, which declared that women have a "fundamental right to choose to bear a child or to choose and to obtain an abortion."[59]

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[51] *Washington Referendum 20, Abortion Legalization to Four Months Measure (1970)*, BALLOTPEDIA, https://perma.cc/9CRJ-GLLP.
[52] *Id.* Previously, abortion had been a criminal offense in Washington, except in cases to preserve the mother's life.
[53] *Id.*
[54] *Washington Referendum 74, Same-Sex Marriage Measure (2012)*, BALLOTPEDIA, https://perma.cc/SFF2-CEGR
[55] *Id.*
[56] *History of abortion ballot measures*, BALLOTPEDIA, https://perma.cc/KFT9-DGVY.
[57] *California Proposition 1, Right to Reproductive Freedom Amendment (2022)*, BALLOTPEDIA, https://perma.cc/JNJ6-2VUF.
[58] *Id.*
[59] *Id.*

California had a more conservative approach with same sex marriage. In 2006, Proposition 8, an amendment to the state constitution, was passed by voters.[60] The amendment banned the state from recognizing same sex marriages.[61] California voters approved the initiative with 52% of the vote shortly after the state Supreme Court ruled same sex marriages were legal.[62] Now, in the 2024 general election, voters will have the chance to remove language barring same-sex marriage from the state's constitution.[63] Although same sex marriage is the current law of the land, legislators realize that might not be a guarantee in the future.[64]

C. Michigan

Michigan Proposal 3, the Right to Reproductive Freedom Initiative, was also on the ballot in November 2022 and passed.[65] The initiative, proposed as a state constitutional amendment, provided for a right to reproductive freedom.[66] The amendment defined reproductive freedom as "the right to make and effectuate decisions about all matters relating to pregnancy, including but not limited to prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care."[67] The ballot initiative additionally provided that the state could regulate abortion *after* fetal viability, but that the state could not ban the use of abortion to "protect the life or physical or mental health of the pregnant individual," as determined by an attending health care professional.[68]

D. Ohio

In 2023, Ohio became the seventh state to enshrine abortion rights into its state constitution.[69] Ohio Issue 1, the Right to Make Reproductive Decisions Including Abortion Initiative, was a proposed constitutional amendment.[70] Issue 1, which passed, established a state constitutional right to "make and carry out one's own reproductive decisions," including decisions about abortion, contraception, fertility treatment, miscarriage care, and continuing

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[60] Melissa Alonso & Shania Shelton, *California voters will decide whether to repeal state's Prop 8 same sex marriage ban in 2024*, CNN, https://perma.cc/J8XP-3ZSN.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] Alonso, *supra* note 60. One of the authors of the constitutional amendment, Democratic Assemblyman Evan Low, noted that "Although, same-sex marriage is legal, it could be temporary. We have to remain vigilant, unwavering in our dedication to equality."
[65] *Michigan Proposal 3, Right to Reproductive Freedom Initiative (2022)*, BALLOTPEDIA, https://perma.cc/5ZDE-SPP2.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Ohio becomes the 7th state to enshrine abortion rights into its state constitution*, PBS (Nov. 9, 2023), https://perma.cc/K57Z-9ZXQ.
[70] *Ohio Issue 1, Right to Make Reproductive Decisions Including Abortion Initiative (2023)*, BALLOTPEDIA, https://perma.cc/6SP9-SUST.

pregnancy.[71] Abortion had been legal in Ohio for up to 21 weeks and six days of pregnancy, but the state faced a possible abortion ban with the passage of a heartbeat bill, Senate Bill 23 (also called the *Human Rights and Heartbeat Protection Act*).[72] The state Supreme Court blocked SB 23 pending a lawsuit,[73] and now that reproductive rights are enshrined in the state constitution, abortion access is essentially guaranteed, at least through viability.

E. Kansas

In Kansas, the trend to enshrine abortion access in state law went the other direction. In 2022, the "Kansas No State Constitutional Right to Abortion and Legislative Power to Regulate Abortion Amendment" appeared on the ballot.[74] This measure would have amended the Kansas Constitution to provide that nothing in the state constitution creates a right to abortion or requires government funding for abortion.[75] The proposed amendment was in response to the Kansas Supreme Court ruling in *Hodes & Nauser v. Schmidt*, a 2019 case where the court held that the Kansas Bill of Rights *did* afford a right to abortion.[76] The measure failed, with 58.97% of voters voting "No," and allowed the *Hodes & Nauser* decision to remain the legal precedent in Kansas.[77]

For same sex marriage, Kansas faced a similar history to California. In 2005, voters passed an amendment to the state constitution that banned same sex marriage.[78] The ballot proposal stated: "A vote for this proposition would amend the Kansas constitution to incorporate into it the definition of marriage as a civil contract between one man and one woman only and the declaration that any other marriage is contrary to public policy and void. The proposed constitutional amendment also would prohibit the state from recognizing any other legal relationship that would entitle the parties in the relationship to the rights or incidents of marriage."[79] The amendment was overturned by the Supreme Court's decision in *Obergefell v. Hodges* in 2015.

F. 2024 Elections and Beyond

In the November 2024 elections, more states joined the trend of abortion ballot initiatives. Ten states had the chance to amend their state constitutions to protect or restrict

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[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Kansas No State Constitutional Right to Abortion and Legislative Power to Regulate Abortion Amendment (August 2022)*, BALLOTPEDIA, https://perma.cc/S9C2-4CY4.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Kansas Marriage Amendment (2005)*, BALLOTPEDIA, https://perma.cc/TU8T-EJUH.
[79] *Id.*

women's reproductive rights.[80] Seven out of those ten ballot measures supporting abortion rights passed.[81] An anti-abortion measure in Nebraska also passed.[82] That measure prohibited most abortions after the first trimester, meaning that Nebraska's 12-week ban on abortions has now been enshrined in its constitution.[83]

In the wake of the *Dobbs* decision, and Justice Thomas's foreshadowing of the end of substantive due process rights, states should continue to seek to enshrine unenumerated rights into state constitutions. This effort will guarantee that should federal protections for certain liberty interests be repealed, citizens will still be able to have their freedoms protected at the state level.

III. Solutions to Protect Unenumerated Rights at the Federal Level

As the Introduction noted, the "return" of issues such as abortion access to the state legislatures may not have the intended democratic effect that the Justices believed they would in *Dobbs*. Politically polarizing ideas not only about abortion, but also LGBTQ+ rights and more, may be stunted, and rights possibly even taken away, in state legislatures controlled by politicians who may not represent the interests of all groups. While state ballot initiatives prove to be an important way to enshrine enumerated rights, they also provide an opportunity to remove rights. For example, the Kansas ballot initiative in November 2022 that attempted to cut any potential abortion right out of the state constitution was rejected. However, if it had been approved, Kansas would have essentially removed any current or future right to abortion access and reproductive choice. I argue that the best way to safeguard unenumerated rights is to secure them at the federal level; that way, any state ballot initiatives that seek to undermine fundamental rights will be overruled by a national protection of those rights.

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[80] These ten states are: Arizona, Colorado, Florida, Maryland, Missouri, Montana, Nebraska, Nevada, New York, and South Dakota. *See Ballot Tracker: Status of Abortion-Related State Constitutional Amendment Measures for the 2024 Election*, KFF (Aug. 23, 2024), https://perma.cc/KVH4-2MR9. *See, e.g., Florida Amendment 4, Right to Abortion Initiative (2024)*, BALLOTPEDIA, https://perma.cc/5M4G-LZ4C (amending the state constitution to say: "Except as provided in Article X, Section 22, no law shall prohibit, penalize, delay, or restrict abortion before viability or when necessary to protect the patient's health, as determined by the patient's healthcare provider."); *Maryland Right to Reproductive Freedom Amendment (2024)*, BALLOTPEDIA, https://perma.cc/6CRR-EXDD (amending the Declaration of Rights in the Maryland Constitution to add a new section that guarantees a right to reproductive freedom, defined to include "the ability to make and effectuate decisions to prevent, continue, or end one's own pregnancy."); *New York Equal Protection of Law Amendment (2024)*, BALLOTPEDIA, https://perma.cc/E8EU-6KB7 (amending the Equal Protection Clause of the New York Constitution to prohibit a person's rights from being denied based on the person's "ethnicity, national origin, age, [and] disability," as well as the person's "sex, including sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, and reproductive healthcare and autonomy.").

[81] Isabel Guarnieri & Krystal Leaphart, *Abortion Rights Ballot Measures Win in 7 out of 10 US States*, GUTTMACHER INST. (Nov. 6, 2024), https://perma.cc/7Q3K-H588.

[82] *Id.*

[83] *Id.*

A. The Equal Protection Argument

1. History overlooks women and minorities, so any historical attempt to ground unenumerated rights will be inherently unequal.

One of the main issues with the Court's heavy reliance on the "history and tradition" test to determine which rights are fundamental is that it overlooks the long history of racism, sexism, and homophobia in this country.[84] A purely historical approach to grounding legal rights will never be equal. As Alyssa Fox and Annabelle Crawford pose, "History informs, but should never decide, the rights we are privileged to enjoy today because history was not always fair and equitable to historically powerless groups."[85] Scholars Terri Day and Danielle Weatherby argue similarly: "rather than define implied rights as frozen in time as the *Dobbs* majority does, another interpretative approach understands the Constitution to be a living, breathing document, which must be read in light of changing times and societal values."[86] More to the point, "while the originalist view has merit as an academic theory, it is divorced from the realities of people's everyday lives and modern Society," and lacks consideration of "the impact on people."[87]

Therefore, a flexible approach to Constitutional interpretation is more in step with current social attitudes and norms. Despite what many believe today, adopting the Constitution to fit these current norms does not undermine the Constitution but rather strengthens it. The emerging awareness approach "has expanded 'the sphere of protected liberty' and brought in 'individuals formerly excluded.' This view of the Constitution has made our republic more democratic and fairer, not less."[88]

As Jill Lepore notes in her article, *Of Course the Constitution Has Nothing to Say About Abortion*, "women are indeed missing from the Constitution. That's a problem to remedy, not a precedent to honor."[89] The history and tradition test the Justices are so fond of "disadvantages people who were not enfranchised at the time the Constitution was written, or who have been

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[84] *See* Jamal Greene, *Originalism's Race Problem*, 88 DENV. U. L. REV. 517, 519 (2011). Greene points out that the Constition at the time of ratification included two direct accommodations for slavery: (1) the Fugitive Slave Clause, which required states to return any escaped slaves and prevented states from giving due process to their black citizens who were accused of being fugitive slaves; and (2) the importation clause, which prevented Congress from withdrawing from the international slave trade prior to 1808. *Id*. at 519. Thus, Originalism in its most basic form denies racial equality. *See also* Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRVINE L. REV. 263, 271 (2015) (remarking that "this vision of the country as first and foremost a white Republic, and of the Constitution as its ruling text, remained solidly entrenched for decades after the Civil War"); Sherrilyn A. Ifill, *Freedom Still Awaits*, THE ATLANTIC (Oct. 28, 2015), https://perma.cc/V7SC-PRHP (detailing that "just 20 years after the end of slavery and during a period of intense white-supremacist violence, the court declared in the *Civil Rights Cases* that there must be a time when former slaves 'cease to be the special favorite of the laws' and instead 'take the rank of mere citizens'").

[85] Fox, *supra* note 49, at 92.

[86] Day, *supra* note 5, at 23.

[87] *Id.*

[88] Fox, *supra* note 49, at 97.

[89] Jill Lepore, *Of Course the Constitution Has Nothing to Say About Abortion*, NEW YORKER (May 4, 2022).

poorly enfranchised since then."[90] Thus, the history and tradition test attempts to go back to a past that no longer looks anything like our present. The most equal form of Constitutional interpretation then, as the dissenters in *Dobbs* noted, requires acknowledging that "those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights,"[91] nor any other minority rights.

One of *Dobbs'* many faults was that, despite being an opinion about women's rights, it lacked any sort of in-depth exploration of those rights. It therefore diminished "the rights of women, who, as a group, are a historically disadvantaged political minority,"[92] and "dramatically allow[s] women's re-subordination to men they have been intimate with."[93] The majority in *Dobbs* cast aside the sexist and anti-immigrant motivations underlying certain 19th century criminal abortion laws. The opinion never mentioned the connection between those motivations and "physician-backed campaigns, rooted in racism and competition, to push out midwives—overwhelmingly Black women who had been the primary caregivers for pregnant people."[94] The majority ignored the fact that "marital rape was legal until the 1990s and sometimes juries believed wives consented to torture and rape."[95] They glossed over the truth that "women were (and continue to be) underpaid compared to their male counterparts when performing the same and similar jobs," that during the 1970s and '80s, women's standard of living dramatically declined after divorce, despite increasing for men, and that even for women who desired motherhood, "the concept of family leave did not exist and was not available."[96]

Any attempt to look to history to find whether women's rights are deeply rooted in the history and tradition of our country will fail. In the 1800s, women had no right to their money, land, or bodies due to a legal practice called coverture. Under coverture, a woman's property and legal existence transferred to her husband upon marriage.[97] Married women were also considered property of their husbands, meaning they could not seek gainful employment or manage their

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[90] *Id. See also* Madiba Dennie, *Originalism Is Going to Get Women Killed*, THE ATLANTIC (Feb. 9, 2023), https://perma.cc/XHD6-YMUK (arguing that Originalism threatens women and other minority groups who were disempowered at the time of the Constitution's adoption). Dennie specifically highlights in the article the effect that Originalism had on the Fifth Circuit decision in *U.S. v. Rahimi*, now awaiting a decision from the Supreme Court this term. The court in *Rahimi* dealt with a law restricting the firearm rights of domestic-violence offenders. Dennie notes that the Founders mentioned a right to keep and bear arms in the Constitution, but did not mention women, who are disproportionately affected by domestic violence. "The presence of a gun in a domestic-violence situation increases the risk of femicide by more than 1,000 percent." Therefore, Dennie argues, "Originalist ideology glorifies an era of blatant oppression along racial, gender, and class lines, transforming that era's lowest shortcomings into our highest standards."

[91] *Dobbs*, 597 U.S. at 373.

[92] Fox, *supra* note 49, at 97.

[93] Marc Spindelman, *Dobbs' Sex Equality Troubles*, 32 WM. & MARY BILL RTS. J. 117, 130 (2023).

[94] *Legal Analysis: What Dobbs Got Wrong*, CTR. FOR REPROD. RTS. 1, 4 (Mar. 2023).

[95] Goodwin, *supra* note 8, at 1209.

[96] *Id.* at 1208. *See also* Adam, *infra* note 97 (Noting that although the gender pay gap has narrowed since the Equal Pay Act, women still earn $0.82 for every dollar a man makes, according to 2020 data from the Bureau of Labor Statistics).

[97] Jamela Adam, *When Could Women Open a Bank Account?*, FORBES (Mar. 20, 2023), https://perma.cc/G8WW-UJ3Y.

assets independently.[98] It was not until 1974, one year after *Roe* was decided, that the Equal Credit Opportunity Act ensured women in the United States the right to open a bank account on their own.[99]

Women also lacked a political voice in the United States until the passage of the 19th Amendment in 1920. Although several states or territories had granted women the right to vote before 1920, there was no federal guarantee for women.[100] Jury service also posed an equality issue. As late as 1961, the Supreme Court in *Hoyt v. Florida*, upheld Florida's rules that automatically exempted women from jury service and did not place women on jury lists.[101] The Court found that the exclusion was justified because a "woman is still regarded as the center of home and family life."[102]

Reva Siegel argues in her article, *The History of History and Tradition: The Roots of Dobbs's Method (and Originalism) in the Defense of Segregation*, that the history behind *Dobbs'* history and tradition test was also used in the defense of segregation. She claims that while the Roberts Court claimed authority to overturn *Roe* by comparing itself to the Warren Court in *Brown v. Board* overturning *Plessy v. Ferguson*, early forms of the history and tradition test actually emerged out of resistance to *Brown*.[103] Siegal notes that "counting states that segregated education (or banned abortion) in 1868 was not a neutral measure of the Constitution's meaning, but instead perpetuated political inequalities of the past into the future."[104] Thus, the democracy *Dobbs* sought to support was a democracy without rights to protect the participation of those historically excluded from democratic process.

As these foregoing reasons make clear, there is simply no way for the Justices to determine which unenumerated rights are fundamental, using a history and tradition test, without finding some way to grapple with the incredible history of inequality in this country. While some like Akhil Reed Amar argue that "unless liberals on the Court learn (or relearn) how to do originalism, they will lose many winnable cases,"[105] the fact of the matter is that it is the Court's approach that needs to change and adapt. While Originalism is certainly more appealing and

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[98] *Id.*

[99] *Id.* Note that technically, women had the right to open a bank account in the 1960s, but many banks still refused to let women do so without a signature from their husbands. Therefore men still held control over women's access to banking services, and unmarried women were often refused service by financial institutions. *Id.*

[100] *Women's Rights*, ANNENBERG CLASSROOM, https://perma.cc/C22L-SQKL. The Territory of Wyoming passed the first law giving women over age 21 the right to vote in 1869. Kansas followed suit in 1887, followed by Colorado in 1893; Utah and Idaho in 1896; Washington in 1910; California in 1911; Oregon, Kansas and Arizona in 1912; Illinois in 1913; Montana and Nevada in 1914; New York in 1917; and Michigan, South Dakota and Oklahoma in 1918.

[101] *Id.*

[102] Hoyt v. Florida, 368 U.S. 57, 62 (1961).

[103] Reva Siegel, *The History of History and Tradition: The Roots of Dobbs's Method (and Originalism) in the Defense of Segregation*, YALE L. J. F. 99, 100 (Nov. 6, 2023).

[104] *Id. See also* Greene, *supra* note 84, at 522 (discussing how "a racially sensitive constitutionalism must always [] hold out the possibility of legitimate dissent from history. Originalism denies that possibility").

[105] Amar, *supra* note 30.

persuasive to some conservative Justices, unenumerated rights need stronger protections than a historical approach can provide.

2. The Civil War Amendments *do* protect women's reproductive choice.

While the Thirteenth and Fourteenth Amendments do enumerate certain liberty and equal protection rights, there still remains a debate about how far these rights extend. In the midst of the *Dobbs* decision and its aftermath, many legal scholars argued that the Civil War amendments do protect a right to sexual autonomy and reproductive choice. Pregnancy that is mandated, forced, or compelled goes against the 13th Amendment's prohibition against involuntary servitude and protection of bodily autonomy, as well as the 14th Amendment's emphasis on equality. As Michele Goodwin argues in her article, *No, Justice Alito, Reproductive Justice Is in the Constitution*, "ending the forced sexual and reproductive servitude of Black girls and women was a critical part of the passage of the 13th and 14th Amendments. The overturning of *Roe v. Wade* reveals the Supreme Court's neglectful reading of the amendments that abolished slavery and guaranteed all people equal protection under the law. It means the erasure of Black women from the Constitution."[106]

Goodwin writes: "At the heart of abolishing slavery and involuntary servitude in the 13th Amendment was the forced sexual and reproductive servitude of Black girls and women."[107] Therefore, Justice Alito's claim in the *Dobbs* majority opinion that there is no enumeration and original meaning in the Constitution related to involuntary sexual subordination and reproduction, "misreads and misunderstands American slavery, the social conditions of that enterprise and legal history."[108]American slavery revolved around practices such as stalking, kidnapping, and confining enslaved women, as well as the coercion, rape and torture of Black women and girls.[109]

Other scholars note that the majority in *Dobbs* undermined the purpose of the Fourteenth Amendment, "which together with its sibling Reconstruction-era amendments, was meant to address the lasting brutality of slavery and the Framers' denial of Black people's humanity. States had endorsed sexual violence and rape, coerced pregnancy and childbearing, and forced the separation of families to deny enslaved people fundamental aspects of liberty, bodily integrity, and dignity."[110]

In *Casey*, Justice Blackmun referenced these very issues. Concurring in part and dissenting in part, he clarified that "by restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer

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[106] Michele Goodwin, *No, Justice Alito, Reproductive Justice Is in the Constitution*, NY TIMES (June 26, 2022).
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Legal Analysis*, *supra* note 94, at 5. *See also* Ifill, *supra* note 84 (noting that "the powerful enforcement clauses and unequivocal 'no state shall' language of the Reconstruction Amendments is the textual evidence of the framers and the clear intention to recalibrate state power in relationship to blacks").

the pains of childbirth, and in most instances, provide years of maternal care."[111] Even Akhil Reed Amar, who argues that liberal justices need to start using Originalism, acknowledges that "enslaved women were forced to reproduce against their will and modern abortion laws are likewise conscripting unwilling women into, quite literally, forced labor."[112]

In response to those who argue that the Civil War amendments cannot cover a right to abortion access because such a right is not explicitly enumerated, these scholars once again turn to the history of inequality in the United States. They argue that the majority in *Dobbs* "fails to acknowledge that the ratifiers of the Fourteenth Amendment were white, male landowners, who did not view women or people of color as full and equal citizens, and did not permit them a voice in the political process."[113] At the time of the passing of the Civil War amendments, "hardly anything in the law books of the eighteen-sixties guaranteed women anything. Because, usually, they still weren't persons. Nor, for that matter, were fetuses."[114] Even if not explicitly stated, the Civil War amendments *do* in fact cover many unenumerated rights related to women's autonomy and reproductive health, because to not read between the lines ignores the context of the realities of the time period in which these amendments were written. To hold that the Civil War amendments ignore women's rights is to hold that the institution of American slavery was not the practice of terrorism and horror that it truly was.

B. The Equal Rights Amendment

The Equal Rights Amendment ("ERA") is another chance to enshrine unenumerated rights, in particular women's rights, in the Constitution. The proposed amendment, first proposed in 1923, reads as follows: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."[115] In 1972, the ERA was sent to the states for ratification. Congress initially set a deadline of seven years for the requisite number of states to ratify the amendment.[116] That deadline was later extended to 1982.[117] As of January 27, 2020, the ERA has satisfied the requirements of Article V of the Constitution for ratification, which

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[111] Planned Parenthood v. Casey, 505 U.S. 833, 928–29 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).
[112] Amar, *supra* note 30.
[113] *Legal Analysis*, *supra* note 94, at 4. *See also* Ifill, *supra* note 84 (discussing the failure of Reconstruction). Ifill describes how "the Supreme Court's devastating 1876 decision in *U.S. v. Cruikshank* (in which the Court vacated the conviction of three white men who participated in the massacre of 300 blacks protecting the federal courthouse in Louisiana), the widespread white-supremacist violence in the South, and the removal of federal troops from Louisiana and Mississippi [were] among the leading factors that ended Reconstruction."
[114] Lepore, *supra* note 89.
[115] *Equal Rights Amendment*, ERA, https://perma.cc/8T8C-P8U9.
[116] Elizabeth Blair, *50 years ago sex equality seemed destined for the Constitution. What happened?*, NPR (Mar. 22, 2022), https://perma.cc/59FZ-LJQT.
[117] *Id.*

includes passage by two-thirds of each house of Congress and approval by three-fourths of the states.[118]

So why isn't this amendment part of the Constitution yet? There remains controversy about the ERA's deadline, and whether the three states (Nevada, Illinois, and Virginia) that ratified the ERA after 1982 actually count.[119] Congress has seen action in the last few years with regards to attempting to eliminate the ERA's 1982 deadline for ratification. On March 17, 2021, the House of Representatives voted and approved removing the time limit with H.J. Res. 17.[120] The Senate on January 22, 2021 had introduced S.J. Res. 1 which would do the same thing: eliminate the ratification deadline.[121] Now, S.J. Res. 1 just needs to make it to the floor for a vote.

Due to the murkiness of the ratification deadline, the Archivist of the United States has not yet taken the final ministerial step of publishing the ERA in the Federal Register with certification of its ratification as the 28th Amendment.[122] In part, that is due to President Trump-era memo from the Department of Justice's Office of Legal Counsel, released weeks before Virginia's ratification, stating that the ERA resolution expired after its 1982 deadline and that any state ratification that happened after 1982 would be null.[123] Because of the Trump administration's instructions, the National Archives and Records Administration ("NARA") declined to publish the ERA to the Constitution despite it achieving the necessary prerequisites. Thus, the "Trump administration effectively killed the ERA."[124]

In January 2022, the Biden administration's Office of Legal Counsel published a memo in response to the Trump administration's memo. It hinted that while the Trump-era memo was not an obstacle to the ratification of the ERA, the best way forward was with Congress. The memo stated:

> "A 2020 opinion of the Office of Legal Counsel that addressed the legal status of the proposed Equal Rights Amendment is not an obstacle either to Congress's ability to act

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[118] *Equal Rights Amendment*, ERA, https://perma.cc/8T8C-P8U9. Virginia became the 38th state to ratify the ERA in 2020. *Id*. State-level ERAs also remain a vital option to enshrine equal rights in state constitutions. *See State-Level Equal Rights Amendments*, BRENNAN CTR. (Aug. 26, 2022), https://perma.cc/UCL2-ZRM3. In 2022, the Brennan Center reported that 22 states had their own ERAs, 6 states had limited gender-equality provisions in their constitutions, and 4 states had active state ERA ratification efforts in the works. 18 states (and D.C.) did not have ERA provisions. *Id*. *See also* Greg Cergol, *NY Prop 1, so-called 'Equal Rights Amendment,' passes as state constitutional amendment*, NBC NEW YORK (Nov. 6, 2024), https://perma.cc/5YDN-ELK7 (discussing New York's state ERA that passed in November 2024 and guarantees, among other things, prohibition of discrimination on the basis of pregnancy and pregnancy outcome).

[119] *Equal Rights Amendment*, ERA, https://perma.cc/8T8C-P8U9.

[120] H.J. Res.17, 117th Cong. (2021).

[121] S.J. Res. 1, 117th Cong. (2021).

[122] *Equal Rights Amendment*, ERA, https://perma.cc/8T8C-P8U9.

[123] Alanna Vagianos, *A Trump-Era Memo Is Blocking The Equal Rights Amendment From Being Ratified Today*, HUFFPOST (Jan. 27, 2022), https://perma.cc/W5YH-GVZU. *See also Ratification of the Equal Rights Amendment*, Opinions of the Office of Legal Counsel in Volume 44, OFFICE OF LEGAL COUNSEL (Jan. 6, 2020), https://perma.cc/CM8G-2HU3.

[124] Vagianos, *supra* note 123.

with respect to ratification of the ERA or to judicial consideration of questions regarding the constitutional status of the ERA."[125]

Ultimately the best way to fully enshrine the ERA is (1) for the Senate to be able to call a vote on eliminating the 1982 ratification deadline, and have that vote pass; or (2) have the Biden administration instruct the Archivist to disregard the Trump-era memo and proceed with publishing the ERA in the Federal Register.

C. The Ninth Amendment

What about the Ninth Amendment as a foundation for grounding unenumerated rights? After all, Justice Goldberg in his *Griswold* concurrence stated his belief "that the right of privacy in the marital relation is fundamental and basic—a personal right 'retained by the people' within the meaning of the Ninth Amendment."[126] Goldberg grounded the right to privacy in the Ninth Amendment because he maintained that the amendment "shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive."[127]

Scholar Earl Maltz would argue similarly to Justice Goldberg, more than two decades later, in his article on unenumerated rights. He argued pointedly that "on its face, the language of the amendment seems to acknowledge the existence of unenumerated rights."[128] In reconciling Originalism with the Ninth Amendment, Maltz highlighted that "the framers of the [Ninth] amendment did not create those rights through operation of the legitimate constitution-making process envisioned by originalists; at most the framers simply assumed that a body of rights existed prior to the making of the written Constitution and resolved that creation of other constraints on government by the framers' constitution-making process should not destroy those rights."[129] Both Justice Goldberg and Maltz would argue that the framers could never have intended for the Bill of Rights to be the only rights that existed and would be protected.

As with states seeking to protect unenumerated rights with state ballot initiatives and state-level ERAs, states have also sought to enact "Baby Ninth Amendments" as scholar Anthony Sanders calls them. At the time the Civil War began, twelve states out of the thirty-four in the Union had these provisions in their constitutions. Today, thirty-three states have a Baby Ninth Amendment in their constitutions.[130] Sanders describes how these Baby Ninth provisions, modeled on the federal Ninth Amendment, "can only be understood to protect unenumerated

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[125] CHRISTOPHER H. SCHROEDER, *Effect of 2020 OLC Opinion on Possible Congressional Action Regarding Ratification of the Equal Rights Amendment*, 46 Op. O.L.C. __ (Jan. 26, 2022), https://perma.cc/PYS5-CXKS.
[126] Griswold v. Conn., 381 U.S. 479, 499 (Goldberg, J. concurring).
[127] *Id*. at 492.
[128] Earl M. Maltz, *Unenumerated Rights and Originalist Methodology: A Comment on the Ninth Amendment Symposium*, 64 CHI.-KENT L. REV. 981 (1988).
[129] *Id*. at 984.
[130] Anthony B. Sanders, *Baby Ninth Amendments Since 1860: The Unenumerated Rights Americans Repeatedly Want (And Judges Often Don't)*, 70 RUTGERS U. L. REV. 857, 859 (2018).

individual rights, and to be judicially enforceable just like the other rights in each state's bill of rights."[131] Sanders discusses that the "most controversial post-New Deal unenumerated right," the right to privacy, has been the subject of several state Baby Ninth cases.[132] For example, in 1985, Mississippi recognized a right to privacy under its Baby Ninth in a case involving forced blood transfusions.[133] Mississippi went on to extend the right to privacy to protect abortion in 1998.[134] A year before *Lawrence v. Texas*, Arkansas's Supreme Court ruled that the state's ban on homosexual sodomy violated the right to privacy protected by its Baby Ninth.[135]

While these rights protected by Baby Ninths are "denied and disparaged" because they are not enumerated,[136] they should not be so easily discounted. As Sanders points out, Baby Ninths have historically been a realistic measure to protect unenumerated rights. Perhaps if Baby Ninths are seen as protecting "fundamental" rights, and therefore deserving of strict scrutiny, these are another way that the framers' goals of a more expansive federal Ninth Amendment can be realized at the state level.

IV. Conclusion

Unenumerated rights need not be enumerated to be deemed fundamental. The Court's preference for a "history and tradition" test suggests that it is out of touch with the lessons to be learned from America's long history of inequality. Fundamental rights of marriage and reproductive health may have only been deemed fundamental because of a more recent "emerging awareness" of them as liberty interests, but that does not mean they are not crucial to the idea of equality protected by the Civil War amendments. Legal arguments using the Equal Protection Clause and the Ninth Amendment are persuasive. Renewing support for the passage of the ERA is also important, as are state ERAs.

While federal enshrinement of unenumerated rights is the best way to protect these rights, state-level initiatives should not be discounted. Both before and after *Dobbs*, states have enshrined previously unenumerated rights such as access to contraception and gay marriage in their state constitutions. These options provide a more democratic way to allow citizens to voice their opinions on which rights should be considered fundamental, and therefore protected. Overall, the *Dobbs* decision means the future for unenumerated rights is uncertain, but there is hope for these rights if we continue to push for an equal and just society.

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[131] *Id*.
[132] *Id*. at 894.
[133] *Id*.
[134] *Id*. *See also* Pro-Choice Mississippi v. Fordice, 716 So.2d 645 (Miss. 1998).
[135] Sanders, *supra* note 130, at 894. *See also* Jegley v. Picado, 80 S.W.3d 332 (Ark. 2002).
[136] Sanders, *supra* note 130, at 896.