Red Herring History: An Analysis of Why *Dobbs* is Not Originalism

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I. INTRODUCTION

Several of the Supreme Court's recent opinions have brought originalism under fire, but none more so than *Dobbs v. Jackson Women's Health Organization*. Many now criticize the originalist framework as providing a cramped view of civil rights for groups that were marginalized at the Founding.[1]

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1. Daniel S. Lucks, *Originalism threatens to turn the clock back on race*, WASHINGTON POST (Oct. 13, 2020), https://www.washingtonpost.com/outlook/2020/10/13/originalism-threatens-turn-clock-back-race/ [https://perma.cc/XQT9-6UU8].

Given the conclusion that "we're all originalists now,"[2] the dominance of originalism would thus seem to be cause for deep concern. But is originalism really to blame? *Dobbs* has been criticized by many originalists themselves, who decry the decision as rooted in non-originalist reasoning.[3] So the question remains: is *Dobbs v. Jackson Women's Health Organization* really originalist? Or is there something else underlying the conservative majority's decision? This paper argues that *Dobbs* is not grounded in originalism, but rather in tradition-based substantive due process.

Part I of this paper will provide an overview framework of both theories. Many people conflate history with originalism, but while originalism employs history, it is not synonymous with it. Whereas originalism uses history to discern the original meaning of a word or phrase, tradition-based substantive due process uses history to analyze whether a certain practice is "deeply rooted" in our nation's history and traditions. In other words, the former's time period is fixed, whereas the latter's is not. In addition, under originalism judges are constrained by the text of the Constitution, while substantive due process is a concept created to deal with unenumerated rights—rights not contained within the text of the Constitution.

Part II of this paper will then demonstrate that *Dobbs* is not rooted in originalism, though on the surface it may appear to be. The *Dobbs* majority used history to decide whether the right to abortion was "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty"[4] rather than to discern the original meaning of a constitutional phrase. This makes *Dobbs* an example of tradition-based substantive due process, not originalism.

Part III of this paper will then present the key to the current Supreme Court majority's tradition-based substantive due process approach. A juxtaposition of *Bowers v. Hardwick* and *Lawrence v. Texas*, two cases concerning statutes prohibiting homosexual sodomy, reveals that the key is how broadly the right at issue is characterized. And applying this principle to a comparison of *Dobbs* and *Roe* only reinforces this diagnosis.

Substantive due process has been widely criticized, and for good reason. Its implementation often leads to the protection of rights that are entirely untethered from the text of the Constitution, such as the right to abortion.[5] But in conclusion, I will argue that while substantive due process has its flaws, it is nonetheless a vital component of American constitutional jurisprudence. Without it the

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2. *We are all originalists*, C-SPAN (Sep. 26, 2020) https://www.c-span.org/video/?c4910015/user-clip-originalists [https://perma.cc/2M7M-58TB].

3. @lsolum, TWITTER (May 5, 2022, 6:33 AM), https://twitter.com/lsolum/status/1522162603291643904 [https://perma.cc/53BL-AYP9].

4. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

5. *See id.* at 2245 ("*Roe*, however, was remarkably loose in its treatment of the constitutional text. It held that the abortion right, which is not mentioned in the Constitution, is part of the right to privacy, which is also not mentioned.").

unenumerated rights recognized by the Ninth Amendment have no mechanism for recognition. For better or worse, conservatives who adhere to tradition-based substantive due process should learn to embrace the reality of unenumerated rights. This paper does not offer a solution or alternative to tradition-based substantive due process. Instead, it argues that the doctrine is wrong insofar as it is geared towards avoiding unenumerated rights by arbitrarily restricting them rather than embracing them as constitutionally provided for.

II. JUST BECAUSE IT'S HISTORY, DOESN'T MEAN IT'S ORIGINALISM

Originalism is infamous for its use of history. But originalism is not the only method of constitutional interpretation that utilizes history. This section will outline how originalism's use of history differs from the Court's use of history in *Dobbs*. Originalism uses history to identify how constitutional phrases were understood at the time they were written. This makes originalism a useful tool for finding the "original meaning" of constitutional rights but less useful for unenumerated rights—rights that are not expressly written in the Constitution. For these unenumerated rights, the Court has devised a doctrine known as "substantive due process." Substantive due process, which finds its roots in the Fifth and Fourteenth Amendments, provides a mechanism for recognizing rights that are not enumerated in the Constitution but nonetheless deemed fundamental and thus worthy of protection.

A. What Originalism Is

Originalism is widely regarded as the dominant method of constitutional jurisprudence. As Justice Elena Kagan stated at her confirmation hearing, "we're all originalists now."[6] But if justices on both the right and left side of the aisle can classify themselves as originalists, then what exactly *is* originalism? Originalist scholar Lawrence Solum summarized the theory as follows: "[i]n constitutional cases, the United States Supreme Court should consider itself bound by the original public meaning of the constitutional text."[7] As evinced by Solum's statement, within originalism itself, "public meaning originalism" is considered the predominant form.[8] This particular methodology asserts that "the original meaning of the constitutional text is best understood as its *public meaning*: roughly, the meaning that the text had for competent speakers of American English at the time it was framed and ratified."[9] Within this framework are two key distinguishing traits of

6. *See We are all originalists*, *supra* note 2.

7. What is Originalism: Hearing on S. 115-208 Before the S. Comm. on the Judiciary, 115th Cong. 447–48 (2017) (Statement of Lawrence B. Solum at the Hearings on the Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States).

8. *See also* Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1965 (2020) ("Public Meaning Originalism is the predominant form of originalist constitutional theory."). From here on out, assume that any mention of "originalism" refers specifically to public meaning originalism.

9. *Id*. at 1957.

originalism: (1) the constraint principle and (2) the fixation thesis.[10] As Solum puts it, "[t]ogether, constraint and fixation form the core of contemporary originalist theory."[11]

1. The Constraint Principle

The "constraint principle" reflects the idea that the original meaning of the constitutional text should *constrain* constitutional practice.[12] "At a minimum, constraint requires that constitutional practice be consistent with original meaning."[13] This judicial constraint is different from judicial *restraint*. Restraint concerns deference to decisions made by legislative statutes or executive officials whereas constraint is focused on fidelity to the communicative content of the constitutional text.[14] Thus the constraint principle is primarily characterized by consistency with original meaning. While originalists may disagree on the level of consistency required, "[a]ll or almost all originalists can agree on a minimum level constraint: the doctrines of constitutional law and decisions in constitutional cases should be consistent with the original meaning—subject to limited and exceptional defeasibility conditions."[15]

Originalists point to several reasons why judges are constrained by the original meaning of the text of the Constitution.[16] One major source of justification is the oath judges take when sworn into office.[17] For originalist scholars, the oath of office carries two major implications. The first is that the Constitution carries an objective original meaning. This point has been expounded upon by Richard Re, who claims that "an oath to support the Constitution necessarily creates a promise to support the historical document known by that name."[18] An oath to support the Constitution thus creates a morally binding promise "to adopt an interpretive theory tethered to the Constitution's text and history."[19] "Were judges free to interpret the Constitution however they saw fit, in the service of whatever ends they deemed desirable," argue Randy Barnett and Evan Bernick, "the oath would have little significance."[20] In other words, judges are sworn to uphold the objective original meaning of the Constitution because they take an oath to uphold *the*

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10. *See* Randy E. Barnett & Evan Bernick, *The Letter and Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 3 (2018).

11. Solum, *supra* note 8, at 3.

12. *Id*. at 2.

13. *Id*. at 8.

14. *Id*. at 18.

15. *Id*. at 8.

16. This section of the paper is not an attempt to fully expound on all of the justifications for the constraint principle, but instead to provide an example of a common argument originalists make. For a comprehensive overview of the constraint principle, see Solum, *supra* note 8.

17. Barnett & Bernick, *supra* note 10, at 23. For the text of the oath see 28 U.S.C. § 453 (". . . I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States.").

18. Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299, 323 (2016).

19. *Id*. at 324.

20. Barnett & Bernick, *supra* note 10, at 24.

Constitution, not their interpretation of it. By binding officials to the original meaning of the text, the oath thus constrains judges.

The second implication is that judges are to act as fiduciaries of the American people. According to Professor Randy Barnett, "the voluntary assumption of office accompanied by the express oath to 'support this Constitution' required by Article VI creates a fiduciary relationship that binds all government officials to follow instructions and act in good faith."[21] As Judge Frank Easterbrook has described it: "Like other judges, [he] took an oath to support and enforce both the laws and the Constitution. That is to say, [he] made a promise—a contract. In exchange for receiving power and lifetime tenure [he] agreed to limit the extent of [his] discretion."[22] Because judges are fiduciaries of the American people, the text of the Constitution constrains them. Barnett cites the fiduciary duty of good faith in support of the constraint principle because it provides a means of assessing whether a judge's "construction ha[s] the effect of rendering the text a nullity, of little or no practical significance, thereby eliminating it as a constraint on the fiduciary agents of the people."[23]

These two implications of the oath fit together nicely to form a normative justification for the constraint principle. If the Constitution has an objective original meaning, and if judges have a fiduciary duty to engage in good faith efforts to uphold that original meaning, then the original meaning of the Constitution should constrain judicial actors. As Solum puts it, "constitutional actors, including the Supreme Court, should not engage in constitutional construction that effectively amends the Constitution."[24]

2. The Fixation Thesis

The fixation thesis reflects the idea that "[t]he meaning of the constitutional text is fixed when each provision is framed and ratified."[25] Solum explains the core idea of the fixation thesis using the following example: "Imagine that you are reading a text written quite some time ago—a letter written in the thirteenth century, for example. If you want to know what the letter means (or more precisely, what it *communicates*), you will need to know what the words and phrases used in the letter meant at the time the letter was written."[26] The fixation thesis is fundamentally a claim about meaning—not about application.[27] While the communicative content of a phrase is fixed, that content may be applied to various and evolving factual scenarios. For example, the freedoms of press and free

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21. *Id*. at 6.
22. Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1122 (1998).
23. Barnett & Bernick, *supra* note 10, at 36–37.
24. Solum, *supra* note 8, at 3.
25. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015).
26. *Id*.
27. *Id*. at 21.

speech can apply to the internet even though they did not originally apply to that factual context because communicative content is not fact specific.[28]

The fixation thesis addresses two problems that arise in the interpretation of historical texts. First, "the language may be unfamiliar or familiar words may seem to be used in unfamiliar ways."[29] Second, "the text may be ambiguous because we lack knowledge of the context in which the text was written."[30] In order to properly understand words and phrases as they were used, originalist scholars employ the fixation thesis to observe how those words and phrases were understood by the public at the time of their adoption. "For public meaning originalism, the communicative content of the constitutional text is fixed at the time the text of each provision was communicated to the public."[31] Thus, "[t]he public context of constitutional communication is time-bound."[32]

The fixation thesis is one of the primary ways by which originalism distinguishes itself from other theories of constitutional interpretation, namely living constitutionalism. Similar to originalism, there are various forms of living constitutionalism.[33] Broadly speaking however, living constitutionalism refers to the idea that the meaning of the Constitution "evolves, changes over time, and adapts to new circumstances, without being formally amended."[34] As Justice Scalia argues, the concept of fixed meaning gives originalism more objective parameters than theories like living constitutionalism because "the difficulties and uncertainties of determining original meaning and applying it to modern circumstances are negligible compared with the difficulties and uncertainties of the philosophy which says that the Constitution *changes*."[35]

B. What Originalism Is Not

As explained above, originalism involves using history to determine the original meaning of constitutional provisions and the rights enumerated therein. But what about unenumerated rights? Both the Ninth Amendment and the debates at the Founding reveal that the Bill of Rights was not intended to enumerate all the rights that American citizens are entitled to. In fact, many were opposed to the inclusion of a Bill of Rights precisely because it could be construed to be a

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28. *Id.*
29. *Id.* at 30.
30. *Id.* at 30.
31. *Id.* at 27.
32. *Id.* at 28.
33. Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1271 (2019) ("Living constitutionalism is united by the idea of constitutional change, but there are many different ways that constitutional change can be accomplished.").
34. David A. Strauss, *The Living Constitution*, UNIV. OF CHI. L. SCH. (Sep. 27, 2010), https://www.law.uchicago.edu/news/living-constitution [https://perma.cc/N3AR-GKKH].
35. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 45–46 (1997).

complete and finite list of the rights Americans held. Many Federalists such as James Wilson and James Iredell voiced such objections.[36]

However, the adoption of a Bill of Rights ultimately proved necessary to ensure ratification. In 1789, James Madison gave a speech introducing the proposed amendments and explaining their necessity. In it, he stated that he "believe[d] that the great mass of people who opposed the constitution disliked it because it did not contain effectual provisions against encroachments on particular rights," and thus that it would "be practicable . . . to obviate that objection . . . to satisfy the public mind that their liberties will be perpetual."[37] Madison conceded that many "champions for republican liberty have thought such a provision not only unnecessary, but even improper . . . [and] dangerous," and it was for that reason that he proposed the inclusion of the Ninth Amendment.[38]

The Ninth Amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[39] However Madison's original draft read as follows:

> The exceptions here or elsewhere in the constitution made in favor of particular rights shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution, but either as actual limitations of powers or inserted *merely for greater caution*.[40]

In speaking on the need for the Ninth Amendment, Madison noted that

> [i]t has been objected . . . that by enumerating particular exceptions it would disparage those rights which were not placed in that enumeration, and it might follow by implication that those rights which were not singled out were intended to be assigned into the hands of the general government and were consequently insecure.[41]

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36. *See* James Wilson, *Speech in the Statehouse Yard, Philadelphia* (Oct. 6, 1787), https://archive.csac.history.wisc.edu/17_James_Wilson_Speech_in_the_State_House_Yard.pdf [https://perma.cc/DD7H-GCN2] ("In a government consisting of enumerated powers, a bill of rights would not only be unnecessary, but highly imprudent. If we attempt enumeration, everything that is not enumerated is presumed to be given."); James Iredell, *Speech to the North Carolina Ratification Convention* (July 29, 1788), https://archive.csac.history.wisc.edu/nc_iredell.pdf [https://perma.cc/6XGK-YJUE] ("It would be the greatest absurdity to pretend that when a legislature ais formed for a particular purpose it can have any authority but what is so expressly given to it. It would be not only useless, but dangerous to enumerate rights which are not intended to be given up, because it would be implying in the strongest manner that every right not included in the exception might be impaired by the government. And it would be impossible to enumerate very right.").

37. James Madison, *Speech to the House Introducing Amendments* (June 8, 1789), https://oll.libertyfund.org/page/1789-madison-speech-introducing-proposed-amendments-to-the-constitution [https://perma.cc/3CN4-SHVQ].

38. *Id.*

39. U.S. CONST. amend. IX.

40. Madison, *supra* note 37.

41. *Id.*

He further admitted that "[t]his is one of the most plausible arguments against the admission of a bill of rights that I have heard."[42]

The Ninth Amendment was thus crafted to serve a particular purpose: protecting unenumerated rights. There is little scholarly disagreement today over the fact that unenumerated rights exist,[43] but there is great debate over how those unenumerated rights are to be defined and protected.[44] Despite the consensus that the Ninth Amendment was intended to protect unenumerated rights, its "role in modern jurisprudence is still largely irrelevant."[45] Because the Supreme Court has sparingly invoked the Ninth Amendment to recognize unenumerated rights, the task has fallen to the judicially-created doctrine of substantive due process.

In simplified terms, substantive due process is the idea that the Fifth and Fourteenth Amendments protect fundamental rights from substantive government interference, rather than just procedural violations. Scholars dispute the origin of substantive due process. Critics argue that it is "sheer invention, a matter of Justices reading their preferred social theories into the Constitution,"[46] while defenders assert that substantive due process "faithfully captures the Constitution's commitment to privacy and personal autonomy."[47] Many critics argue that it first appeared in *Dred Scott v. Sandford*,[48] in which the Supreme Court struck down the

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42. *Id.*

43. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 490 (1965) (Goldberg, J., concurring) ("These statements of Madison and Story make clear that the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people.").

44. *See, e.g.*, Brennan Mancil, *Reviving Elusive Rights: State Constitutional Unenumerated Rights Clauses as Bounded Guarantors of Fundamental Liberties*, 19 GEO. J. L. & PUB. POL'Y. 281 (2021).

45. Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. BALT. L. REV. 169, 185 (2003).

46. Joshua D. Hawley, *The Intellectual Origins of (Modern) Substantive Due Process*, 93 TEX. L. REV. 275, 276–77 (2014). For examples of substantive due process critics, *see* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 273–74 (2d ed. 1997) (criticizing courts for substituting their own views of policy for those of legislatures); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 31–32 (1990) (criticizing the Supreme Court for inventing "substantive" due process); Frank H. Easterbrook, *Substance and Due Process,* 1982 SUP. CT. REV. 85, 125 (concluding that the Supreme Court bases its due process judgments on the Justices' policy views); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?* 103 NW. U. L. REV. 857, 897 (2009) (arguing that modem substantive due process depends on the "subjective, shifting judgment" of judges); John Harrison, *Substantive Due Process and the Constitutional Text,* 83 VA. L. REV. 493 (1997) (presenting and then refuting common arguments for a textual basis of substantive due process).

47. Hawley, *supra* note 46, at 277. For examples of substantive due process defenders, see Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment,* 58 EMORY L.J. 585, 594 (2009) (arguing that the Framers of the Constitution would have understood "due process of law" to include specific, yet unenumerated rights); Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 999 (1990) (concluding that the Due Process Clause probably had substantive as well as procedural components in 1791); David A.J. Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 FORDHAM L. REV. 1281 (1977) (arguing that the Constitution vouchsafes broad protections for personal privacy).

48. Dred Scott v. Sandford, 60 U.S. 393 (1856).

Missouri Compromise as a limitation on slave owners' property rights that exceeded Congress' constitutional powers.[49] *Lochner v. New York* is also a cited origin.[50]

States were (and still are) universally recognized to possess "police powers"—the ability to regulate the "health, safety, welfare, and morals of the people."[51] Courts reviewed state and municipal acts "for reasonableness, to ensure they were not in restraint of trade, and to ensure they were genuinely intended to advance the purposes of the municipal corporation—that is, their police-power purposes."[52] In *Lochner*, the Court struck down a New York statute known as the Bakeshop Act, which forbid bakers to work more than 60 hours a week or 10 hours a day. The Court stated that "the limit of the police power has been reached and passed in this case" because, "in [the Court's] judgment," there was "no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the [the bakers]."[53] The Court concluded that the statute was "an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into [contracts] which may seem to him appropriate or necessary."[54] In other words, the *Lochner* Court concluded that the state of New York had violated the bakers' freedom of contract by "reading the Due Process Clause . . . not as a guarantee of process—or not only as that—but as a more general restraint on arbitrary interferences with liberty."[55]

Although *Lochner* was effectively overruled,[56] its underlying sentiments have arguably prevailed. Rather than using substantive due process to protect economic liberties, as in *Lochner*, the Court has largely pivoted to the protection of personal liberties that are deemed fundamental.[57] In *West Coast Hotel v. Parrish*,

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49. *See* Matthew J. Franck, *Asking Busybody Judges to Overrule Busybody Legislators*, NAT'L REV. ONLINE (Dec. 13, 2015), https://www.nationalreview.com/bench-memos/substantive-due-process-george-will/ [https://perma.cc/6LD2-VH9D] ("Transforming due process into an all-purpose clause for overturning laws that fail to live up to the moral vision of judges was the work of *Dred Scott*."); Matthew J. Franck, *What Happened to the Due Process Clause in the* Dred Scott *Case? The Continuing Confusion Over "Substance" versus "Process"*, 4 AM. POL. THOUGHT 120 (2015).

50. 198 U.S. 45, 58 (1905); *see generally* Hawley, *supra* note 46.

51. Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. CHI. L. REV. 815, 826 (2020).

52. *Id.*

53. *Lochner*, 198 U.S. at 58.

54. *Id.* at 56.

55. Hawley, *supra* note 46, at 290.

56. In 1934, the Supreme Court decided in *Nebbia v. New York* that there is no constitutional fundamental right to freedom of contract. 291 U.S. 502 (1934). In 1937, the Supreme Court decided *West Coast Hotel Co. v. Parrish*, which implicitly signaled the end of the *Lochner* era by repudiating the idea that freedom of contract should be unrestricted. 300 U.S. 379 (1937). In *Williamson v. Lee Optical*, the Court stated that "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." 348 U.S. 483, 488 (1955).

57. Today, the Supreme Court provides special protection for three types of rights under substantive due process in the Fourteenth Amendment—an approach originating in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938): (1) rights enumerated in and derived from the first eight

even as the Court abandoned exacting scrutiny of economic regulation, it "continued to embrace the idea that the Due Process Clause enacted a general value of liberty and gave the judiciary the power to enforce it."[58] Indeed, the very premise of Chief Justice Hughes's opinion in *Parrish* was that the Due Process Clause embraced a substantive liberty value.[59]

Originalists are frequently critical of the concept of substantive due process on the grounds that the Due Process Clause "guarantees only 'process' before a person is deprived of life, liberty, or property."[60] They argue that the Clause "lack[s] . . . a guiding principle to distinguish 'fundamental' rights that warrant protection from nonfundamental rights that do not."[61] However, these critics can be themselves criticized for neglecting key aspects of the Due Process Clause's history. While substantive due process does involve inquiry into "normative questions," some scholars have pointed out that "[t]he Constitution—from its opening commitment to the 'Blessings of Liberty' to its closing reference to rights 'other' than those specified in its text—is a thoroughly normative document."[62] The Constitution "binds the government to act lawfully, [and] lawfulness incorporates norms of generality, regularity, fairness, rationality, and public-orientation."[63] It is thus "not a morally neutral framework for mere majority-rules decision making"; instead, "[t]he Due Process Clause was written to ensure that government does not act without reasons, nor for insufficient, corrupt, or illusory reasons."[64]

Still, some originalists have actually defended substantive due process. For example, Professor Frederick Gedicks has argued that the original public meaning of the Due Process Clause of the Fifth Amendment in the late eighteenth century "encompassed judicial recognition and enforcement of unenumerated substantive rights as a limit on congressional power."[65] Gedicks traces this "concept of due process as a substantive limitation on government" back to "thirteenth-century England" and the "law of the land clause of the Magna Carta."[66] Interestingly, despite their fierce critiques of substantive due process, even many of the staunchest originalists, such as Justice Scalia, have acquiesced to its existence in modern constitutional jurisprudence.[67] Of the current Court, only Justice

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amendments to the Constitution, (2) the right to participate in the political process, such as the rights of voting, association, and free speech, and (3) the rights of "discrete and insular minorities." *Id.*

58. Hawley, *supra* note 46, at 295.

59. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) ("Liberty in each of its phases has its history and connotation.").

60. McDonald v. City of Chicago, 561 U.S. 742, 811 (2010) (Thomas, J., dissenting).

61. *Id.*

62. Timothy Sandefur, *In Defense of Substantive Due Process, or, The Promise of Lawful Rule*, 35 HARV. J. L. & PUB. POL'Y 284, 285 (2011).

63. *Id.*

64. *Id.* at 285–86.

65. Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 594 (2009).

66. *Id.*

67. Transcript of Oral Argument, McDonald v. City of Chicago, 561 U.S. 742 (2009) (No. 08-1521) ("Well, I mean, what you argue is the darling of the professoriate, for sure, but it's also contrary to 140

Thomas appears willing to reverse substantive due process and embrace an alternative position.[68] Rather than abandoning it, the conservative justices have been content to restrict the doctrine's application, leading to two distinctly different approaches to the unenumerated rights question.

1. The Liberty Approach to Unenumerated Rights

The liberty approach[69] is reflected in *Griswold v. Connecticut*. In *Griswold*, the Court struck down a state law restricting the use of contraception by married couples. Writing for the majority, Justice Douglas argued that "the First Amendment has a penumbra where privacy is protected from governmental intrusion."[70] Using this penumbral theory to create "zones of privacy," the Court elevated the status of some unenumerated rights to the same plane as those enumerated in the Bill of Rights.[71]

The Court used this same penumbral reasoning to pen the *Roe* decision, which "brought modern substantive due process into full flower."[72] In *Roe*, Justice Blackmun invoked the right to privacy established by *Griswold* and argued that it "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[73] In *Casey*, two decades later, Justice Kennedy reaffirmed the "central holding"[74] of *Roe* and elaborated on the Court's unenumerated rights jurisprudence. Kennedy admitted that "[i]t is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the [Bill of Rights]."[75] However, he reaffirmed the existence of unenumerated rights by stating that "[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."[76] The Court then affirmed the position established in *Griswold* that matters "involving the most intimate and personal choices

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years of our jurisprudence. Why do you want to undertake that burden instead of just arguing substantive due process? Which, as much as I think it's wrong, I have—even I have acquiesced in it.").

68. McDonald v. City of Chicago, 561 U.S. 742, 806 (2010) (Thomas, J., dissenting) ("Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause.").

69. The liberty approach is frequently attributed to the liberal side of the Court, but this is slightly over-simplistic. Conservative Justice Anthony Kennedy authored two of the biggest liberty approach decisions—*Casey* and *Obergefell*. Generally speaking, the liberty approach is used by the liberal Justices, however exceptions to this trend (like Justice Kennedy) do exist.

70. Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

71. Mancil, *supra* note 44, at 288.

72. Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 72 (2006).

73. Roe v. Wade, 410 U.S. 113, 153 (1973).

74. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 853 (1992).

75. *Id.* at 847.

76. *Id.* at 848.

a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."[77]

This approach has thus been described as the "liberty" approach because it involves an evaluation of "the liberty interest of the individual and weighs it against competing governmental concerns, determining on this basis whether the liberty interest deserves protection as a constitutional right."[78] In both *Roe* and *Casey*, the Court engaged in a balancing test between the liberty interests of the mother—including the difficulties of unwanted motherhood and mental and physical health effects of pregnancy[79]—and the state's interests, which included safeguarding health, maintaining medical standards, and protecting potential life.[80]

As seen in *Roe* and *Casey*, the liberty analysis begins with "something like a presumptive 'right to be let alone,' as invoked by Justice Blackmun's dissenting opinion in *Bowers*."[81] This notion of a "right to be let alone" is "decidedly ambiguous, but it is generally consistent with the libertarian philosophy of John Stuart Mill, who argued famously that personal liberty should be honored in the absence of 'harm to others.'"[82] Further, "[i]n conducting its political-moral analysis, the Court does not ignore American traditions or contemporary societal values, but it considers them only at a relatively general level of abstraction," so as not to be "confined to the protection of rights that have specific historical or contemporary support."[83] The focus for the liberty approach is thus on "protect[ing] personal decisions that fundamentally affect a person's self-understanding, basic life direction, and core personal relationships" by "identif[ying] personal liberties . . . appropriate for our contemporary society."[84]

2. The History and Tradition Approach to Unenumerated Rights

The conservative approach to unenumerated rights developed in response to the liberal "penumbral" approach, which the conservative side of the Court criticized as usurping the province of the legislature and creating rights that the Due Process Clause of the Fourteenth Amendment was not intended to protect.[85]

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77. *Id.* at 851.

78. Conkle, *supra* note 72, at 66–67.

79. Roe v. Wade, 410 U.S. 113, 153 (1973); *Casey*, 505 U.S. at 872–73.

80. *Roe*, 410 U.S. at 154.

81. Conkle, *supra* note 72, at 108 (quoting Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting)).

82. *Id.*; *see also* JOHN STUART MILL, ON LIBERTY 10–11 (1859) (stating that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others" and "[h]is own good, either physical or moral, is not a sufficient warrant").

83. Conkle, *supra* note 72, at 107.

84. *Id.* at 107–08.

85. *See Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting) ("To reach its result, the Court necessarily has had to find within the Scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment."); *see also* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("But we have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the

To constrict the reach of substantive due process, conservatives on the Court adopted an alternative, two-prong approach—one that requires a "careful description" of the asserted fundamental liberty interest and an examination of whether the right is "deeply rooted in this Nation's history and tradition."[86] *Washington v. Glucksberg* illustrates this framework.

In *Glucksberg,* the Supreme Court held that there is no substantive due process right to physician-assisted suicide.[87] Beginning with prong one—a careful description of the liberty asserted interest—the Court presented the question as "whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so."[88] Writing for the majority, Justice Rehnquist emphasized the importance of precision and "careful[] formulati[on]"—in other words, of *narrowly* defining the right.[89] The Court then moved on to the second prong: assessing whether the right to assisted suicide is deeply rooted in our Nation's history and traditions. In doing so, the Court was "confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults."[90] Ultimately, the Court concluded that "the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause."[91]

Just as judicial conservatives tout originalism as an objective theory of constitutional interpretation,[92] the history and tradition framework is similarly cast as an objective method of protecting unenumerated rights. As the *Glucksberg* Court put it: "the Due Process Clause specially protects those fundamental rights and liberties which are, *objectively*, deeply rooted in this Nation's history and tradition."[93] Similar to how the historical understanding of words and phrases provides guideposts for original meaning, "[o]ur Nation's history, legal traditions, and practices . . . provide the crucial guideposts for responsible decisionmaking" when it comes to unenumerated rights.[94] Rooting substantive due process in tradition minimizes the risk that judges will overstep the boundary of interpreting the

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matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." (internal quotations and citations omitted)).

86. *Glucksberg*, 521 U.S. at 720–21.

87. *Id.* at 735. The Court was unanimous in rejecting the constitutional claim, but it was divided in its reasoning.

88. *Id.* at 723.

89. *Id.* at 722–23 ("[W]e have a tradition of carefully formulating the interest at stake in substantive-due-process cases. For example, although *Cruzan* is often described as a 'right to die' case . . . we were, in fact, more precise: We assumed that the Constitution granted competent persons a 'constitutionally protected right to refuse lifesaving hydration and nutrition.'" (quoting Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 279 (1990))).

90. *Id.* at 723.

91. *Id.* at 728.

92. *See generally* Scalia, *supra* note 35.

93. *Glucksberg*, 521 U.S. at 720–21 (emphasis added) (internal quotations omitted).

94. *Id.* at 721 (internal quotations omitted).

law—which is their proper role—and making it. Justice White vocalized this concern in *Bowers*, writing that "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[95] Thus, for conservatives, the tradition-based approach is a "restrained methodology"[96] that "minimize[s] the risk of subjective judicial decision-making."[97]

Tradition-based substantive due process is not without its critics. However, the doctrine has strong underlying justifications. For one, its focus is on the long-standing practices of "our people," not of our judges—removing room for the aforementioned subjective judicial decision-making.[98] Similarly, some have argued that tradition-based substantive due process has "democratic" roots because participants in traditions are "voters," to whom judges ought to defer.[99] Professor Sunstein has elaborated on this argument, stating that

> [in this] view, the judgments of many people extending over long periods deserve respect on essentially democratic grounds. The claim is not that those judgments are necessarily right or true. Instead, they are, in a sense, votes; and if the same votes have been made by multiple generations, then they deserve respect. We might describe this approach as a kind of democratic traditionalism. It supports traditionalist approaches to the Due Process Clause . . . on the theory that if so many citizens have committed themselves to a practice, their judgments deserve judicial deference.[100]

This argument also accounts for the concerns of subjective decision-making; if a decision must be made on whether a right is "fundamental," shouldn't that decision be left to the people rather than the judiciary?

III. *DOBBS* AND TRADITION-BASED SUBSTANTIVE DUE PROCESS

A. Dobbs *is Not Originalism*

Justice Alito's majority opinion in *Dobbs v. Jackson Women's Health* has brought originalism under more fire than usual.[101] But given the outline of originalism provided above, does *Dobbs* really square with originalism?

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95. Bowers v. Hardwick, 478 U.S. 186, 194 (1986).

96. *Glucksberg*, 521 U.S. at 721; *see generally* Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law,* 117 HARV. L. REV. 4, 91 (2003) (arguing that *Glucksberg* "proposed a profound reconceptualization of substantive due process" by restricting the Court to a tradition-based inquiry and by "impos[ing] a straitjacket" on that inquiry).

97. Conkle, *supra* note 72, at 89.

98. Cass R. Sunstein, *Due Process Traditionalism*, 106 MICH. L. REV. 1543, 1545 (2008).

99. *Id.* at 1546.

100. *Id.* at 1561.

101. *See, e.g.*, Chautauqua Institution, *Reva Siegel: Robert H. Jackson Lecture*, YOUTUBE (Aug. 1, 2022), https://www.youtube.com/watch?v=PWRJiC5L744 [https://perma.cc/KJN9-UFLP]; Reva Siegal, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127 (2023); David H. Gans, *This Court Has*

On the surface, Justice Alito's majority opinion does appear to be originalist. It begins with an analysis of the text of the Constitution. Alito states that "[c]onstitutional analysis must begin with the language of the instrument, which offers a fixed standard for ascertaining what our founding document means."[102] After establishing that the Due Process Clause was the ground under which the asserted right to abortion would fall, the Court engages in a cursory analysis of the word "liberty."[103] The Court appears to be employing an originalist inquiry because it examines whether the word "liberty" in the Fourteenth Amendment should be understood to encompass the right to abortion. However, the majority does not even attempt to examine the original public meaning of the word "liberty" as it is used in the Fourteenth Amendment. Instead, the Court construes the word "liberty" as a term of art.[104] Rather than engaging in an analysis of original meaning, Justice Alito launches into a historical analysis of the various abortion laws that have existed throughout American history.

As outlined above, part of what distinguishes originalism from tradition-based substantive due process is the way history is used, and in just one line, Justice Alito demonstrates why *Dobbs* is not an originalist opinion: "[t]he Constitution makes no reference to abortion."[105] By its very nature, originalism pertains only to rights enumerated within the text of the Constitution. In an ironic way, the *Dobbs* majority did apply one of the fundamental tenets of originalism: the constraint principle. By ruling that the Constitution says nothing about abortion, the *Dobbs* Court viewed itself as constrained by the text and barred from ruling whether there was a *textual*, fundamental constitutional right to abortion. However, because there was no textual—or "enumerated"—right, the Court's inquiry then turned to whether there was a tradition-based right. Rather than using history to discern original meaning, Alito used history to decide whether the right to abortion was "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[106] This makes *Dobbs* an example of conservative tradition-based substantive due process—*not* originalism. Ultimately, because it concluded that history demonstrated that the right to abortion was not deeply rooted in America's history and traditions, the Court overruled *Roe* and *Casey*'s

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Revealed Conservative Originalism to Be a Hollow Shell, ATLANTIC (July 20, 2022), https://www.theatlantic.com/ideas/archive/2022/07/roe-overturned-alito-dobbs-originalism/670561/ [https://perma.cc/T8BN-KMB9]; David J. Garrow, *Justice Alito's Originalist Triumph*, WALL ST. J. (May 4, 2022), https://www.wsj.com/articles/justice-alitos-originalist-triumph-supreme-court-draft-opinion-constitution-abortion-roe-v-wade-justices-11651695865 [https://perma.cc/54TB-8MLL].

102. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2244–45 (2022) (citations omitted) (internal quotations omitted).

103. *Id.* at 2247.

104. David Weisberg, *Is Dobbs an Instance of Originalism? Yes and No*, ORIGINALISM BLOG (Aug. 10, 2022), https://originalismblog.typepad.com/the-originalism-blog/2022/08/is-dobbs-an-instance-of-originalism-yes-and-nodavid-weisberg.html [https://perma.cc/X6RX-RNNL].

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

106. *Id.*

establishment of a constitutional right to abortion and returned the regulation of abortion to the States.[107]

B. The Key to Tradition-Based Substantive Due Process

Under the Court's history and tradition-based analysis of unenumerated rights, the key is how narrowly you define the right. Recall the first prong of the *Washington v. Glucksberg* test: a "careful description" of the asserted fundamental liberty interest.[108] The *Glucksberg* Court stressed the importance of precision and "careful[] formulati[on]"—in other words, of *narrowly* defining the right.[109] As Laurence Tribe and Michael Dorf put it, "[t]he more abstractly one states the already-protected right, the more likely it becomes that the claimed right will fall within [the] protection" of the Constitution, and conversely, the more narrowly one defines a right, the less likely it becomes.[110] This is primarily true for those "non-traditional" rights—rights that were either historically prohibited but have received modern acceptance or rights that only arose in the context of the modern era and have no historical antecedents.

Comparing *Bowers v. Hardwick* and *Lawrence v. Texas* illustrates this point. In *Bowers*, the Supreme Court considered a Georgia statute that criminalized sodomy. The majority characterized the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[111] Unsurprisingly, the Court concluded that there is no such fundamental right embedded in our nation's history and tradition. But less than 20 years later, the Court overruled itself. In *Lawrence*, the Court considered a case that was essentially factually identical to *Bowers*: in both cases, police officers observed and subsequently charged adult men engaging in consensual acts of sodomy in the bedrooms of their respective homes. Despite these similarities, the *Lawrence* Court overruled *Bowers*, and the key to the flip was how it defined the right. The *Lawrence* Court framed the issue as "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty."[112] Because the two opinions "ask different questions, it is not surprising that they give different answers."[113] One need only read how the issue is presented in *Bowers* and in *Lawrence* to understand why the Court changes course.

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107. Weisberg, *supra* note 104.

108. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

109. *Id.* at 722–23 ("[W]e have a tradition of carefully formulating the interest at stake in substantive-due-process cases. For example, although *Cruzan* is often described as a 'right to die' case . . . we were, in fact, more precise: We assumed that the Constitution granted competent persons a 'constitutionally protected right to refuse lifesaving hydration and nutrition.'" (quoting Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 279 (1990))).

110. Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990).

111. Bowers v. Hardwick, 478 U.S. 186, 190 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

112. *Lawrence*, 539 U.S. at 564.

113. Tribe & Dorf, *supra* note 110, at 1066.

The *Lawrence* majority was expressly critical of *Bowers*, stating that the majority in that case "fail[ed] to appreciate the extent of the liberty at stake."[114] Justice Kennedy, delivering the opinion of the Court, argued that framing the issue as simply "the right to engage in certain sexual conduct demeans the claim the individual put forward."[115] For the *Lawrence* majority, the statutes at issue did more than merely prohibit a particular sexual act: "[t]heir penalties and purposes . . . have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home."[116] Thus, the right in question was not simply a right to homosexual sodomy, but the right to "control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."[117] By framing the right to homosexual sodomy more broadly, the *Lawrence* Court was able to deem it deeply rooted, whereas in *Bowers*, the description of the right in very specific terms "disconnect[ed] it from previously established rights."[118]

This clash between general and specific abstractions of identical rights is not unique to *Bowers* and *Lawrence*. For example, in *Michael H. v. Gerald D.*, Justice Scalia, writing for the majority, disagreed with the dissenting Justice Brennan over the level of generality used to classify the parental relationship at issue.[119] Michael was the biological father of Victoria, but Victoria's mother was married to Gerald, who was listed as the father on Victoria's birth certificate. When Victoria's mother refused to allow Michael to continue visiting Victoria, Michael brought suit and contended that he had a liberty interest in his relationship with Victoria. Whereas Justice Scalia viewed Michael's rights as "the rights of the natural father of a child adulterously conceived," Justice Brennan opted for a higher level of generality: parenthood.[120] As he put it, rather than analyzing the traditional rights ascribed to parenthood, "the plurality asks whether the *specific variety* of parenthood under consideration—a natural father's relationship with a child whose mother is married to another man—has enjoyed such protection."[121] Justice Scalia defended his approach, arguing that if

> there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general. But there is such a more specific tradition, and it unqualifiedly denies protection to such a parent.[122]

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114. *Lawrence*, 539 U.S. at 567.
115. *Id.*
116. *Id.*
117. *Id.*
118. Tribe & Dorf, *supra* note 110, at 1066.
119. Michael H. v. Gerald D., 491 U.S. 110 (1989).
120. *Id.* at 127 n.6.
121. *Id.* at 139 (Brennan, J., dissenting) (emphasis added).
122. *Id.* at 127 n.6.

As seen above, the key to securing fundamental status for a right under the tradition-based theory of substantive due process is defining the right at the highest level of generality possible. This becomes difficult, however, when the rubber meets the road. Because the first prong of *Glucksberg* requires a careful definition, there exists a tension in the advocate's job. On the one hand, a certain level of specificity is necessary to satisfy the standard, but on the other, the more specific the definition becomes, the less likely it is that the right will be deemed deeply rooted—especially in the context of non-traditional rights. This structure is intentional. Recall that the tradition-based theory of substantive due process developed in response to the liberty-based approach. Because most conservative Justices are fundamentally opposed to the doctrine of substantive due process, they are not keen on expanding it.[123] The requirements that a right be carefully defined and deeply rooted are thus a check on substantive due process, intended to limit the number of rights able to be recognized under that doctrine.

C. Applying the Key to Dobbs

Like *Bowers* and *Lawrence*, *Dobbs* and *Roe* considered the same right and reached diametrically opposed outcomes. But identifying the differing levels of generality is slightly harder when comparing the latter cases. The *Dobbs* majority framed the right at stake as a "right to obtain an abortion."[124] On the surface, this is not much different from how the right was framed in *Roe*: a woman's right to "choose to terminate her pregnancy."[125] However the *Roe* Court strategically couched the right in a broader category of "personal marital, familial, and sexual privacy [rights] said to be protected by the Bill of Rights or its penumbras."[126] By connecting the right to abortion to this broader category of rights, the *Roe* Court was able to tie the right to abortion to the more generalized right to privacy established in *Griswold*—a right that was deemed "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[127]

This right to abortion did not hold up under the *Glucksberg* framework for Justice Alito, who zeroed in on the right to abortion rather than a more generalized right to sexual privacy. In the majority's opinion, there was a "lack of any

123. Vitoria Olivo Factor, *The Evolution of Substantive Due Process Throughout Time*, UNIV. OF CENTRAL FLORIDA HONORS UNDERGRADUATE THESES, 2020, at 21–22 ("Of the Justices currently on the Court those who have most openly displayed their dislike for substantive due process and its prior uses are most likely to change its future use. These Justices include Chief Justice John Roberts as well as Associate Justices Thomas, Alito, Gorsuch and Kavanaugh.").

124. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2244 (2022).

125. Roe v. Wade, 410 U.S. 113, 129 (1973), *holding modified by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. at 2228.

126. *Roe*, 410 U.S. at 129 (citing Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972)).

127. *Id.* at 153; *see also Dobbs*, 142 S. Ct. at 2257 ("Instead of seriously pressing the argument that the abortion right itself has deep roots, supporters of *Roe* and *Casey* contend that the abortion right is an integral part of a broader entrenched right.").

real historical support for the right that *Roe* . . . recognized."[128] Justice Alito explicitly rejected the *Roe* Court's attempts to generalize the right to abortion as part of a broader category, stating that "[t]hese attempts to justify abortion through appeals to a broader right to autonomy and to define one's 'concept of existence' prove too much."[129] The majority expressed concern that "[t]hose criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like."[130] Whereas the *Roe* Court was content to characterize abortion at a high level of generality, the *Dobbs* Court was not. Thus, the Court was able to hold that the right to abortion is not "deeply rooted in this Nation's history and tradition" nor "implicit in the concept of ordered liberty."[131]

IV. CONCLUSION

In summary, *Dobbs v. Jackson Women's Health* is *not* an originalist decision. Originalism is rooted in the text of the Constitution, and without an explicit constitutional reference to abortion, the *Dobbs* Court was forced to engage in an unenumerated rights analysis. But does being non-originalist make *Dobbs* wrong, or even just procedurally flawed? Some may believe so, but I do not. Originalism is a useful methodology for discerning the bounds of explicit constitutional provisions and constraining lawmakers when they attempt to circumvent the democratic, legislative process by "updating" the law via the judiciary. But the text of the Constitution makes clear that not all rights possessed by the American people are enumerated. And "[a]lthough the constitutional text does mark some values as special, it will not settle most cases."[132] This is especially true in contemporary America, where the rights litigated at the Supreme Court are increasingly unenumerated and potentially "non-traditional."

Many originalists argue that substantive due process was judicially manufactured to fill the gap created by the *Slaughter-House Cases*[133] in 1873, and that the role played by the Due Process Clause today should be played by the Privileges and Immunities Clause of the Fourteenth Amendment.[134] Yet even the Supreme Court's conservative majority has rejected the idea that we should undo 150 years of precedent to reground in the Privileges and Immunities Clause what has

128. *Dobbs*, 142 S. Ct. at 2255.
129. *Id*. at 2258 (quoting *Casey*, 505 U.S. at 851).
130. *Dobbs*, 142 S. Ct. at 2258.
131. *Id*. at 2242 (quoting *Glucksberg*, 521 U.S. at 721).
132. Tribe & Dorf, *supra* note 110, at 1064.
133. 83 U.S. 36 (1872).
134. *See, e.g.*, William J. Aceves, *A Distinction with a Difference: Rights, Privileges, and the Fourteenth Amendment*, 98 TEX. L. REV. ONLINE 1 (2019); McDonald v. City of Chicago, 561 U.S. 742, 806 (2010) (Thomas, J., dissenting) ("Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause.").

already been accomplished via the Due Process Clause.[135] Simply put: substantive due process may not be perfect, but it is nonetheless a vital part of modern American constitutional jurisprudence. Ignoring that reality only creates more problems and also risks depriving American citizens of fundamental, yet unenumerated rights—the very fear that the Federalist objectors to the Bill of Rights had over 200 years ago.

Yet instead of fully embracing the reality of unenumerated rights, tradition-based substantive due process is often invoked to merely restrict them. Tradition-based substantive due process's guardrails are in many ways necessary to prevent the due process doctrine from recognizing rights that it emphatically should not. I would argue that the right to abortion falls firmly in this category. But while some guardrails are certainly necessary, the proper course for originalists is not to arbitrarily restrict substantive due process based on the level of generality at which a right is defined. This paper does not offer a solution nor an alternative to tradition-based substantive due process, but instead merely argues that the doctrine is wrong insofar as it is geared towards avoiding unenumerated rights by arbitrarily restricting them rather than embracing them as constitutionally provided for. In short, I argue that conservatives should *engage* with the normative questions inherent to the Constitution and build a robust unenumerated rights jurisprudence—as some are already attempting[136]—rather than merely play defense by freezing the unenumerated rights canon by narrowly defining rights and employing potentially subjective historical narratives.

135. Transcript of Oral Argument at 7, McDonald v. City of Chicago, 561 U.S. 742 (2010) (No. 08-1521) ("Well, I mean, what you argue is the darling of the professoriate, for sure, but it's also contrary to 140 years of our jurisprudence. Why do you want to undertake that burden instead of just arguing substantive due process? Which, as much as I think it's wrong, I have—even I have acquiesced in it.").

136. *See, e.g.*, Randy Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV 1 (2006); Gerard N. Magliocca, *Rediscovering* Corfield v. Coryell, 95 NOTRE DAME L. REV. 701 (2019).