Unenumerated Rights, State Supreme Court Decisions and The Ninth Amendment: Toward A New Interpretation of The Inkblot

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I. INTRODUCTION

The United States Constitution attempts to strike a balance between the Government's power and citizens' rights. During the Constitutional Convention, a debate emerged over the necessity of inserting a specific list of constitutionally-protected individual rights.[1] The Anti-Federalists argued that if these individual rights were not explicitly enumerated, then they would not be enforceable against the government.[2] The Federalists argued that no exhaustive list of rights was possible, and the danger of a non-exhaustive list was that any rights that were not identified "would be forfeited to the federal government."[3] Ultimately, the Anti-Federalists' position succeeded and the Constitution's ratification became dependent upon the inclusion of individual rights.[4] These rights were packaged as amendments, and James Madison's initial drafts of the amendments were, after cursory edits, passed within a few months.[5] The first eight of these amendments identified specific guaranteed rights.[6] However, the Ninth

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1. Joseph F. Kadlec, *Employing the Ninth Amendment to Supplement Substantive Due Process: Recognizing the History of the Ninth Amendment and the Existence of Nonfundamental Unenumerated Rights*, 48 B.C. L. REV. 387, 396 (2007).

2. Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 239 (1983).

3. *Id.* at 240.

4. Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 66 TEMP. L. REV. 361, 364 (1993).

5. *Id.* at 364–65.

6. *See* U.S. CONST. amend. I; U.S. CONST. amend. II; U.S. CONST. amend. III; U.S. CONST. amend. IV; U.S. CONST. amend. V; U.S. CONST. amend. VI; U.S. CONST. amend. VII; U.S. CONST. amend. VIII.

Amendment provided citizens additional rights that were not guaranteed in the preceding amendments.[7]

This Article addresses these non-enumerated rights by building upon Christopher Schmidt's three-part test for identifying Ninth Amendment rights. Specifically, this Article suggests judges should look to state supreme court decisions as persuasive authority when determining whether unenumerated rights exist. This interpretation will be referred to as the "supplemented Schmidt proposal." To do this, it will first provide background on the Ninth Amendment, the ways in which the Court currently thinks about unenumerated rights, Christopher Schmidt's Ninth Amendment interpretation, the Court's use of international law as persuasive authority when evaluating the Eighth Amendment, court politicization, the *Hodes* decision and Kansas's abortion politics, and a theory of constitutional modalities forwarded by Philip Bobbitt. Second, it will utilize Bobbitt's modalities to argue the supplemented Schmidt proposal avoids the limitations of other Ninth Amendment and unenumerated rights theories. Third, the supplemented Schmidt proposal will be applied to *Hodes* to illustrate how it might operate if accepted by courts. Fourth, two counterarguments will be entertained and ultimately rebutted.

II. BACKGROUND

A. Ninth Amendment

The Ninth Amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[8] It has long "been virtually ignored by the United States Supreme Court, and no decisions of the Court have directly relied upon it."[9]

1. Interpretations

Unsurprisingly, courts and scholars have interpreted the Ninth Amendment in a variety of ways, but two broad interpretations dominate the debate.[10] First, some understand the Ninth Amendment to be "a mere

7. Caplan, *supra* note 2, at 260.

8. U.S. CONST. amend. IX.

9. Jeffrey D. Jackson, *The Modalities of the Ninth Amendment: Ways of Thinking About Unenumerated Rights Inspired by Philip Bobbitt's Constitutional Fate*, 75 MISS. L.J. 495, 496 (2006).

10. Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305, 312 (1987).

declaration of a constitutional truism" that has no "enforceable content[.]"[11] This understanding is best illustrated by Judge Robert Bork's comments before the Senate Judiciary Committee during his United States Supreme Court confirmation hearings, in which he analogized the Ninth Amendment to an inkblot.[12] He posed a hypothetical situation where there is only one copy of the Constitution and an amendment is included "that says 'Congress shall make no' and then there is an ink blot and you cannot read the rest . . . ."[13] Bork argued that in this hypothetical no judge can make up the meaning of the text below the inkblot.[14] Even he, an originalist, did not know what to do with the Ninth Amendment.[15] The second broad interpretation of the Ninth Amendment suggests the Ninth Amendment is an open-ended repository for rights.[16] This interpretation generally takes two forms: one as "a modern construct of activist egalitarians" and the other emphasizing "natural law theories" espoused by various philosophical thinkers.[17]

2. Supreme Court Cases

Justice Story's dissent in *Houston v. Moore* is the first "discovered discussion of the Ninth Amendment by a Supreme Court Justice."[18] The dissent understood "the Ninth Amendment as limiting the interpreted scope of federal power in order to preserve state regulatory autonomy."[19] As is the case of Justice Story's dissent, most contemporary Ninth Amendment references exist in concurrences or dissents. For example, the "modern debate over the Ninth Amendment" began with Justice Goldberg's concurrence in *Griswold v. Connecticut*.[20]

In *Griswold*, the Court considered the constitutionality of two Connecticut statutes proscribing physicians from providing contraception.[21] The plaintiffs were physicians who had been charged

11. *Id.* at 316.

12. Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 10 (2006).

13. *Id.*

14. *Id.*

15. *Id.*

16. Massey, *supra* note 10, at 312.

17. *Id.*

18. Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597, 614 (2005) (outlining three historical phases of Ninth Amendment decisions leading up to 1965); Houston v. Moore, 18 U.S. 1, 49 (1820) (Story, J., dissenting) (Justice Story misnamed the Ninth Amendment as the Eleventh Amendment).

19. Lash, *supra* note 18, at 620; *see Moore*, 18 U.S. at 49 (Story, J., dissenting).

20. Lash, *supra* note 18, at 710.

21. 381 U.S. 479, 480 (1965).

under these statues for giving "information, instruction, and medical advice to *married persons* as to the means of preventing conception."[22] The Court analyzed the issue through a Fourteenth Amendment Due Process lens, and ultimately struck down the statutes because "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[23] One right that derives from these penumbras is the right to marital privacy.[24] Analogizing the statutes to police searches through marital bedrooms, the Court held the statutes were "repulsive to the notions of privacy surrounding the marriage relationship."[25] Justice Goldberg's concurrence, however, went a step further and suggested "the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments."[26] Accordingly, Justice Goldberg concluded that the right to marital privacy was a right guaranteed by the Ninth Amendment.[27]

Two additional United States Supreme Court cases have followed a similar pattern. In *Palmer v. Thompson*, the Court evaluated Jackson, Mississippi's decision to close all public pools after being ordered to desegregate.[28] Plaintiffs argued this was a violation of the Equal Protection Clause, but the Court concluded the closures were constitutional and done for purposes of "preserv[ing] peace and order and because the pools could not be operated economically on an integrated basis."[29] In his dissent, Justice Douglas suggested "the right of the people to education or to work or to recreation by swimming or otherwise" and "the right to pure air and pure water" may be provided by the Ninth Amendment.[30] In *Troxel v. Granville*, the Court reviewed a Washington statute related to visitation rights.[31] The plaintiffs filed a petition under the statute to "obtain visitation rights with" their two granddaughters, which the mother of the granddaughters opposed.[32] The Washington Supreme Court held—and the Supreme Court affirmed—that the statute "unconstitutionally interferes with the fundamental right of parents to rear

22. *Id.*
23. *Id.* at 484.
24. *Id.* at 485–86.
25. *Id.*
26. *Id.* at 488 (Goldberg, J., concurring).
27. *Id.* at 499 (Goldberg, J., concurring).
28. 403 U.S. 217, 218–19 (1971).
29. *Id.* at 219.
30. *Id.* at 233–34 (Douglas, J., dissenting).
31. 530 U.S. 57, 60 (2000).
32. *Id.* at 61.

their children."[33] In his dissent, Justice Scalia argued "a right of parents to direct the upbringing of their children" is an unenumerated right under the Ninth Amendment.[34] Though these cases illustrate that Justices have pondered the parameters of the Ninth Amendment, the limited nature of these considerations demonstrates the Court's underdeveloped jurisprudence concerning the unenumerated rights the amendment guarantees.[35]

B. Other Avenues for Identifying Unenumerated Rights

Due Process is the primary vehicle the Court has chosen to identify unenumerated rights.[36] From 1890 to 1937 the United States Supreme Court, during what became known as the "Lochner era," regularly "held that state legislation designed to protect workers against growing capitalistic interests was unconstitutional because it interfered with the liberty of contract protected by the Due Process Clause."[37] This "economic substantive due process" doctrine eventually fell into disfavor, but the Court's search for unenumerated, fundamental rights continued leading to a long line of decisions identifying non-explicit rights using an appeal to tradition.[38]

The tradition-based approach is best exemplified by *Washington v. Glucksberg*.[39] The test used by the Court for unenumerated rights "is essentially a fundamental rights test."[40] In *Glucksberg*, the Court found that a Washington statutory prohibition against assisting a suicide did not violate the Fourteenth Amendment.[41] That is, "the plaintiff-patients in the case had no right to physician-assisted suicide, nor did the plaintiff-physicians have a right to assist them."[42] The *Glucksberg* Court outlined a two-part test for identifying unenumerated rights.[43] First, the right must

33. *Id*. at 60, 63.

34. *Id*. at 91 (Scalia, J., dissenting).

35. *See* Jackson, *supra* note 9, at 524.

36. *See generally* Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. BALT. L. REV. 169 (2003) (outlining the history of using the Fourteenth Amendment's Due Process to identify fundamental rights).

37. Adam B. Wolf, *Fundamentally Flawed: Tradition and Fundamental Rights*, 57 U. MIAMI L. REV. 101, 108 (2002).

38. *Id*. at 108–10.

39. 521 U.S. 702 (1997).

40. Kadlec, *supra* note 1, at 391.

41. 521 U.S. at 705–06.

42. Kadlec, *supra* note 1, at 391.

43. 521 U.S. at 720–21.

be "deeply rooted in this Nation's history and tradition."[44] Second, there must be a "careful description" defining the right.[45] Once these two requirements are met, the Court will then "require[] the infringing legislation to be narrowly tailored to achieve a compelling government interest."[46] Critics have attacked the tradition-based approach to identifying unenumerated rights on multiple grounds.[47] One specific criticism is that "[t]he Due Process Clause often looks backward" because of its emphasis on history.[48]

Planned Parenthood of Southeastern Pennsylvania v. Casey provides a second avenue for identifying unenumerated rights.[49] Rather than relying on tradition, the Court noted it should "exercise that same capacity which by tradition courts always have exercised: reasoned judgment."[50] The reasoned judgment test requires the Court to "identify rights independently, through a process that amounts to a type of philosophical analysis or political-moral reasoning."[51] The reasoned judgment test is essentially a balancing test, that weighs the importance of the proposed liberty interest against any "competing governmental concerns . . . ."[52] Using this test, the *Casey* Court concluded "[t]he woman's right to terminate her pregnancy before viability . . . is a rule of law and a component of liberty we cannot renounce."[53] The reasoned judgment test, however, has an anti-majoritarian element because "the Court is free to invalidate legislation, and thus to repudiate the policymaking of elected officials, based on the Court's own political-moral judgment."[54]

The Court has embraced both the tradition-based test and the reasoned judgment test.[55] However, a third test may be implicit in the *Lawrence v. Texas* decision.[56] In *Lawrence*, the Court struck down a Texas statute criminalizing same-sex sexual conduct.[57] The Court relied on "an

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44. *Id.* (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)).

45. *Id.* at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

46. Kadlec, *supra* note 1, at 391.

47. *See, e.g.*, Wolf, *supra* note 37 (outlining six criticisms of the tradition-based approach to fundamental rights).

48. Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988).

49. 505 U.S. 833 (1992).

50. *Id.* at 849.

51. Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 66 (2006).

52. *Id.* at 66–67.

53. *Casey*, 505 U.S. at 871.

54. Conkle, *supra* note 51, at 112.

55. *Id.* at 133.

56. Conkle, *supra* note 51, at 66–67 (citing Lawrence v. Texas, 539 U.S. 558 (2003)).

57. 539 U.S. at 579, 562.

emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[58] This has led one scholar to argue for a third test where "substantive due process rights should be limited to rights that are supported not only by the Supreme Court's political-moral judgment but also by an objective determination of contemporary national values."[59] This "national values" test, however, is not a "developed theory . . . in the Supreme Court's substantive due process decisions" and remains a scholarly interpretation.[60]

In addition to creating new rights, the Court has also expanded who has access to particular rights. One example is *Loving v. Virginia*.[61] In *Loving*, the Court struck down a Virginia statute that prevented interracial marriage.[62] The Court noted the Virginia statute violated the plaintiff's "freedom to marry," which the Court intimated "ha[d] long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[63] The Court continued this expansion in *Obergefell v. Hodges*.[64] There, the Court held that the fundamental right to marry also applies to same-sex couples.[65] When making decisions like these, the tradition-based, reasoned judgment and national values tests have each been used or implied, exemplifying the diversity of Fourteenth Amendment doctrine.

C. Christopher Schmidt's Ninth Amendment Interpretation

Though the substantive due process theories outlined above are the primary tests currently used to identify unenumerated rights, scholarly interpretations of the Ninth Amendment propose methodologies to do the same. Christopher Schmidt has argued the Ninth Amendment is a better vehicle for unenumerated rights decisions because the substantive due process doctrine developed by the Court does not have "textual constitutional support" leading "judges to limit the scope of rights granted under it."[66] That is, the doctrine of substantive due process relies on tradition and history, thereby creating a "weak and unsatisfactory

58. *Id.* at 572.
59. Conkle, *supra* note 51, at 68.
60. *Id.* at 123–24.
61. 388 U.S. 1 (1967).
62. *Id.* at 2.
63. *Id.* at 12.
64. 576 U.S. 644 (2015).
65. *Id.* at 681.
66. Schmidt, *supra* note 36, at 189.

mechanism for the protection of personal freedom."[67] By contrast, the text of the Ninth Amendment suggests that unenumerated rights are retained, and is also vague enough "to apply to current legal disputes . . . ."[68] With these ideas in mind, Schmidt proposes a three-step test to determining unenumerated rights using the Ninth Amendment. First, judges must determine whether the proposed right is "governed by any other provision of the Constitution[.]"[69] If it is not, then step two asks judges to determine, by a preponderance of evidence, "whether the alleged right was considered a right retained by the people at the enactment of the Constitution, or if it has evolved into a right that is currently retained by the people."[70] Third, judges must determine the appropriate standard of review.[71] If the Court finds a fundamental right, then strict scrutiny should be applied.[72]

D. Eighth Amendment and International Law as Persuasive Authority

The Eighth Amendment proscribes the use of "cruel and unusual punishment."[73] Though *Marbury v. Madison*[74] made it clear the United States Supreme Court has final authority when determining the meaning of the Constitution, the Court has, at times, looked at domestic foreign law and international law as persuasive authority when interpreting the Eighth Amendment.[75] Justice Ginsberg, Justice Breyer, and Justice O'Connor spoke publicly in support of looking to non-domestic sources of law to interpret the United States Constitution, while Justice Scalia rejected the idea.[76]

In particular, the United States Supreme Court has taken non-domestic sources of law into account when evaluating Eighth Amendment challenges involving juveniles. For example, in *Thompson v. Oklahoma*, the Court held that a death sentence imposed on an individual who was fifteen-years-old at the time of the crime violated the Eighth Amendment.[77] Among other reasons for this holding, the Court noted that

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67. *Id.*
68. *Id.* at 195.
69. *Id.* at 215.
70. *Id.*
71. *Id.*
72. *Id.* at 215, 219–20.
73. U.S. CONST. amend. VIII.
74. 5 U.S. 137, 178 (1803).
75. *See, e.g.*, Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 846–68 (2005) (tracing the history of modern United States Supreme Court criminal law decisions using non-domestic sources of law).
76. *Id.* at 749–50.
77. 487 U.S. 815, 818–19, 838 (1988).

"other nations that share our Anglo-American heritage" as well as "leading members of the Western European community" support the conclusion that "it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense . . . ."[78] Similarly, in *Roper v. Simmons* the United States Supreme Court held that any death penalty sentence imposed on individuals that committed the crime when they were under eighteen years old violated the Fourteenth and Eighth Amendments.[79] The Court once again relied on non-domestic sources of law, noting "the same treaties identified in the Thompson majority . . . and added to them the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child."[80] Though non-domestic law has been used persuasively in other contexts, the Eighth Amendment represents "the most frequent use of international law" in contemporary judicial decisions.[81]

E. Court Politicization

The relationship between federal court decisions and political parties is complex. Scholars conducting historical analyses of court polarization have noted "there is little evidence of partisan division within the Court" prior to 1937.[82] Court decisions between 1941 and 1944 nearly were divided along party lines, and many of these cases were related to civil rights.[83] In 1941, the Justices began dissenting more frequently, and dissenting and concurring opinions became frequent.[84] Beginning with the Reagan administration, "presidents have increasingly paid attention to ideology in Supreme Court appointments."[85] This has occurred in a context of increasing political polarization that has prompted the emergence of "rival liberal and conservative social networks" that advise presidents on identifying "predictably liberal or conservative nominees."[86] Moreover, court appointees are less likely to be centrist than in the past.[87] Both elections and appointments of judges tend to skew toward "more

78. *Id.* at 830.

79. 543 U.S. 551, 578 (2005).

80. Rex D. Glensy, *The Use of International Law in U.S. Constitutional Adjudication*, 25 EMORY INT'L L. REV. 197, 239–40 (2011) (citing *Roper*, 543 U.S. at 575–77).

81. *Id.* at 237.

82. Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 310 (2016).

83. *Id.* at 313–14.

84. *Id.* at 314.

85. *Id.* at 361.

86. *Id.*

87. *Id.* at 317.

extreme candidates who reflect the extreme positions of polarized political actors."[88] These trends do not only exist in the United States Supreme Court, but can be found to lesser degrees in both Federal Courts of Appeals and Federal District Court judges.[89] As a consequence, presidential elections are now increasingly important when predicting how federal courts will rule.[90]

F. Hodes and Kansas's Abortion Context

Kansas has a history of abortion-related political activity including protests that ultimately changed the state's political landscape.[91] Leading up to the 1990s, "Kansas was one of the least abortion-restrictive states in the country."[92] This prompted the emergence of what came to be known as the Summer of Mercy.[93] Over the course of forty-six days in 1991, thousands of anti-abortion protestors descended upon Wichita, Kansas.[94] The protesters were there to oppose Dr. George Tiller, one of the few doctors in the country who performed "abortions in the final weeks of pregnancies."[95] The campaign led to almost 2,700 arrests and a shift in Kansas's political environment.[96] In 2009, Tiller was murdered by a man who held pro-life views.[97] Governor Sam Brownback, first elected in 2010, "made anti[-]abortion legislation the hallmark of his two terms in office . . . ."[98] It is within this backdrop that the Kansas Supreme Court

88. Tonja Jacobi & Matthew Sag, *The New Oral Argument: Justices as Advocates*, 94 NOTRE DAME L. REV. 1161, 1186 (2019).

89. Herbert M. Kritzer, *Polarized Justice? Changing Patterns of Decision-Making in the Federal Courts*, 28 KAN. J.L. & PUB. POL'Y 309, 313–14 (2019).

90. Devins and Baum, *supra* note 82, at 301–02.

91. *See, e.g.*, Suzanne Perez Tobias, *Abortion Activists Set to Return to Wichita to Mark 'Summer of Mercy' Anniversary*, WICHITA EAGLE (Mar. 12, 2016, 3:37 PM), https://www.kansas.com/news/local/article65681017.html [https://perma.cc/BZG8-7LBY].

92. Dan Margolies & Celia Llopis-Jepsen, *Kansas Supreme Court Rules State Constitution Protects Right to Abortion*, NPR (Apr. 26, 2019, 10:52 AM), https://www.npr.org/2019/04/26/717449336/kansas-supreme-court-rules-state-constitutionprotects-right-to-abortion [https://perma.cc/YJE8-6N6D].

93. Tobias, *supra* note 91.

94. *Id.*; *Brownback Ties 'Summer of Mercy' Anti-Abortion Effort to the Fight Against Slavery*, KANSAS CITY STAR (Jan. 15, 2014, 10:03 PM), https://www.kansascity.com/news/local/news-columns-blogs/thebuzz/article336549/Brownbackties-'Summer-of-Mercy'-anti-abortion-effort-tothe-fight-against-slavery.html [https://perma.cc/3EDC-3WZB].

95. KANSAS CITY STAR, *supra* note 94.

96. Tobias, *supra* note 91.

97. KANSAS CITY STAR, *supra* note 94.

98. Emily Wax-Thibodeaux & Annie Gowen, *Kansas Supreme Court Rules State Constitution Protects Abortion Rights, a Decision That Could Lead to Challenges in Other States*, WASH. POST (Apr. 26, 2019, 1:05 PM), https://www.washingtonpost.com/national/kansas-supreme-court-rules-state-constitution-protects-abortion-rights-bars-law-that-aimed-to-ban-procedure/2019/04/26/54361c4a-6834-11e9-8985-4cf30147bdca_story.html [https://perma.cc/9DF6-7GR5].

decided *Hodes & Nauser, MDS, P.A. v. Schmidt*[99] in 2019.

The Kansas Supreme Court's landmark decision in *Hodes* held that Kansas's Bill of Rights guaranteed a person's right to have an abortion.[100] The case revolved around a 2015 piece of legislation passed by the Kansas Legislature.[101] The bill, S.B. 95, "prohibit[ed] physicians from performing a specific abortion method referred to in medical terms as Dilation and Evacuation (D & E) except" to save the life of the individual or prevent extensive and irreparable physical injury to the individual.[102] Hodes and Nauser, physicians who provided D & E procedures, challenged this legislation for violating "sections 1 and 2 of the Kansas Constitution Bill of Rights because they infringe on inalienable natural rights, specifically, the right to liberty."[103] Additionally, they sought a temporary injunction to stop the bill from being implemented until the case worked its way through the courts.[104]

The State made two arguments in defense. First, even though *Roe v. Wade* held a woman had the right "to decide whether to continue her pregnancy" under the United States Constitution, the State argued there was no analogous right found in the Kansas Constitution.[105] Second, the State argued even if the Kansas Constitution guaranteed that right, S.B. 95 would not violate it because the bill does not impose an undue burden according to *Planned Parenthood v. Casey*.[106]

At the trial court level, the temporary injunction was granted, and the State immediately appealed.[107] The Kansas Court of Appeals, "sitting en banc, split 6-1-7."[108] With this split in place, the temporary injunction was not dismissed and the Kansas Supreme Court "granted the State's petition for review . . . ."[109] The Kansas Supreme Court's task was to evaluate "whether the trial court erred in granting a temporary injunction."[110] This required the Kansas Supreme Court to determine if the plaintiff physicians would have a substantial likelihood of prevailing on the merits.[111] In the

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99. 440 P.3d 461 (Kan. 2019).
100. *Id.* at 502.
101. *Id.* at 466.
102. *Id.*
103. *Id.* at 466–67.
104. *Id.* at 467.
105. *Id.*; *see* Roe v. Wade, 410 U.S. 113, 153 (1973).
106. *Hodes*, 440 P.3d at 467; *see* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992).
107. *Hodes*, 440 P.3d at 468.
108. *Id.*
109. *Id.* at 469.
110. *Id.*
111. *Id.*

context of *Hodes*, this meant the Kansas Supreme Court needed to determine whether the Kansas Constitution's Bill of Rights protected a woman's right to an abortion and whether S.B. 95 violated the right.[112]

The court looked to the language of the Kansas Constitution's Bill of Rights. Section 1 reads: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness."[113] The court noted that Kansas's Bill of Rights includes the language "inalienable natural rights," which is absent from the Fourteenth Amendment of the United States Constitution.[114] Because of this, the court concluded the Kansas Constitution Bill of Rights "acknowledges rights that are distinct from and broader than the United States Constitution" including "the right of personal autonomy" that "allows a woman to make her own decisions regarding her body, health, family formation, and family life—decisions that can include whether to continue a pregnancy."[115] The court came to this conclusion by evaluating historical evidence from the Wyandotte Convention, prior Kansas case law, persuasive authority from other states, and the writings of John Locke.[116]

Having established this fundamental right, the court then concluded that a higher level of scrutiny was required than the undue burden test announced in *Casey*.[117] Specifically, the court held that a strict scrutiny analysis should be applied when evaluating any potential violation of a fundamental right outlined in the Kansas Constitution.[118] S.B. 95 failed the strict scrutiny test because proscribing D & E procedures would require women to undergo more dangerous procedures, thereby "delay[ing] or completely prevent[ing] the exercise of an inalienable natural right."[119] The State had not shown any compelling interest to delay or preclude this right nor had it shown that S.B. 95 was narrowly tailored to achieve that interest.[120] Having therefore determined that the plaintiffs would have a substantial likelihood of prevailing on the merits, the court did not find "it necessary to remand this case to the trial court for new findings or additional legal analysis related to the temporary injunction phase."[121]

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112. *Id.*
113. *Id.* at 472 (citing KAN. CONST. B. of R. § 1).
114. *Id.* at 471–72.
115. *Id.* at 471.
116. *Id.* at 472–83.
117. *Id.* at 497–98.
118. *Id.* at 497–99.
119. *Id.* at 498.
120. *Id.* at 502–03.
121. *Id.* at 501.

G. Bobbitt's Modalities

Not all constitutional arguments look the same, and the same holds true for arguments surrounding the Ninth Amendment. Constitutional scholar Philip Bobbitt, in his 1982 book, *Constitutional Fate*, laid out a typology of arguments that scholars and judges use when analyzing constitutional questions.[122] He defines constitutional modalities as "the ways in which legal propositions are characterized as true from a constitutional point of view"[123] and believes that "[t]he various arguments illustrated often work in combination."[124] Bobbitt outlines six modalities, which Jeffrey D. Jackson, a professor at Washburn University School of Law, links to the Ninth Amendment in his scholarship.[125]

1. Historical Modality

These "arguments depend on a determination of the original understanding of the constitutional provision to be construed."[126] Bobbitt notes the unique status of historical arguments in constitutional interpretation.[127] He suggests it is analogous to contemporary physicists probing the work of Democritus to understand "problems associated with electron spin."[128] The justification for historical arguments comes from an understanding "that the Constitution *bound* government and that the People had therefore devised a construction by which they could enforce its limits and rules."[129]

The difficulty, of course, arises when determining the true original meaning of the Constitution.[130] Scholars have proposed two historical arguments regarding the Ninth Amendment. First, state law theory suggests "the rights the Framers and Ratifiers meant to be retained by the people were the rights which they had possessed under state constitutions and laws."[131] Jackson notes that this interpretation's set of rights would not include "any rights which states added to their constitutions after the

122. *See generally* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).
123. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12 (1991).
124. BOBBITT, *supra* note 122, at 8.
125. *See* Jackson, *supra* note 9, at 499–502.
126. BOBBITT, *supra* note 122, at 9.
127. *See id.*
128. *Id.*
129. *Id.* at 10.
130. *See id.*
131. Jackson, *supra* note 9, at 507.

Framing . . . ."[132] Second, the natural rights historical argument suggests Ninth Amendment rights can be found by investigating "the works of Edward Coke, John Locke, and William Blackstone," philosophers and theorists writing about natural law that the Founders would likely have encountered.[133]

2. Textual Modality

These arguments are "drawn from a consideration of the present sense of the words of the provision."[134] Bobbitt suggests these arguments are legitimate because they "rest on a sort of ongoing social contract, whose terms are given their contemporary meanings continually reaffirmed by the refusal of the People to amend the instrument."[135] Textual arguments about the Ninth Amendment are generally unhelpful because a reading of the Ninth Amendment's text would lead a reader to conclude there are additional rights, but a textual analysis would shed no light on the character of those rights.[136] In essence, the Ninth Amendment "expressly directs the person searching for those rights to look outside the text to find them."[137]

3. Doctrinal Modality

Doctrinal arguments "assert[] principles derived from precedent or from judicial or academic commentary on precedent."[138] Doctrinal arguments are both more precise and more general than textual arguments.[139] They are more precise because they focus on a particular line of cases or reasoning, rather than the different lines of caselaw emanating from particular words or phrases.[140] They are also more general because they rely on *stare decisis*, which is much broader than any particular constitutional question.[141] Ninth Amendment doctrinal arguments cannot rely on caselaw due to the "paucity of the Court's Ninth Amendment jurisprudence."[142] However, the United States Supreme

132. *Id.* at 508.
133. *Id.* at 511.
134. BOBBITT, *supra* note 122, at 7.
135. *Id.* at 26.
136. Jackson, *supra* note 9, at 517.
137. *Id.*
138. BOBBITT, *supra* note 122, at 7.
139. *Id.* at 43.
140. *Id.*
141. *Id.*
142. Jackson, *supra* note 9, at 523.

Court has recognized non-enumerated rights "under the rubrics of substantive due process, equal protection, and the Privileges or Immunities Clause."[143] Accordingly, a Ninth Amendment doctrinal argument would use the tests developed in these cases because "there is a significant overlap between the rights protected by substantive due process and the rights retained" through Ninth Amendment interpretations positing the existence of unenumerated rights.[144]

4. Prudential Modality

Prudential arguments are "actuated by the political and economic circumstances surrounding the decision."[145] They are fundamentally consequentialist arguments that "balance the necessity of taking an action against its costs."[146] In the context of the Ninth Amendment, prudential arguments suggest "the Court should balance the reasons for protecting a purported unenumerated right with the costs" of that protection.[147] Factors that may influence this balance include public support for the right and concerns about how this right would be applied.[148] The primary problem with prudential arguments is that the case-by-case nature of prudential balancing means "it is not possible to determine with specificity what kind of package of rights" should emerge because of the complexity of social currents at the time of analysis.[149]

5. Structural Modality

These "arguments are inferences from the existence of constitutional structures and the relationships which the Constitution ordains among those structures."[150] Like textual arguments, structural arguments look to the text of the Constitution.[151] However, rather than attempting to understand rights or powers, structural arguments identify how the structures of given rights or powers relate to one another.[152] Bobbitt identifies the steps to a structural argument.[153] The first step requires "an

143. *Id.* at 524.
144. *Id.* at 525; *see supra* Part II(B).
145. BOBBITT, *supra* note 122, at 61.
146. Jackson, *supra* note 9, at 533.
147. *Id.*
148. *Id.*
149. *Id.* at 534.
150. BOBBITT, *supra* note 122, at 74.
151. *Id.* at 80.
152. *Id.*
153. BOBBITT, *supra* note 123, at 16.

uncontroversial statement about a constitutional structure" to be introduced.[154] Next, "a relationship is inferred from this structure[.]"[155] Then, "a factual assertion about the world is made" followed by "a conclusion . . . that provides the rule in the case."[156] In the context of the Ninth Amendment, some structural arguments look to "the structure created by the enumerated rights in the Bill of Rights" and conclude that this structure infers the existence of unenumerated rights.[157]

6. Ethical Modality

An ethical argument is a "constitutional argument whose force relies on a characterization of American institutions and the role within them of the American people."[158] Specifically, "[i]t is the character, or *ethos*, of the American polity that is advanced in ethical argument as the source from which particular decisions derive."[159] Bobbitt is careful to note that this is not a moral argument.[160] A moral argument would rely on a metric of good or bad that exists outside of the American culture.[161] Ethical arguments, instead, "do not claim that a particular solution is right or wrong in any sense larger than that [] solution comports with" how members of the American political community "have chosen to solve political and customary constitutional problems."[162] In the context of the Ninth Amendment, an ethical argument would not identify a particular "bundle of rights" as the Ninth Amendment's substance, but rather would point scholars and judges in the right direction by requiring each Ninth Amendment right be grounded in America's *ethos*.[163] For example, one scholar's Ninth Amendment interpretation relies on "the noblest of the concepts to which our nation is committed" including "liberty, proportionality, justice, and the pursuit of happiness . . . ."[164]

III. ANALYSIS

This Article expands and supplements Christopher Schmidt's Ninth

154. *Id.*
155. *Id.*
156. *Id.*
157. Jackson, *supra* note 9, at 538.
158. BOBBITT, *supra* note 122, at 94.
159. *Id.*
160. *Id.*
161. *Id.* at 94–95.
162. *Id.*
163. Jackson, *supra* note 9, at 542.
164. *Id.* at 541.

Amendment interpretation. Unenumerated rights should be determined using Schmidt's three-part test. Once all the current constitutional doctrines have been exhausted, judges should turn to the Ninth Amendment and look to state supreme court decisions as persuasive authority when determining whether unenumerated rights exist. This section will utilize Bobbitt's six modalities to argue this understanding of unenumerated rights is preferable. Once these arguments are explicated, Schmidt's supplemented theory will be applied to *Hodes* and two counterarguments will be entertained and ultimately rebutted.

A. Historical Argument

The state law theory and the natural rights theory are flawed. State law theory limits the Ninth Amendment's substance to the rights protected by state constitutions and statutes during the Founding Era.[165] It echoes the Anti-Federalist argument that, without explicitly identifying the rights already existing in states, those rights would cease to be enforceable.[166] While scholars have taken different positions on whether these explicitly state-originating rights would be enforceable against the federal government, the outcome of that debate is less important than the broader concern that the state law theory creates a stagnant Ninth Amendment that is tied exclusively to the past.[167] The supplemented Schmidt proposal avoids this problem. First, it assumes unenumerated rights exist in the Ninth Amendment beyond state rights in the 1700s. Second, the proposal instructs judges to determine whether the right in question was believed to be retained by the people at the time of the Founding or, alternatively, is currently believed to be retained by the people.[168] In this way, it could capture the rights identified in the state law theory as long as those rights have not fallen into disfavor as time went on.

The second historical interpretation, the natural rights theory, suggests the Ninth Amendment protects rights that were inherent prior to any man-made political document. However, this historical interpretation of the Ninth Amendment is concerningly abstract because there is no consensus that governs which natural rights should inform Ninth Amendment discussions.[169] The supplemented Schmidt proposal does not militate against using the natural law theorists that early American thinkers were familiar with. Rather, it would allow state supreme courts to inform Ninth

165. *See supra* Part II(G)(1).
166. Jackson, *supra* note 9, at 507.
167. *Id.* at 508–10.
168. *See supra* Part II(C).
169. *See* Jackson, *supra* note 9, at 516.

Amendment rights, which the Kansas Supreme Court did by looking to Blackstone, Locke, and Coke in *Hodes*.[170] That is, natural rights remain a part of the decision-making process. Instead of having judges interpreting the United States Constitution peer into the complexity of historical research and moral theory, natural rights analysis is pushed down one layer into the components that are viewed as factors for determining whether, by a preponderance of evidence, a right is retained by the people.

B. Textual Argument

The supplemented Schmidt proposal is authentic to the text of the Ninth Amendment. A facial reading of the Ninth Amendment seems to indicate there are additional rights that are not enumerated in the preceding Amendments.[171] As Schmidt has argued, the Ninth Amendment's text is vague enough to provide wide latitude in interpreting what precisely is included.[172] Though the text does not make the amendment's substance explicit, it also does not preclude state supreme court decisions as a factor. Unfortunately, strictly textual arguments cannot go much further than this in the Ninth Amendment context and it is likely that any Ninth Amendment interpretation will need to rely more heavily on other modalities.

C. Doctrinal Argument

There are three doctrinal arguments supporting the supplemented Schmidt proposal. First, this proposal adheres to Supreme Court precedent. Under *Marbury v. Madison*, the United States Supreme Court is the ultimate arbiter of the Ninth Amendment's substance.[173] The Court will first look to its own doctrines and established case law. Then, if an unenumerated right cannot be found using those frameworks, the Court will move on to evaluating, as persuasive authority, additional sources of law including state supreme court decisions. Focusing on state supreme court decisions is particularly useful because state court judges utilize the same forms of reasoning, support of prior precedent, and reliance on briefs to think about fundamental rights. Because of this, state supreme court decisions should be afforded more weight than other forms of persuasive authority when judges consider the existence of fundamental rights.

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170. Hodes & Nauser, MDS, P.A. v. Schmidt, 440 P.3d 461, 480–81 (Kan. 2019); *see supra* Part II(F).

171. *See supra* Part II(G)(2).

172. Schmidt, *supra* note 36, at 190–94; *see supra* Part II(C).

173. 5 U.S. 137, 178 (1803); *see supra* Part II(D).

Justice Brandeis's dissent in *New State Ice Co. v. Liebmann* noted states should "serve as a laboratory" for "novel social and economic experiments . . . ."[174] Similarly, the supplemented Schmidt proposal suggests that state supreme courts should serve as laboratories of constitutional thinking. As new issues emerge that involve moral, social, and political calculations, each state will inevitably grapple with the issue's implications. They will think through their own state-based precedents and also be wary of binding federal law. Each state will then, after taking these legal considerations as well as cultural and context-based considerations into account, determine whether or not the emerging issue should be considered a constitutionally protected right. Under this Ninth Amendment interpretation, the United States Supreme Court retains its ability to review state interpretations of federal law, as required by *Martin v. Hunter's Lessee*.[175] The supplemented Schmidt proposal furthers this review by also using these decisions and arguments as persuasive authority when determining the Ninth Amendment's substance.

Second, an additional precedential argument can be made regarding the United States Supreme Court's Eighth Amendment decisions. Just as the United States Supreme Court has used the decisions of international courts as persuasive authority when interpreting the Eighth Amendment, the United States Supreme Court should use state supreme court decisions when interpreting the Ninth Amendment.[176] In both cases, the Court can take advantage of the experience, particularized knowledge, and reasoning of other judicial bodies. The Court is never bound by these authorities, but state supreme court decisions are potentially more useful because they are bound by prior federal cases. That is, state supreme courts operate in the legal environment created by United States Supreme Court decisions. International and foreign law, on the other hand, exist outside of that framework.

Third, the two tests embraced by the United States Supreme Court for determining unenumerated rights present problems that Schmidt's supplemented Ninth Amendment interpretation avoid. First, the tradition-based test makes the evolution of rights difficult. Its backward-looking focus uses the past's moral and social standards as a rubric for the emergence of new rights.[177] The supplemented Schmidt proposal is not bound by the past. Step two of the test allows the Court to identify fundamental rights that it believes, by a preponderance of evidence, the

174. 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

175. 14 U.S. 304, 362 (1816) (holding the United States Supreme Court could reverse a Virginia court interpretation of a treaty).

176. *See supra* Part II(D).

177. *See supra* notes 47–48 and accompanying text.

people retained at the Founding. Moreover, step one relies on prior cases determining fundamental rights. However, it is also explicitly open to new developments and decisions by allowing for fundamental rights that have evolved. One underlying assumption of the supplement to Schmidt's proposal is that state supreme courts will, over time, begin to take positions on new rights. That is not to say that historical tradition is rejected. For example, in *Hodes* the Kansas Supreme Court relied on Kansas history when evaluating the issues presented.[178] The fundamental difference is that the past is respected, but not dispositive.

Second, the reasoned judgment test outlined in *Casey* is equally as problematic. In essence, the test asks nine lawyers to make a judgment about the fundamental rights of every American.[179] This is particularly concerning when taking into account court politicization.[180] A Justice's balancing of the proposed right against government interests is likely influenced by partisan views.[181] This concern is accentuated by the fact that presidents selecting justices not only choose candidates with a similar set of political preferences, but also justices that are more zealous and extreme.[182] The consequence of court politicization on the reasoned judgment test is a set of fundamental rights that derive from the reasoned judgment of political actors rather than objective decision makers. A three-part test that considers state supreme court decisions as persuasive authority when understanding the Ninth Amendment cuts back against this trend. While it is true that the United States Supreme Court will likely always oscillate from one pole to the other, there will likely be a state supreme court with an ideological makeup counter to the United States Supreme Court at any given time.[183] State supreme court judges enter the position "through a variety of appointive and elective mechanisms[,]" each of which is influenced by the "dominant political values in the state . . . ."[184] Assuming the United States electorate remains politically divided, then it follows that some state supreme courts will skew liberal and others will skew conservative. A consequence of this diversity is that there will likely always be state supreme courts with a different ideological preference than the United States Supreme Court. The supplemented Schmidt proposal suggests these state supreme courts will potentially use

178. *See supra* note 116 and accompanying text.

179. *See supra* Part II(B).

180. *See supra* Part II(E).

181. Kritzer, *supra* note 89, at 343.

182. *See id.* at 343–44; *supra* Part II(E).

183. *See supra* Part II(E).

184. Sara C. Benesh & Wendy L. Martinek, *Quantitative Research: Context and Compliance: A Comparison of State Supreme Court and the Circuits*, 93 MARQ. L. REV. 795, 809–10 (2009).

reasoned judgment to think about rights in a different way than the Court, and it welcomes this diversity into the conversation, albeit as persuasive authority.

The third potential United States Supreme Court test related to unenumerated rights is the national values test hinted at in *Lawrence*.[185] However, this test runs into the same problems as the reasoned judgment test. It asks justices to use "reasoned judgment" to determine the national values.[186] The increasing politicization of the Court suggests that any attempt at an objective assessment of national values by the Court will be done through the political lens of the appointing President.[187] The national values test is laudable because it, like the supplemented Schmidt proposal, attempts to make sense of changing societal norms.[188] The problem with the national values test ultimately lies in the actor who measures the values. If the goal is to incorporate changing norms into constitutional protections, then allowing state supreme court decisions regarding natural rights to be persuasive authority regarding the Ninth Amendment's substance is a more all-encompassing strategy because state supreme courts understand the context, meaning, and salience of these issues better than justices on the United States Supreme Court could.[189]

D. Prudential Argument

The prudential argument for the supplemented Schmidt proposal answers the concern that there may come a time where rights that are believed to exist by a broad majority of the American population are not legally enforceable because of the United State Supreme Court's current doctrinal restrictions. In this scenario, citizens are deprived of an unenumerated right that is publicly supported. Though a right may not be federally protected, state supreme courts might determine that the right in question is afforded protection. Using the supplemented Schmidt proposal, the United States Supreme Court could look to the reasoning and determine there is a preponderance of evidence that this right was retained by the people either at the time of the Founding or in the contemporary United States. This determination can be made without the baggage and strictures inherent in the current constitutional doctrines, and can therefore

185. *See supra* footnotes 56–60 and accompanying text.

186. *See supra* footnotes 55–60 and accompanying text.

187. Devins & Baum, *supra* note 82, at 331 (noting the growing importance of ideology in Presidential court appointments for both parties).

188. *See supra* Part II(B).

189. For example, the *Hodes* decision took place within the context of Kansas's long history of abortion politics. *See also supra* Part II(F).

be more responsive to the public will.

E. Structural Argument

A strong structural argument can be made for the supplemented Schmidt proposal. The first step is a statement about the Constitution's structure.[190] Here, the statement would be: The Ninth Amendment is a part of the Bill of Rights but does not explicitly name rights like the first eight amendments. The second step requires the inference of a relationship from this structural description.[191] In this context, the relationship between the amendments suggests the Ninth Amendment functions as "a failsafe" when rights are not found in other parts of the Constitution.[192] Third, a factual claim is made.[193] Here, the assertion would be that the Ninth Amendment is a source of rights. Finally, a rule is provided as a conclusion.[194] The rule here would be the supplemented Schmidt proposal should be accepted because it accurately interprets the text of the Ninth Amendment, while allowing for multiple avenues of right creation using current constitutional doctrine and other sources, including state supreme court decisions.

F. Ethical Argument

American jurisprudence can be been understood as a narrative of rights expansion. From economic substantive due process, which ultimately fell out of favor,[195] to more contemporary rights expansions such as *Griswold*,[196] *Casey*,[197] and *Lawrence*,[198] the United States Supreme Court has been comfortable finding unenumerated rights by using the Fourteenth Amendment.[199] Not only that, but the rights-bearing community has expanded through American history as evidenced by the *Loving*[200] and *Obergefell*[201] decisions.[202] In *Obergefell*, the Court

190. *See supra* Part II(G)(5).
191. *See supra* Part II(G)(5).
192. Schmidt, *supra* note 36, at 192.
193. *See supra* Part II(G)(5).
194. *See supra* Part II(G)(5).
195. *See supra* Part II(B).
196. 381 U.S. 479 (1965); *see supra* Part II(A)(2).
197. 505 U.S. 833 (1992); *see supra* Part II(B).
198. 539 U.S. 558 (2003); *see supra* Part II(B).
199. *See supra* Part II(B).
200. 388 U.S. 1 (1967); *see supra* Part II(B).
201. 576 U.S. 644 (2015); *see supra* Part II(B).
202. *See supra* Part II(B).

highlighted the importance of this evolution by arguing that "[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."[203] The Court noted that same-sex couples should have "equal dignity in the eyes of the law."[204] The supplemented Schmidt proposal channels this *ethos* by allowing rights expansion to take place through the Ninth Amendment. As noted above, it is likely more effective at doing so because it would not be bound by the two tests currently used by the Court: the tradition-based test and the reasoned judgment test. If an unenumerated right is not found using these mechanisms, the Court can then turn its attention to other sources of persuasive authority including state supreme courts, and decisions such as *Hodes*, that analyze fundamental rights.

G. Hodes as a Test Case

The *Hodes* decision is an excellent test case to examine the implications of the supplemented version of Schmidt's proposal. The supplemented version provides an avenue for expanding federal protections beyond the substantive due process doctrines controlling Fourteenth Amendment jurisprudence. The *Hodes* decision is an illustrative example because, as the Kansas Supreme Court noted, the Kansas Constitution's Bill of Rights has more expansive protections than those offered by the United States Constitution.[205]

Imagine a scenario in the coming years where the United States Supreme Court disturbs *Roe v. Wade*.[206] In this hypothetical world, there is no right to abortion guaranteed by the United States Constitution. However, the *Hodes* decision has made the right to abortion constitutionally protected in Kansas. In this scenario, depending on the reasoning of the Court, national advocates may no longer be able to rely on Fourteenth Amendment jurisprudence. They could, however, argue that the Ninth Amendment functions as an additional right-emanating space. The bounds of this space would still be circumscribed by the supplemented Schmidt proposal's test, but it would also not be burdened by the baggage of contemporary substantive due process. Put simply, if *Roe* is disturbed, then the Ninth Amendment is the next place litigants should seek to situate this fundamental right. State supreme court

203. *Obergefell*, 576 U.S. at 671.
204. *Id.* at 681.
205. Hodes & Nauser, MDS, P.A. v. Schmidt, 440 P.3d 461, 471 (Kan. 2019).
206. 410 U.S. 113 (1973).

decisions, like *Hodes*, should inform that analysis.

If litigants operating in this hypothetical world deployed the supplemented Schmidt proposal, then the first step to finding the right to abortion in the Ninth Amendment of the United States Constitution would be concluding that the right cannot be found in any other constitutional doctrine or amendment. Next, the Court will move to step two and evaluate whether, by a preponderance of evidence, the right to abortion was retained at the time of the Founding or is currently retained. When making this evaluation, Schmidt has suggested a variety of sources as persuasive authority including "non-judicial legal sources, state and federal law, state constitutions, and other related sources for epistemic guidance."[207] Specifically, Schmidt mentions "the status of case law regarding the related behavior" and "the status of federal and state laws governing the alleged right . . . ."[208]

The supplemented Schmidt proposal suggests state supreme court decisions are uniquely suited to be persuasive authority in making this evaluation. Bobbitt's modalities are a useful way of structuring this analysis. First, state supreme courts are unparalleled historical guides. In *Hodes*, the Kansas Supreme Court analyzed the language chosen at the Wyandotte Convention, traced its origins to the Declaration of Independence, unpacked the philosophical influences on the Founders, and concluded "section 1 of the Kansas Constitution Bill of Rights protects a woman's right to make decisions about whether she will continue a pregnancy . . . ."[209] Moreover, each state has its own, idiosyncratic history as evidenced by Kansas's unique history of abortion politics. If the United States Supreme Court reviews *Hodes* and other state supreme court decisions on the topic, then it will gain a robust historical understanding of whether the right to abortion is retained by the people.

Second, a doctrinal analysis indicates that other courts, which remain non-binding, have influenced the United States Supreme Court in the past. Litigants could argue that, just as the United States Supreme Court has looked to international courts when contemplating the Eighth Amendment, it should similarly look to state supreme courts and identify rights through the Ninth Amendment. Decisions like *Hodes* provide clarity for judges by packaging analysis of potential rights into the language, structure, and legal environment that they are familiar with.

Third, a prudential argument could be made that the sheer volume of state supreme court decisions analogous to *Hodes* heavily weighs in favor

207. Schmidt, *supra* note 36, at 217.
208. *Id.*
209. *Hodes*, 440 P.3d at 491.

of concluding that the right to abortion is currently retained. As Justice Biles notes in his concurrence, thirteen other state supreme courts have found their constitutions contain a fundamental right to abortion.[210] Fourth, litigants can make a structural argument that the United States Supreme Court does not need to only look to its established doctrines for rights expansion. The Ninth Amendment remains astonishingly underutilized. The Ninth Amendment, if given shape by *Hodes* and other similar decisions, provides a theoretical and constitutional space from which rights can emerge.

Fifth, litigants could argue that state supreme court decisions regarding fundamental rights, when taken in their totality, provide the best measure of the evolving American *ethos*. Just as *Hodes* traced the trajectory of state law and attitudes on the right to abortion, state supreme court decisions from across the country provide a unique window into how different geographical regions, states, and cultural centers have thought about a particular issue over time. This knowledge would help the Court analyze whether the rights-expansion *ethos* is animated toward the right in question, thereby providing insight into whether a right is retained by the people. These historical, doctrinal, prudential and ethical arguments show how, even in a world without *Roe* or *Casey*, the United States Supreme Court could find the right to abortion in the Ninth Amendment if it relied on the supplemented Schmidt proposal. Finally, since this is a fundamental right, the Court would find that strict scrutiny should be used when looking at governmental intrusion into this right. This interpretation breathes new life into the seemingly dismissed Ninth Amendment, while also holding true to the Ninth Amendment's promise that rights exist outside of those explicitly enumerated in the Constitution.

H. Counterargument One – Tunnel Vision and State Supreme Court Justices

One counterargument to the supplemented Schmidt proposal is that it runs into the same problem that it purports to solve. Specifically, the argument is that while United States Supreme Court justices may not accommodate emerging understandings of rights, the justices in state supreme courts will only understand the emerging consensus in their particular state. With this being the case, state supreme courts should not have the ability to inform the substance of the Ninth Amendment, which all citizens, regardless of state, may rely on.

However, it is highly unlikely that a state supreme court would

210. *Id.* at 504 (Biles, J., concurring).

determine a fundamental right exists that is simultaneously rejected by the remainder of states. Likely, the right in question would be informed more by partisan opinion than state-preference. If this is the case, then what is actually occurring is that individual state supreme courts are evaluating whether an issue that is being debated throughout the country is worthy of being a natural right. In this way, it is no different than the United States Supreme Court finding an unenumerated right exists that pleases some of the population and displeases the remainder. It also means that if the ideological makeup of the United States Supreme Court is different than the makeup of state supreme courts, state supreme courts have the opportunity to persuasively identify new natural rights that the United States Supreme Court would not consider.

I. Counterargument Two – Too Broad of an Interpretation

A second counterargument to the supplemented Schmidt proposal is that it is still too broad. For example, what if a state supreme court were to determine that the ability to form a contract in a specific way is a fundamental right? Ultimately, any unenumerated right is an unenumerated right because a court says it is. Essentially, if the supplemented Schmidt proposal of the Ninth Amendment is accepted, then what is to stop state supreme courts from proliferating a variety of fundamental rights that do not appear to be as fundamental as the rights that are frequently thought about in these debates?

There are three responses. First, state supreme court decisions, under this proposal, are only persuasive and not binding. Judges are not bound to interpret the Ninth Amendment as being substantively the same as one particular state supreme court decision. In the event that only a few states recognize a fundamental right, or if this right is not viewed as being fundamental according to the variety of factors entertained, then there would not be an indication, by a preponderance of evidence, that the right in question is retained. Second, this argument is equally applicable to any decision made through the normal avenues of rights expansion. The United States Supreme Court could find through its reasoned judgment or by looking to tradition that the potential right exists. That is, this criticism is not unique to the supplemented Schmidt proposal. It is a criticism of identifying unenumerated rights more broadly. With the supplemented Schmidt proposal, the only risk is that more decision-making bodies will have the opportunity to be engaged in the debate. Third, erring on the side of rights expansion follows the American *ethos* more closely than disclosing the possibility of a new fundamental right being understood.

IV. CONCLUSION

Interpreting the Ninth Amendment is a difficult task. Judges and scholars cannot simply discount its relevance, but they also face the challenge of creating a discrete framework for determining which unenumerated rights should be included. The supplemented Schmidt proposal attempts to solve this dilemma by recommending that state supreme courts serve as laboratories of constitutional thinking. That is, state supreme court decisions on the scope of fundamental rights should inform the Ninth Amendment as persuasive authority. These courts are more responsive to the general public, thereby ensuring that rights believed to exist in communities have an additional avenue for potential federal recognition. This Ninth Amendment interpretation will allow for an expansion of rights, which will offset concerns that the ever-evolving partisan makeup of the United States Supreme Court will eliminate key rights that are collectively embraced throughout the country. In this way, it hews closely to the trajectory of rights expansion that informs the American story. It does so in a way that is unburdened by the United States Supreme Court's current tests for determining the existence of unenumerated rights. The Kansas Supreme Court's *Hodes* decision provides an excellent illustration of how litigants could use this interpretation both to argue for a fundamental right and protect a fundamental right that is being challenged. By relying on the types of reasoning the United States Supreme Court utilizes, the supplemented Schmidt proposal breathes new life into the Ninth Amendment.