COMMENT

THE NINTH AMENDMENT: TEXTUAL SUPPORT FOR MARRIAGE FREEDOM

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INTRODUCTION

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.[1]

Scholars and judges have long debated which rights the U.S. Constitution implicitly protects[2] and how to determine what those rights are.[3] One unresolved issue is whether the Constitution[4] implicitly protects an individual's right to marry[5] a person of the same sex.[6] The Ninth Amendment[7] is one constitutional provision, among others,[8] that may be used to protect individual rights that are not explicitly mentioned in the Constitution,[9] including the right to marry a person of the same sex.[10]

The U.S. Supreme Court has paid relatively little attention to the Ninth Amendment,[11] whereas scholars have paid it substantial attention.[12] Scholars' interpretations of the Ninth Amendment have varied in scope and application,[13]

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1. U.S. CONST. amend. IX.

2. *See, e.g.*, Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895, 922 (2008) [hereinafter Lash, *A Textual-Historical Theory*] (explaining that current scholarly debate concerns the content of rights implicitly protected by the Fourteenth Amendment).

3. *See* discussion *infra* Part I.B.

4. In this Article, all references to a constitution refer only to the U.S. Constitution unless otherwise indicated.

5. In this Article, all references to marriage refer only to opposite-sex marriage unless otherwise indicated.

6. *See* discussion *infra* Part I.A.ii.

7. U.S. CONST. amend. IX.

8. *See, e.g.*, Lash, *A Textual-Historical Theory*, *supra* note 2, at 927 (arguing that the Fourteenth Amendment's Due Process Clause and privileges or immunities clause protect unenumerated rights against state action).

9. *See* discussion *infra* Part III.A.

10. *See* discussion *infra* Part III.B.

11. *See, e.g.*, Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597, 708-09 (2005) [hereinafter Lash, *The Lost Jurisprudence*]; *see also* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 2 (2006) [hereinafter Barnett, *The Ninth Amendment*].

12. *See* discussion *infra* Part II.B–C.

13. *See, e.g.*, Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498, 500 n.3 (2011) (providing examples of scholarly interpretations of the

and this Article will discuss two particular interpretations.[14] The first view[15] is that the Ninth Amendment limits federal power and thereby protects "autonomy of local government," which permits people to locally decide how they may exercise their rights.[16] This federalist view rejects the notion that the Ninth Amendment is a source of individual rights.[17] The second view[18] is that the Ninth Amendment protects unenumerated individual natural rights.[19] "Unenumerated rights" are rights which are not explicitly mentioned[20] in a legal charter.[21] Natural rights are rights that humans inherently have, independently of whether or not the government protects those rights.[22] A constitution cannot possibly enumerate all natural rights because they are theoretically endless.[23] People may legitimately exercise their natural rights, as long as doing so does not interfere with the exercise of other people's natural rights.[24]

Instead of directly relying on the Ninth Amendment, the U.S. Supreme Court has protected unenumerated individual rights in many cases by using the doctrine of substantive due process,[25] which holds that the Fourteenth Amendment's Due Process Clause[26] protects substantive rights.[27] The Court has

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Ninth Amendment); *see also* Barnett, *The Ninth Amendment*, *supra* note 11, at 10-21 (describing five distinct scholarly interpretations of the Ninth Amendment).

14. *See, e.g.*, Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 343-47 (2004) [hereinafter Lash, *The Lost Original Meaning*] (explaining that the two general categories of scholarly interpretations of the Ninth Amendment are that it protects unenumerated individual rights and that it limits federal power to protect state sovereignty).

15. *Id.* at 343 n.47, 345-47 (summarizing scholarship that has advocated this interpretation of the Ninth Amendment).

16. *Id.* at 401-02.

17. *Id.* at 340-341 (advocating this view); *see also* Lash, *A Textual Historical Theory*, *supra* note 2, at 903 (same).

18. Lash, *The Lost Original Meaning*, *supra* note 14, at 343 n.46, 343-45 (citations omitted) (summarizing scholarship that has advocated this interpretation of the Ninth Amendment).

19. *See id*. at 343-47.

20. *See* Lash, *A Textual-Historical Theory*, *supra* note 2, at 901-02 (explaining the meaning of "enumeration").

21. In this Article, all references to enumeration refer only to the U.S. Constitution.

22. Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 442-43 (2004) [hereinafter Barnett, *Police Power*].

23. *Id.* at 446-48.

24. *Id*. at 446.

25. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997) (explaining that the Fourteenth and Fifth Amendments' Due Process Clauses protect fair process and contain a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests").

26. U.S. CONST. amend. XIV, § 1, cl. 3.

27. Lash, *The Lost Jurisprudence*, *supra* note 11, at 713, n.521 (noting that the U.S. Supreme Court has relied on substantive due process instead of the Ninth Amendment to protect unenumerated rights); *see also* Thomas B. McAffee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1216 n.7 (1990) (same).

protected the right to marriage, which it deems "fundamental," by using substantive due process.[28] However, although the Court has determined that marriage is a fundamental right,[29] the Court has avoided directly addressing whether same-sex marriage is also such a right.[30]

Despite the Court's somewhat frequent use of substantive due process, this doctrine has been subject to criticism. Some critics argue that the Due Process Clause's text appears to merely protect procedural, not substantive, rights.[31] Furthermore, critics of substantive due process warn that the doctrine threatens the legitimacy of the Court[32] and gives the Court unbridled discretion.[33] Conversely, some scholars praise the Court for using a broad view of substantive due process to protect individual rights.[34]

Despite the criticism, the U.S. Supreme Court should rely on the Ninth Amendment to broaden the scope of substantive due process to protect unenumerated individual natural rights.[35] In doing so, the Court would have stronger textual support with which to protect such rights, would better protect such rights, and would alleviate concerns about its legitimacy and discretion.[36] Using the Ninth Amendment in such a way, the Court may and should protect the right to marry a person of the same sex.[37]

Part I of this Article begins by providing a brief overview of constitutionally-protected unenumerated rights. Part I.A specifically discusses the right to marriage and differing views of federal courts as to whether that right includes the right to same-sex marriage. Part I.B illustrates how the U.S. Supreme Court has not clearly explained how to determine if the Constitution protects a purported unenumerated right. Part II discusses how to interpret the Ninth Amendment and also discusses its history and two of its scholarly interpretations. Part III.A argues which interpretation of the Ninth Amendment

28. Loving v. Virginia, 388 U.S. 1, 12 (1967).

29. *Id.*

30. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *cert. denied*, 409 U.S. 810 (1972).

31. *See, e.g.*, United States v. Carlton, 512 U.S. 26, 39 (1994) (Scalia, J., concurring) (describing substantive due process as an "oxymoron"); *see also* Mays v. City of East St. Louis, Illinois, 123 F.3d 999, 1001-02 (7th Cir. 1997) (stating that circuit courts have difficulty applying substantive due process because it is an "oxymoron," a concept largely inferred from the Constitution and made explicit in the Ninth Amendment); *cf.* Albright v. Oliver, 510 U.S. 266, 275 (1994) (Scalia, J., concurring) (arguing that the Fourteenth Amendment's Due Process Clause applies parts of the Bill of Rights to the states because that application "is both long established and narrowly limited," but that clause does not protect unenumerated rights because it "merely guarantees certain procedures as a prerequisite to deprivation of liberty").

32. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 194 (1986).

33. *See, e.g.*, *id.* at 191-92; *see also* Michael H. v. Gerald D., 491 U.S. 110, 121 (1989) (plurality opinion) (quoting Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 502 (1977) (plurality opinion)).

34. *See, e.g.*, Barnett, *Police Power*, *supra* note 22, at 493-95.

35. *See infra* Part III.A.

36. *See infra* Part III.A.ii.

37. *See infra* Part III.B.

is the most persuasive and why courts should rely on that amendment to protect unenumerated rights. Finally, Part III.B argues why courts should rely on the Ninth Amendment to protect the right to same-sex marriage.

I. THE CONSTITUTION PROTECTS CERTAIN UNENUMERATED INDIVIDUAL RIGHTS

The U.S. Supreme Court has protected unenumerated rights for over a century.[38] Unenumerated rights are those not explicitly listed in the Constitution.[39] Some such rights that the Court protects are the rights to marriage,[40] procreation,[41] abortion,[42] family relationships,[43] rearing and educating one's children,[44] certain intimate sexual conduct,[45] and contraception.[46] Many of these rights involve "a person's most basic decisions about family and parenthood."[47] In many cases protecting these unenumerated rights, the Court relied on substantive due process.[48]

Substantive due process protects "fundamental" rights,[49] including marriage.[50] If a law at issue violates a fundamental right, a reviewing court must subject the law to strict scrutiny.[51] Under strict scrutiny, the law will be upheld only if it is narrowly tailored to achieving a compelling state interest,[52] which is a difficult standard to meet.[53] If a law at issue does not violate a

38. *See, e.g.*, Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897) (holding the Due Process Clause protects the unenumerated right to liberty of contract).

39. *See* Lash, *A Textual-Historical Theory*, *supra* note 2, at 901-02 (explaining the meaning of "enumeration").

40. Loving v. Virginia, 388 U.S. 1, 12 (1967).

41. Skinner v. Oklahoma *ex rel*. Williamson, 316 U.S. 535, 541 (1942).

42. Roe v. Wade, 410 U.S. 113, 152 (1973).

43. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

44. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

45. Lawrence v. Texas, 539 U.S. 558, 567 (2003).

46. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

47. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849 (1992).

48. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967); *see also* Roe v. Wade, 410 U.S. 113, 153 (1973); *see also Lawrence*, 539 U.S. at 574-75.

49. *See, e.g.*, Reno v. Flores, 507 U.S. 292, 301-02 (1993); *see also* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) ("[S]o rooted in the traditions and conscience of our people as to be ranked as fundamental"); *cf. Lawrence*, 539 U.S. 558 (2003) (protecting an unenumerated right without calling it fundamental).

50. *Loving*, 388 U.S. at 12.

51. *E.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 54 (1983).

52. *E.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977) (holding that in order to satisfy strict scrutiny, a regulation that burdens a fundamental right "may be justified only by compelling state interests, and must be narrowly drawn to express only those interests"); *see also* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) (explaining that a law subject to strict scrutiny is constitutional only if "narrowly tailored" to achieve a "compelling" government interest).

53. *See, e.g.*, *Parents Involved*, 551 U.S. at 720 (describing strict scrutiny as a "searching standard of review"); *c.f.* Grutter v. Bollinger, 539 U.S. 306, 326-27 (2003)

fundamental right or target a suspect or quasi-suspect class,[54] a reviewing court will apply rational-basis scrutiny and thereby uphold the law if it is rationally related to achieving a legitimate state interest.[55] Under this lowest level of scrutiny, the law "is accorded a strong presumption of validity."[56]

The U.S. Supreme Court has relied on substantive due process and strict scrutiny[57] to declare marriage a fundamental right[58] for all persons.[59] Although lower federal courts have disagreed as to whether same-sex marriage is a fundamental right and which level of scrutiny applies to bans on same-sex marriage,[60] the U.S. Supreme Court has avoided addressing these issues.[61] Unfortunately, part of the disagreement among lower federal courts is due to the lack of clarity in the Supreme Court's jurisprudence regarding substantive due process.[62] In resolving this disagreement, the Supreme Court should rely on the Ninth Amendment to support a broad notion of substantive due process that protects the right to marry a person of the same sex.[63]

A. The Constitution Protects the Unenumerated Right to Marriage

The U.S. Supreme Court has repeatedly recognized the importance and constitutional protection of the unenumerated right to marriage.[64] "The freedom

(dispelling the notion that strict scrutiny is " 'strict in theory, but fatal in fact' " because not all laws reviewed under strict scrutiny are struck down).

54. The Equal Protection Clause of the Fourteenth Amendment and that clause's "suspect class" doctrine are largely beyond the scope of this Article.

55. Romer v. Evans, 517 U.S. 620, 631 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, [a court] will uphold the legislative classification so long as it bears a rational relation to some legitimate end"); *see also* Washington v. Glucksberg, 521 U.S. 702, 728 (1997) (holding that a law that burdens conduct that is not a fundamental right must "be rationally related to legitimate government interests").

56. Heller v. Doe, 509 U.S. 312, 319 (1993).

57. Loving v. Virginia, 388 U.S. 1, 12 (1967); Zablocki v. Redhail, 434 U.S. 374, 383 (1978).

58. *Loving*, 388 U.S. at 12.

59. *Zablocki*, 434 U.S. at 384.

60. *Compare* Wilson v. Ake, 354 F. Supp. 2d 1298, 1307 (M.D. Fla. 2005) (holding the Due Process Clause of the Fifth Amendment does not protect the right to marry a person of the same sex), *with* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 991-93 (N.D. Cal. 2010) (explaining that the fundamental right to marry includes marrying a person of the same sex).

61. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *cert. denied*, 409 U.S. 810 (1972).

62. *See infra* Part I.B.

63. *See infra* Part III.

64. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (striking down law prohibiting inter-racial marriage); Zablocki v. Redhail, 434 U.S. 374, 390-91 (1978) (striking down law requiring court's permission to marry for anyone who is under legal obligation to support minor children not in that person's custody); Turner v. Safley, 482 U.S. 78, 96 (1987) (protecting prisoners' right to marry); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847-48 (1992); Griswold v. Connecticut, 381 U.S. 479, 486 (1965); Carey v. Population

to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men'"[65] and "is one of the 'basic civil rights of man.'"[66] Marriage is "intimate to the degree of being sacred."[67] Given this language, the Court unsurprisingly has protected the right to marriage, even though it is not mentioned in the Constitution.[68]

In *Loving v. Virginia*,[69] the U.S. Supreme Court struck down an anti-miscegenation law.[70] The Court applied strict scrutiny because the law in question classified individuals on the basis of race,[71] contrary to the Equal Protection Clause.[72] However, the Court also held that the Due Process Clause provided an independent basis to strike down the law.[73] In so holding, the Court declared that the right to marry is "fundamental."[74] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[75] the Court noted that in *Loving* it had correctly relied on substantive due process to protect the right to interracial marriage, although marriage is not mentioned in the Bill of Rights.[76]

i. Laws that Infringe the Right to Marriage Are Subject to Strict Scrutiny

Loving v. Virginia perhaps created confusion as to whether strict scrutiny must be applied in all constitutional challenges to laws that significantly restrict the right to marriage or merely to laws that restrict this right on the basis of race. In *Zablocki v. Redhail*,[77] the U.S. Supreme Court clarified that the former of these two readings of *Loving* is the correct one. "Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for *all individuals*."[78] The *Zablocki* Court noted that the *Loving* Court could have relied solely on the Equal Protection Clause because the statute classified on

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Servs. Int'l, 431 U.S. 678, 684-85 (1977); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Skinner v. Oklahoma *ex rel*. Williamson, 316 U.S. 535, 541 (1942).

65. *Loving*, 388 U.S. at 12.

66. *Id.* (quoting *Skinner*, 316 U.S. at 541).

67. *Griswold*, 381 U.S. at 486.

68. *Casey*, 505 U.S. at 847-48 (stating that the Court has correctly protected the right to marry although that right is not mentioned in the Bill of Rights).

69. *Loving*, 388 U.S. 1.

70. *Id*. at 12.

71. *Id.* at 9, 11 (subjecting the law to a "very heavy burden of justification," requiring it be "necessary to the accomplishment of some permissible state objective").

72. *Id*. at 12.

73. *Id.*

74. *Id*. at 12 (citing Skinner v. Oklahoma *ex rel*. Williamson, 316 U.S. 535, 541 (1942)).

75. Planned Parenthood of Se. P.a v. Casey, 505 U.S. 833 (1992).

76. *Id.* at 847-48.

77. Zablocki v. Redhail, 434 U.S. 374 (1978).

78. *Id*. at 384 (emphasis added).

the basis of race, but the *Loving* Court also relied on the principle that the right to marry is "a fundamental liberty protected by the Due Process Clause."[79]

Although the *Zablocki* Court relied on the Equal Protection Clause, and not the Due Process Clause,[80] the Court used strict scrutiny because of the right being infringed, not because of the unequal classification created by the statute.[81] The Court stated that "the right to marry is of fundamental importance, and since the classification at issue[82] here significantly interferes with the exercise of that right," strict scrutiny must be applied.[83]

The Court reasoned that the law at issue significantly interfered with the right to marry because it "absolutely prevented" some persons in the affected class from getting married, either because they could not meet the law's requirements or because meeting those requirements was so burdensome that some people may forego getting married.[84] Additionally, the law's requirements were so burdensome that the law significantly interfered with the right to marry even for those persons who satisfied the law's requirements and got married.[85]

The significance of *Zablocki* for same-sex marriage is that strict scrutiny must be applied in all cases involving constitutional challenges to laws that significantly restrict the right to marriage, regardless of the classification schemes used by those laws.[86]

ii. Some Federal Courts Have Protected the Right to Same-Sex Marriage

Although the U.S. Supreme Court has avoided directly addressing whether the Constitution protects the right to marry a person of the same sex,[87] lower federal courts have addressed this issue with varying results.[88] The U.S.

79. *Id.* at 383.

80. *Id.* at 381-82.

81. *Id.* at 383 ("[U]nder the Equal Protection Clause, '[the Court] must first determine what burden of justification the classification created thereby must meet, by looking to the nature of the classification and the individual interests affected.' ").

82. The law at issue required a certain class of state residents to obtain court permission before they could legally marry. *Zablocki*, 434 U.S. at 375. The law at issue defined the regulated class as all persons who have minor children not in their custody and who have court-ordered obligations to support those children. *Id.* Under the law at issue, any person in this class may obtain court permission to marry only after proving compliance with the support obligation and demonstrating "that the children covered by the support order 'are not then and are not likely thereafter to become public charges.' " *Id.*

83. *Id.* at 383.

84. *Id.* at 387.

85. *Id.*

86. *See supra* notes 77-83 and accompanying text.

87. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *cert. denied*, 409 U.S. 810 (1972).

88. *Compare* Wilson v. Ake, 354 F. Supp. 2d 1298, 1307 (M.D. Fla. 2005) (holding the Due Process Clause of the Fifth Amendment does not protect the right to marry a person of the same sex), *with* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 991-93 (N.D. Cal.

Supreme Court has avoided this issue by dismissing an appeal for lack of a substantial federal question,[89] which is binding on lower federal courts, absent intervening doctrinal changes.[90] Lower federal courts have disagreed over whether intervening doctrinal changes have made same-sex marriage a substantial federal question.[91] One lower-court decision to strike down a ban on same-sex marriage is *Perry v. Schwarzenegger*.[92]

In *Perry v. Schwarzenegger*, the U.S. District Court for the Northern District of California held that California's asserted interests[93] in banning same-sex marriage did not withstand even rational-basis scrutiny.[94] The first asserted state interest was maintaining tradition, which the court held is not a legitimate state interest.[95] A second asserted state interest broadly included several alleged benefits of promoting opposite-sex marriages, including their alleged stability and ability to produce and raise children.[96] The court held that the ban on same-sex marriage does not rationally further this interest because the ban "has nothing to do with children," in no way affects who may become a parent, does not increase the stability of opposite-sex marriages, and counter-intuitively denies same-sex parents the stability that allegedly follows from marriage.[97]

A third asserted state interest was protecting the rights of persons who oppose same-sex marriage by protecting their ability to educate their children, to promote the moral development of their children, and to exercise their First Amendment rights.[98] The court held that the same-sex marriage ban does not rationally further this interest because the ban "does not affect the rights of

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2010) (explaining that the fundamental right to marry includes marrying a person of the same sex).

89. *Baker*, 409 U.S. at 810 (denying certiorari).

90. Hicks v. Miranda, 422 U.S. 332, 344-45 (1975).

91. *Compare* In re Kandu, 315 B.R. 123, 137-38 (Bankr. W.D. Wash. 2004) (holding that *Baker*, 409 U.S. at 810 (denying certiorari), is not binding precedent because it involved a state law substantially different from the federal law at issue and because of intervening doctrinal changes, particularly Lawrence v. Texas, 539 U.S. 558 (2003)), *with Wilson*, 354 F. Supp. 2d at 1307 (holding that *Lawrence v. Texas* did not sufficiently change constitutional law doctrine to make same-sex marriage a substantial federal question).

92. *Perry*, 704 F. Supp. 2d 921, *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).

93. The asserted state interests not relevant to this discussion are omitted.

94. Although the court held the ban on same-sex marriage was subject to strict scrutiny for preventing the plaintiffs from exercising the fundamental right to marry, the court concluded that the ban did not even satisfy rational-basis scrutiny and then analyzed the law under only rational-basis scrutiny. *Perry*, 704 F. Supp. 2d at 994, 997 ("Because plaintiffs seek to exercise their fundamental right to marry, their claim is subject to strict scrutiny. . . . Here, however, strict scrutiny is unnecessary. [The ban at issue] fails to survive even rational basis review.").

95. *Id.* at 998 (citing Williams v. Illinois, 399 U.S. 235, 239 (1970) and Heller v. Doe by Doe, 509 U.S. 312, 327 (1993)).

96. *Id.* at 999.

97. *Id.* at 999-1000.

98. *Id.* at 1000.

those opposed to homosexuality or to marriage for couples of the same sex."[99] Instead, the ban only eliminates the right of same-sex couples to marry in California.[100]

The court inferred that the same-sex marriage ban was premised on moral disapproval of same-sex couples.[101] However, the court held that moral disapproval is not a legitimate state interest.[102] Moreover, the court reasoned, moral disapproval is a form of animus and is thus an improper basis for legislation.[103]

The U.S. Court of Appeals for the Ninth Circuit affirmed *Perry v. Schwarzenegger* on appeal[104] on the narrower ground[105] that the ban singles out same-sex couples for unequal treatment, in violation of the Equal Protection Clause, by taking away a right same-sex couples once had.[106] The court thereby avoided the issues of whether same-sex couples have a fundamental right to marry and whether a state that has never permitted same-sex marriage constitutionally may ban same-sex marriage.[107]

Before addressing the state's asserted interests in the ban, the court addressed two important points. First, the ban causes significant harm to same-sex couples,[108] although its legal effect is limited to denying same-sex couples the official designation of marriage.[109] Second, although a state may constitutionally eliminate rights that it had granted beyond those required by the U.S. Constitution,[110] a state must have a legitimate reason to do so.[111]

Applying rational-basis scrutiny,[112] the court struck down the ban for lacking a rational relationship to achieving the asserted state interests[113] and

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99. *Id.* at 1000-01.

100. *Perry*, 704 F. Supp. 2d at 1001.

101. *Id.* at 1002.

102. *Id.* (citing Lawrence v. Texas, 539 U.S. 558, 571 (2003)).

103. *Id.* (citing Romer v. Evans, 517 U.S. 620, 633 (1996); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973); Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).

104. Perry v. Brown, 671 F.3d 1052, 1064 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 786 (U.S. 2012).

105. *Id.* at 1076, 1095.

106. *Id.* at 1079-80 (explaining that California permitted same-sex marriages for 143 days between the California Supreme Court's decision that protected same-sex marriage under the state constitution, In re Marriage Cases, 183 P.3d 384 (Cal. 2008), and the voters' amendment to the state constitution forbidding same-sex marriage).

107. *Id.* at 1082. Of course, the court's analysis under rational-basis scrutiny perhaps could apply to any ban on same-sex marriage, so this case may not be as narrow as the court supposed it was.

108. *Id.* at 1077-78.

109. *Id.* at 1076-78 (explaining that same-sex couples in California are still able to obtain domestic-partnership status, which includes every right that marital status does except for the official designation of "marriage").

110. *Perry*, 671 F.3d at 1082-84.

111. *Id.* at 1083-84 ("[A] bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest" (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973))); (citing Romer v. Evans, 517 U.S. 620 (1996)).

112. *Id.* at 1082 (citing *Romer*, 517 U.S. 620).

avoided resolving whether those interests are legitimate.[114] Having concluded that no asserted state interests justify the ban on same-sex marriage, the court inferred a few reasons for the ban and held them to be illegitimate state interests. The court held that neither a notion of morality[115] nor tradition justifies taking away a right, even if that right is against tradition.[116] The court also inferred that disapproval of gays and lesbians as a class motivated passage of the ban.[117] However, although such motives are not necessarily ill will,[118] the court held that such disapproval is not a legitimate state interest.[119]

Notwithstanding the *Perry* decisions, other federal courts have failed to protect the right to marry a person of the same sex, partly because of disagreement over the U.S. Supreme Court's jurisprudence on substantive due process.[120] In resolving this disagreement, the Supreme Court should accept the natural-rights interpretation of the Ninth Amendment[121] and, accordingly, hold that substantive due process is a broad doctrine[122] that protects the right to marry a person of the same sex.[123] Such reliance on the Ninth Amendment could clarify and strengthen jurisprudence on substantive due process.[124]

B. Substantive Due Process Jurisprudence Lacks Clarity

Lower federal courts have disagreed over whether substantive due process protects the right to marry a person of the same sex.[125] Such disagreements examine whether a fundamental right is at stake[126] and whether an asserted state interest is a legitimate one.[127] At the general level, the U.S. Supreme Court has

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113. The asserted state interests not relevant to this discussion are omitted.

114. *Perry*, 671 F.3d at 1086-92.

115. *Id.* at 1092-94 (citing Lawrence v. Texas, 539 U.S. 558, 577-78 (2003)).

116. *Id.* at 1092-93 (citing Williams v. Illinois, 399 U.S. 235, 239-40 (1970); *Lawrence*, 539 U.S. at 577-78 (2003); Loving v. Virginia, 388 U.S. 1 (1967)).

117. *Id.* at 1093-95.

118. *Id.* at 1093.

119. *Id.* at 1094 (citing Romer v. Evans, 517 U.S. 620, 633-35 (1996)).

120. *See infra* notes 125-127 and accompanying text.

121. *See infra* Part III.A.i.

122. *See infra* Part III.A.ii.

123. *See infra* Part III.B.

124. *See infra* Part III.A.ii.

125. *Compare* Wilson v. Ake, 354 F. Supp. 2d 1298, 1307 (M.D. Fla. 2005) (holding the Due Process Clause of the Fifth Amendment does not protect the right to marry a person of the same sex), *with* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 991-93 (N.D. Cal. 2010) (explaining that the fundamental right to marry includes marrying a person of the same sex).

126. *Compare Wilson*, 354 F. Supp. 2d at 1307 (holding the right to marry a person of the same sex is not a fundamental right), *with Perry*, 704 F. Supp. 2d at 991-93 (holding the fundamental right to marry includes marrying a person of the same sex).

127. *Compare Wilson*, 354 F. Supp. 2d at 1309 (holding that controlling precedent requires the court to conclude that a state has a legitimate interest in encouraging the raising of children in a home consisting of a mother and father (citing Lofton v. Sec'y of Dep't of Children and Family Services, 358 F.3d 804, 819-20 (11th Cir. 2004) (holding that a state

not clearly and uniformly used substantive due process to protect unenumerated individual rights.[128] Specifically, the Court has created confusion over which substantive due process test applies in a given case and how to apply it.

The confusion over which test to apply stems from the U.S. Supreme Court's creation of and use of various tests to analyze substantive due process cases.[129] The Court in *Palko v. Connecticut*[130] held that rights mentioned in the Bill of Rights apply to the states through the Fourteenth Amendment's Due Process Clause,[131] if those rights are "implicit in the concept of ordered liberty."[132] In *Moore v. City of East Cleveland, Ohio*,[133] the Court announced that substantive due process protects the sanctity of the family because the institution of the family is "deeply rooted in this Nation's history and tradition."[134] In dissent, Chief Justice Burger argued that the proper test to apply was *Palko*'s "ordered liberty" test, and that the alleged right did not rise to that level.[135] In *Bowers v. Hardick*,[136] the Court separately applied the "deeply rooted" and "ordered liberty" tests.[137] In *Washington v. Glucksberg*,[138] the Court possibly suggested that an unenumerated purported right must satisfy both tests to receive heightened constitutional protection.[139]

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has a legitimate interest in seeking to place adoptive children in a home consisting of a mother and father))), *with Perry*, 704 F. Supp. 2d at 999-1000 (holding a state does not have a legitimate interest in preferring opposite-sex-couple parenting to same-sex-couple parenting).

128. *See infra* notes 141-44 and accompanying text.

129. *See, e.g.*, McDonald v. City of Chicago, Ill., 130 S. Ct. 3020, 3031-32 (2010) (discussing several tests the Court has used to determine whether substantive due process protects a purported right).

130. Palko v. Connecticut, 302 U.S. 319 (1937).

131. The Bill of Rights applies only to the federal government, but the U.S. Supreme Court has held that most of its rights also apply to the states through the Fourteenth Amendment's Due Process Clause. *E.g.*, *McDonald*, 130 S. Ct. at 3028, 3031-36 (citations omitted).

132. *Palko*, 302 U.S. at 324-25.

133. Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977).

134. *Id.* at 503-04 (plurality opinion).

135. *Id.* at 536-37 (Burger, C.J., dissenting).

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

137. *Bowers*, 478 U.S. at 191-92, 194 (stating that the two tests are "different description[s]" of determining fundamental liberties and holding that the alleged right is not " 'deeply rooted in this Nation's history and tradition' *or* 'implicit in the concept of ordered liberty' ") (emphasis added).

138. Washington v. Glucksberg, 521 U.S. 702 (1997).

139. *Id.* at 720-21("[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition' . . . *and* 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed[.]' " (emphasis added) (citations omitted)); *see also* Chavez v. Martinez, 538 U.S. 760, 775 (2003) (plurality opinion) ("Only fundamental rights and liberties which are 'deeply rooted in this Nation's history and tradition' *and* 'implicit in the concept of ordered liberty' qualify for such protection." (emphasis added) (quoting *Glucksberg*, 521 U.S. at 721) (internal quotation marks omitted)); *Lawrence*, 539

Adding further confusion, the Court has not always uniformly and clearly applied the substantive due process tests. In *Michael H. v. Gerald D.*,[140] the Court applied the "deeply rooted" test very narrowly.[141] The Court later rejected the *Michael H.* narrow application of the "deeply rooted" test.[142] In both *Bowers* and *Glucksberg*, the Court mentioned both the "deeply rooted" and "ordered liberty" tests,[143] but then discussed only why the "deeply rooted" test was not satisfied before concluding that neither test was satisfied.[144] The Court thus has not clearly shown how to apply either of the two tests.

More recently, in *Lawrence v. Texas*,[145] the Court used substantive due process[146] to overrule *Bowers v. Hardwick*[147] but did not apply a pre-existing substantive due process test or announce a new one.[148] By failing to apply known tests, the Court may have created a test called the "exercise of liberty" test.[149] In his dissent in *Lawrence*, Justice Scalia argued that the Court used substantive due process to protect the right at stake without calling it "fundamental,"[150] although the Constitution provides heightened protection to rights only if they are fundamental.[151] He also argued that the Court applied "an unheard-of form of rational-basis review."[152]

U.S. at 593 n.3 (2003) (Scalia, J., dissenting) (arguing that "[a]n asserted fundamental liberty interest must not only be deeply rooted in this Nation's history and tradition, but it must also be implicit in the concept of ordered liberty") (citation omitted) (internal quotation marks omitted).

140. Michael H. v. Gerald D., 491 U.S. 110 (1989).

141. *Id.* at 127-28 n.6 (Rehnquist, C.J. & Scalia, J., plurality opinion) (arguing the Court should look "to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified").

142. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847-48 (1992) (refusing to define protected practices "at the most specific level").

143. Bowers v. Hardwick, 478 U.S. 186, 191-92, 194 (1986); *Glucksberg*, 521 U.S. at 720-21 (1997).

144. *See Bowers*, 478 U.S. at 192-94; *Glucksberg*, 521 U.S. at 722-28.

145. Lawrence v. Texas, 539 U.S. 558 (2003).

146. *Id.* at 574-75 (choosing to rely on the Fourteenth Amendment's Due Process Clause instead of its Equal Protection Clause).

147. *Id.* at 578.

148. *See, e.g.*, Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 670-71 (2005); *see also* Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 680 (2006) (arguing *Lawrence v. Texas* "rejected precedent . . . as to the methodology the Court ought to use in substantive due process cases").

149. *See Lawrence*, 539 U.S. at 564 ("[T]he case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment."); *see also id.* at 562 ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.").

150. *Id.* at 586 (Scalia, J., dissenting).

151. *Id.* at 588 (Scalia, J., dissenting).

152. *Id.* at 586 (Scalia, J., dissenting); *see also* Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1916-17

The Court has stated several reasons for its general reluctance to expand the amount of rights protected by substantive due process. One reason is the lack of "guideposts" in such an "open-ended" area of law.[153] Similarly, the Court has expressed concern that the preferences of the Members of the Court may appear to be the only limits to substantive due process.[154] Moreover, the Court has expressed concern that it 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."[155]

i. Lack of Clarity in Substantive Due Process Jurisprudence May Threaten Individual Liberty

The U.S. Supreme Court's substantive due process jurisprudence may have inadequately protected individual liberty, due in part to lack of clarity. Indeed, "[l]iberty finds no refuge in a jurisprudence of doubt."[156] In particular, the Court has possibly permitted states to use unenumerated police powers to violate people's unenumerated individual rights.[157] When the Court apparently applied the "ordered liberty" and "deeply rooted" tests together in *Washington v. Glucksberg*,[158] it refused to protect the right to assisted suicide.[159] In *Bowers v. Hardwick*, the Court independently applied those two tests[160] and refused to strike down a criminal "sodomy" law.[161] In *Michael H. v. Gerald D.*, the Court very narrowly applied the "deeply rooted" test[162] and thereby refused to protect a putative father's right to establish his paternity.[163]

(2004) (arguing the U.S. Supreme Court did not explicitly state which standard of review it applied in *Lawrence v. Texas*).

153. Albright v. Oliver, 510 U.S. 266, 271-72 (1994) (plurality opinion) (" 'As a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.' " (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992))).

154. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 191-92 (1986); *see also* Michael H. v. Gerald D., 491 U.S. 110, 121 (1989) (plurality opinion) (quoting Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 502 (1977) (plurality opinion)).

155. *Bowers*, 478 U.S. at 194.

156. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992).

157. *See generally* Barnett, *Police Power*, *supra* note 22.

158. *See supra* note 139.

159. Washington v. Glucksberg, 521 U.S. 702, 735 (1997) (holding that the Due Process Clause of the Fourteenth Amendment does not protect the right to assisted suicide).

160. *See supra* note 137.

161. Bowers v. Hardwick, 478 U.S. 186, 186 (1986) (holding that the Due Process Clause of the Fourteenth Amendment does not protect a right to "sodomy"), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

162. *See supra* note 141 and accompanying text.

163. Michael H. v. Gerald D., 491 U.S. 110, 111 (1989) (plurality opinion) (holding that the Due Process Clause of the Fourteenth Amendment does not protect the right of a putative father to prove paternity of a child born into a marriage between the mother and another man).

To summarize, the Court has used substantive due process to protect several unenumerated rights but has refused to protect others.[164] The scope of such protected rights is unclear, including whether the right to marriage includes the right to marry a person of the same sex.[165] This lack of clarity is due, at least in part, to the Court's inconsistent use of two substantive due process tests.[166] Therefore, the Court should clarify how to determine which purported rights are constitutionally protected by relying on the Ninth Amendment to support a broad notion of substantive due process.[167] Doing so would protect individual natural rights and support the Court's legitimacy.[168]

II. THE NINTH AMENDMENT HAS TWO LEADING SCHOLARLY INTERPRETATIONS

The U.S. Supreme Court has never directly interpreted the Ninth Amendment's meaning.[169] Early court opinions that cite the Ninth Amendment do so in conjunction with the Tenth Amendment[170] and are arguably about only the Tenth Amendment.[171] However, some cases that protected unenumerated individual rights have cited the Ninth Amendment for support.[172] Despite this lack of judicial attention, substantial scholarly attention has focused on the Ninth Amendment for the past couple of decades.[173]

Justice Goldberg's concurrence in *Griswold v. Connecticut*[174] is widely assumed to have begun the modern discussion of the Ninth Amendment.[175] In *Griswold*, the U.S. Supreme Court struck down a Connecticut law, as applied to married couples, which forbade both the use of contraceptives and assisting

164. *See supra* notes 40-46, 159, 161, 163 and accompanying text.

165. *See supra* notes 87-91, 125-127 and accompanying text.

166. *See supra* Part I.B.

167. *See infra* Part III.A.

168. *See infra* Part III.A.ii.

169. Lash, *The Lost Jurisprudence*, *supra* note 11, at 708 (citing BENNETT B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT 27 (1955)).

170. U.S. CONST. amend. X.

171. Lash, *The Lost Jurisprudence*, *supra* note 11, at 709 (2005) (citing BENNETT B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT 32 (1955)).

172. Planned Parenthood of S*e.* P*a.* v. Casey, 505 U.S. 833, 848 (1992) (explaining that the Ninth Amendment shows 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."); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (holding that the Ninth Amendment and other provisions in the Bill of Rights have penumbras that create a right to privacy); *c.f.* Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that the right to privacy protects the right to abortion, whether the former is found under the Due Process Clause or the Ninth Amendment, although the Court relied on the Due Process Clause instead of the Ninth Amendment).

173. *See supra* note 13.

174. *Griswold*, 381 U.S. at 486-99 (Goldberg, J., concurring).

175. Lash, *The Lost Jurisprudence*, *supra* note 11, at 598.

someone to use contraceptives.[176] The majority opinion held the law unconstitutional for violating an unenumerated right to marital privacy implied in the "penumbras" of several constitutional amendments, including the Ninth Amendment.[177]

Justice Goldberg, in his concurring opinion joined by Justice Brennan and Chief Justice Warren, argued that the language and history of the Ninth Amendment support the proposition that the Fifth and Fourteenth Amendments' Due Process Clauses protect rights in addition to those enumerated in the Bill of Rights.[178] Similarly, Justice Goldberg argued that the Ninth Amendment supports the legitimacy of the Court's substantive due process jurisprudence,[179] although the Ninth Amendment is not an independent source of rights.[180] The limit to such jurisprudence, he argued, is that the Court may protect only fundamental rights.[181]

One current prevailing scholarly interpretation of the Ninth Amendment views that amendment as a federalist provision that protects autonomy of local government.[182] A second such interpretation is that the Ninth Amendment protects individual natural rights.[183] These two interpretations "largely overlap and, where they differ, are not necessarily mutually inconsistent."[184] However, this overlap does not mean the two interpretations are equally persuasive,[185] and textual and historical evidence shows that the natural-rights interpretation is the more-persuasive one.[186]

A. Interpretations of the Ninth Amendment Should Rely on Its Text and History

Relying on the Ninth Amendment's text and history is the appropriate way to interpret that amendment.[187] Canons of constitutional interpretation that rely on text and history are known as "textualism" and "originalism," respectively.[188] Interpretation of any constitutional provision should begin with

176. *Griswold*, 381 U.S. at 480.
177. *Id.* at 484-86.
178. *Id.* at 486-87 (Goldberg, J., concurring).
179. *Id.* at 492-93.
180. *Id.* at 492.
181. *Id.* at 493.
182. *See supra* note 13.
183. *See supra* note 13.
184. *See* Barnett, *The Ninth Amendment*, *supra* note 11, at 4-5, 20-21.
185. *See id*. at 21.
186. *See infra* Part III.A.i.
187. *See generally* Lash, *A Textual-Historical Theory*, *supra* note 2 (interpreting the Ninth Amendment according to its text and history); *see also* Randy E. Barnett, *Kurt Lash's Majoritarian Difficulty: A Response to a Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 937 (2008) [hereinafter Barnett, *A Response to a Textual-Historical Theory*] (same).
188. Lash, *A Textual-Historical Theory*, *supra* note 2, at 900 & nn.18-19 (citations omitted) (explaining originalism and textualism).

the text of that provision because the text governs.[189] However, because constitutional provisions' text is subject to various reasonable interpretations, the history of such provisions should guide their interpretations.[190] Many scholars rely on both the text and history of constitutional provisions when interpreting those provisions,[191] and some scholars argue that all textual analysis requires a historical analysis.[192] Originalism is the leading canon of constitutional interpretation among scholars,[193] and at least three separate originalist approaches exist.[194]

Without arguing about the merits of the particular originalist approaches, any combination thereof seems an appropriate approach. Some scholars appear to combine originalist approaches in their analyses of the Ninth Amendment.[195] Additionally, the Ninth Amendment's use of the past-tense verb "retained"[196] suggests that some originalist interpretation of that amendment is appropriate, given that the Seventh Amendment's use of the past-tense verb "preserved"[197] necessitates historical analysis to interpret that amendment.[198]

However, the Ninth Amendment's retained rights[199] extend beyond rights that the government recognized when the Ninth Amendment was ratified.[200] By

189. *See, e.g.*, *id. at* 900 (citation omitted).

190. *E.g.*, *id*. at 900 (2008) (citations omitted) (advocating using the Ninth Amendment's history to interpret its text, which is "not self-defining"); *see also* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 613-14 (1999) [hereinafter Barnett, *An Originalism*] (arguing that originalism is the "prevailing approach to constitutional interpretation").

191. *E.g.*, Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (combining textualism and originalism); *see also* Lash, *A Textual-Historical Theory*, *supra* note 2 (interpreting the Ninth Amendment according to its text and history); *see also* Barnett, *A Response to a Textual-Historical Theory*, *supra* note 187 (same).

192. *E.g.*, Lash, *A Textual-Historical Theory*, *supra* note 2, at 900 (citation omitted).

193. Barnett, *An Originalism*, *supra* note 190, at 613-14 (arguing that originalism is the "prevailing approach to constitutional interpretation").

194. Barnett, *The Ninth Amendment*, *supra* note 11, at 5.

195. *See, e.g.*, *id*. at 6-10 (stating that the subsequent analysis will focus on the original public meaning approach, although that analysis apparently partially relies on original framers' intent and original ratifiers' intent by discussing the drafting and ratification of the Ninth Amendment); Lash, *The Lost Original Meaning*, *supra* note 14, 339-40, 348-402 (2004) (stating that the subsequent analysis will focus on both original ratifiers' intent and original public meaning, and then analyzing the framers' drafting and the ratification of the Ninth Amendment to interpret that Amendment).

196. U.S. CONST. amend. IX.; *see also* Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 264 (1983) ("The [N]inth [A]mendment looks to the past, to established rights that have been or shall have been 'retained.' ").

197. U.S. CONST. amend. VII ("[T]he right of trial by jury shall be preserved[.]").

198. *E.g.*, Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 564-65 (1990) (holding that when a court considers whether the Seventh Amendment right to a jury is applicable, the court must engage in historical analysis to determine whether the Seventh Amendment "preserved" the alleged right when ratified in 1791).

199. *See* Lash, *A Textual-Historical Theory*, *supra* note 2, at 910 (2008) (discussing several types of rights that the Ninth Amendment may have retained and concluding that such rights include individual natural rights).

comparison, the Seventh Amendment's "preserved" right includes and extends beyond the scope of that right that the government recognized when the Seventh Amendment was ratified.[201] Furthermore, the Ninth Amendment retained individual natural rights,[202] which humans inherently had when the Ninth Amendment was ratified regardless of whether or not the government recognized those rights.[203] With this caveat, an originalist method of interpretation is the most appropriate way to interpret the Ninth Amendment.

B. Interpretation of The Ninth Amendment As a Federalist Provision that Protects Autonomy of Local Government

One prevailing scholarly interpretation views the Ninth Amendment as a federalist provision that limits federal power[204] and thereby protects "autonomy of local government."[205] This, in turn, protects people's right to local control of their rights.[206] This federalist view rejects the notion that the Ninth Amendment is a source of individual rights.[207] Advocates of the federalist view argue that the Ninth Amendment does not authorize courts to strike down laws.[208] Moreover, this view warns that an unduly broad interpretation of individual rights protected under substantive due process by the Fourteenth Amendment

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200. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 848 (1992) (The Ninth Amendment shows 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."); *see also* Randy E. Barnett, *Police Power*, *supra* note 22, at 442-48 (2004) (explaining how the framers' beliefs in limitless inherent natural rights shaped the Ninth Amendment).

201. Curtis v. Loether, 415 U.S. 189, 193 (1974) ("Although the thrust of the [Seventh] Amendment was to preserve the right to jury trial as it existed [when that Amendment was ratified] in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time.").

202. *See infra* Part III.A.i.; *see also* Barnett, *A Response to a Textual-Historical Theory*, *supra* note 187, at 940-54 (arguing that the Ninth Amendment's text and history suggest that Amendment protects unenumerated individual natural rights); Lash, *A Textual Historical Theory*, *supra* note 2, at 904-06, 908-10 (arguing that the Ninth Amendment may be interpreted to require that unenumerated rights be protected to the same extent as enumerated rights and that the rights protected by the Ninth Amendment are not limited to individual natural rights because "there is strong historical support for the proposition that the retained rights of the people were considered so vast as to not be *capable* of enumeration."). *See generally* Barnett, *The Ninth Amendment*, *supra* note 11, at 1 (same).

203. Barnett, *Police Power*, *supra* note 22, at 442-43 (arguing that humans inherently possess individual natural rights regardless of whether or not the government recognizes or protects those rights); Barnett, *The Ninth Amendment*, *supra* note 11, at 13-14 ("[T]he Ninth Amendment was meant to preserve the 'other' individual, natural, preexisting rights that were 'retained by the people' when forming a government but were not included in 'the enumeration of certain rights.' ").

204. *See supra* note 13.

205. Lash, *The Lost Original Meaning*, *supra* note 14, at 401-02.

206. *Id.*

207. *See id.* at 340-41; *see also* Lash, *A Textual-Historical Theory*, *supra* note 2, at 903.

208. Lash, *The Lost Original Meaning*, *supra* note 14, at 346.

could invade people's right to local self-government, retained by the Ninth Amendment.[209] Professor Kurt Lash, an advocate of this federalist view, does not suggest that the *Griswold* Court was incorrect to find a right to privacy.[210] Instead, he argues that the Ninth Amendment is the least appropriate constitutional provision to use to support "an expansive interpretation of the Fourteenth Amendment's Due Process Clause."[211]

C. Interpretation of the Ninth Amendment As a Protection of Unenumerated Individual Natural Rights

A second prevailing scholarly view interprets the Ninth Amendment as protecting unenumerated individual natural rights.[212] This view generally argues that courts may use the Ninth Amendment to protect unenumerated rights.[213] Although the Ninth Amendment does not expressly call for affirmatively protecting unenumerated rights, the natural-rights view argues that viewing the Ninth Amendment as merely a rule of construction makes no sense if such rights do not exist.[214]

This interpretation broadly defines natural rights to include the right to do anything that does not interfere with the exercise of other people's natural rights.[215] People inherently possess natural rights, which exist regardless of whether or not the government actually protects those rights.[216] Furthermore, natural rights form the basis of determining whether governmental action is just.[217] According to Professor Randy Barnett, an advocate of the natural-rights view of the Ninth Amendment, government should not interfere with natural rights without a compelling justification.[218]

To further elaborate, natural rights are so endless that they cannot possibly be enumerated in a constitution but instead are limited only by one's imagination.[219] An example of the breadth of this notion occurred in the House of Representatives during a debate on the language of what became part of the First Amendment.[220] During that debate, Representative Theodore Sedgwick criticized the attempt to enumerate natural rights because the enumeration would be "very lengthy" and include such minutia as the rights to wear a hat, go to bed when one pleases, and get out of bed when one pleases.[221]

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209. Lash, *A Textual-Historical Theory*, *supra* note 2, at 923-24.

210. Lash, *The Lost Jurisprudence*, *supra* note 11, at 712.

211. *Id.*

212. *See supra* note 13.

213. Lash, *The Lost Original Meaning*, *supra* note 14, at 345.

214. Randy E. Barnett, *The People or the State?: Chisholm v. Georgia and Popular Sovereignty*, 93 VA. L. REV. 1729, 1750 (2007).

215. Barnett, *Police Power*, *supra* note 22, at 446.

216. *Id.* at 442-43.

217. *Id.*

218. *Id.* at 446.

219. *Id.* at 446-48.

220. *Id.* at 447-48.

221. Barnett, *Police Power*, *supra* note 22, at 447-48.

Although natural rights may legitimately be subject to government regulation, this does not mean they may legitimately be completely surrendered to the government.[222] Instead, natural rights may be subject to reasonable government regulation because such regulation is essential to facilitating their exercise.[223] Some natural rights may even be surrendered to the government in order to secure the rights not surrendered.[224] For example, John Locke argued that when humans form a civil society, they surrender to the government their executive power to enforce one's rights by punishing or extracting reparations from one's attacker, but only so that everyone's right to self-preservation is better protected.[225]

III. ANALYSIS: THE U.S. SUPREME COURT SHOULD USE THE NINTH AMENDMENT'S NATURAL-RIGHTS INTERPRETATION TO EXPAND THE SCOPE OF SUBSTANTIVE DUE PROCESS AND THEREBY PROTECT THE RIGHT TO SAME-SEX MARRIAGE

The U.S. Supreme Court should accept the natural-rights interpretation of the Ninth Amendment and use that amendment to expand the scope of substantive due process to protect unenumerated individual natural rights. In doing so, the Court should hold that substantive due process protects the right to marry a person of the same sex.

A. The U.S. Supreme Court Should Rely on the Ninth Amendment's Natural-Rights Interpretation to Supplement Substantive Due Process and Thereby Broadly Protect Unenumerated Individual Natural Rights

i. The Ninth Amendment Protects Unenumerated Individual Natural Rights

The most persuasive interpretation of the Ninth Amendment is the natural-rights one, for several reasons, including textualist[226] and originalist methods of constitutional interpretation.

The first reason is the Ninth Amendment's text. The Ninth Amendment refers to people and rights, not states and powers.[227] Therefore, viewing the

222. *Id.* at 455.

223. *Id.*

224. *Id.*

225. *Id.* at 454 (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT 326 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690)).

226. This textualist analysis includes an "intra-textualist" analysis, which is a specific type of textualism that interprets one constitutional provision by comparing that provision's text to the text of other constitutional provisions. *See* Lash, *A Textual-Historical Theory*, *supra* note 2, at 899 & n.15 (2008) (citing Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999)) (explaining intra-textualism).

227. U.S. CONST. amend. IX; *see also* Barnett, *A Response to a Textual-Historical Theory*, *supra* note 187, at 946 (explaining that the Ninth Amendment refers to "the people" like the Fourth Amendment does, which also protects an individual right, given that it refers

Ninth Amendment as protecting individual rights makes the most sense, textually. The federalist argument that the Bill of Rights' and Preamble's references to "the people" refer to popular sovereignty, not individual rights,[228] makes little sense in light of certain amendments' references to "the people" in the context of protecting individual rights.[229] Furthermore, the Ninth Amendment's textual prohibition of "den[ial] or disparage[ment]" of unenumerated rights suggests that the Ninth Amendment protects unenumerated rights to the same extent that the Constitution protects enumerated rights.[230]

The second reason is that historical evidence favors the natural-rights interpretation. Historical evidence overwhelmingly shows that the founding generation strongly believed in natural rights.[231] Specifically, James Madison, who conceived and formulated the Ninth Amendment, was concerned that majoritarian governments could violate people's individual rights,[232] a concern largely shared by the Constitutional Convention.[233] James Madison introduced the Ninth Amendment to calm concerns that the Bill of Rights would be read as exhaustive and thus allow unenumerated individual natural rights to be violated, not to calm concerns about federalism.[234] Justice Goldberg and advocates of the federalist view of the Ninth Amendment, such as Professor Lash and Justice Black, have accepted this history as accurate.[235] Indeed, Professor Lash acknowledges that the federalist view of the Ninth Amendment

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to security of bodies and homes, as contrasted with the Tenth Amendment, which mentions "the people" and "states" and speak in terms of powers, not rights).

228. Lash, *The Lost Original Meaning*, *supra* note 14, at 341.

229. *See supra* note 227.

230. Barnett, *The Ninth Amendment*, *supra* note 11, at 78; Lash, *A Textual-Historical Theory*, *supra* note 2, at 900-01, 904-05.

231. *See* Barnett, *Police Power*, *supra* note 22, at 444; *see also* Lash, *The Lost Original Meaning*, *supra* note 14, at 347, 401.

232. Barnett, *A Response to a Textual-Historical Theory*, *supra* note 187, at 940-42.

233. *Id.* at 960-62.

234. *Id.* at 945; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 n.15 (1980) (plurality opinion) ("Madison's efforts, culminating in the Ninth Amendment, served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others.").

235. Griswold v. Connecticut, 381 U.S. 479, 488-89 (1965) (Goldberg, J., concurring) (stating that the Ninth Amendment "was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected"); *id.* at 519-20 (Black, J., dissenting) ("[T]he Ninth Amendment was intended to protect against the idea that 'by enumerating particular exceptions to the grant of power' to the Federal Government, 'those rights which were not singled out, were intended to be assigned into the hands of the General Government (the United States), and were consequently insecure.'"); Lash, *A Textual-Historical Theory*, *supra* note 2, at 901-02, 904 (recounting this history and acknowledging that "[i]t is generally accepted that one of the central purposes of the Ninth Amendment was to avoid the implication that the Bill of Rights was an exhaustive list of rights"); *see also* Lash, *The Lost Jurisprudence*, *supra* note 11, at 712 (arguing that Justice Black's dissent came closest of all opinions in *Griswold* to accepting the federalist view of the Ninth Amendment).

has been criticized for failing to "fully appreciate the Founders' belief in natural rights."[236]

The third reason is that too broad of a notion of state police powers may unduly swallow the natural rights protected by the Ninth Amendment.[237] Although the federalist view has the reverse concern of expansive rights unduly restricting state police powers,[238] the natural-rights view's concern has a stronger basis for several reasons. A broad reading of Tenth Amendment police powers is not consistent with the Tenth Amendment's text.[239] Additionally, any concern with judges protecting unenumerated individual rights applies at least as much to judges protecting unenumerated state police powers.[240] Moreover, the federalist view accepts that federalism exists because states theoretically better protect individual rights than the federal government does,[241] so the federalist view inconsistently argues that the Ninth Amendment permits state control of those rights.[242] Finally, the U.S. Supreme Court has held that federalism exists to protect individual rights, not state autonomy and power.[243]

236. Lash, *The Lost Original Meaning*, *supra* note 14, at 347.

237. *See generally* Barnett, *Police Power*, *supra* note 22.

238. Lash, *A Textual-Historical Theory*, *supra* note 2, at 923-24 .

239. Barnett, *Police Power*, *supra* note 22, at 430-32 (arguing the "Tenth Amendment is expressly noncommittal on the scope of state powers" because it not only limits state powers to those not granted to the federal government but also to those not prohibited by the Constitution and arguing that the Tenth Amendment reserves powers for the states and the people without specifying which).

240. *Id*. at 430-33 (noting both concerns and arguing that the Constitution provides more textual support for unenumerated individual rights than for unenumerated police powers).

241. Lash, *The Lost Original Meaning*, *supra* note 14, at 402 ("The very presumption of the Bill of Rights is that personal rights will be better protected if left to the states.").

242. *See id.* (arguing the Ninth Amendment gives people the right "to decide, on a local level, how they wished to exercise their rights").

243. *See*, *e.g.*, New York v. United States, 505 U.S. 144, 181 (1992) (citation omitted) ("The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.' "); *see also* Bond v. United States, 131 S. Ct. 2355, 2364 (2011) ("Federalism secures the freedom of the individual. . . . Individual liberty secured by federalism is not simply derivative of the rights of the States."); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (explaining that balancing power between the states and the federal government "will reduce the risk of tyranny and abuse from either front"); *id*. at 458-59 ("In the tension between federal and state power lies the promise of liberty. . . . The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.' ") (quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985)); Printz v. United States, 521 U.S. 898, 921 (1997) ("This separation of the two spheres [of government] is one of the Constitution's structural protections of liberty.").

The final reason is that the natural-rights interpretation, unlike the federalist one, does not render the Ninth Amendment redundant[244] with the Tenth Amendment,[245] which limits federal power to that expressly granted in the Constitution.[246] Although the federalist view argues that the Ninth Amendment limits the means Congress may use, whereas the Tenth Amendment limits Congress's ends to enumerated powers,[247] this distinction is unpersuasive because such limits are essentially one and the same: limits on Congress's power. Additionally, modern jurisprudence on federalism is grounded in the Tenth Amendment and not the Ninth Amendment.[248]

ii. The Ninth Amendment Should Supplement and Expand the Scope of Substantive Due Process

The Ninth Amendment provides a stronger foundation for judicial protection of unenumerated rights than substantive due process does. Therefore, the U.S. Supreme Court should also rely on the Ninth Amendment in substantive due process cases. Although citing the Ninth Amendment as textual support for substantive due process has been criticized,[249] the U.S. Supreme Court has supported it.[250] Several reasons support this proposition, including textualist analysis.

First, the Ninth Amendment provides stronger textual support for protection of unenumerated rights than the Due Process Clause does. The Due Process Clause's lack of textual support for protecting substantive rights is

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244. Interpretations of the Constitution that create redundancies are to be avoided because such interpretations render the redundancies without effect, and no constitutional provision is to be without effect. *See, e.g.*, Marbury v. Madison, 5 U.S. 368, 387, 1 Cranch 137, 174 (1803).

245. The Ninth Amendment has been "[a]lmost invariably paired with the Tenth Amendment." Lash, *A Textual-Historical Theory*, *supra* note 2, at 897; *see also supra* note 171 and accompanying text.

246. *See, e.g.*, *New York*, 505 U.S. at 156-57.

247. Lash, *A Textual-Historical Theory*, *supra* note 2, at 920-21 (arguing the Ninth Amendment "prohibits the federal government from claiming that the only limit to its 'necessary and proper powers' are those expressly enumerated in the Constitution"); *see also* Lash, *The Lost Original Meaning*, *supra* note 14, at 399 (arguing the Tenth Amendment limits federal powers to those enumerated, whereas the Ninth Amendment limits the interpretation of those powers).

248. Lash, *A Textual-Historical Theory*, *supra* note 2, at 925 (citing City of Boerne v. Flores, 521 U.S. 507 (1997); United States v. Morrison, 529 U.S. 598 (2000)).

249. *See, e.g.*, Lash, *The Lost Jurisprudence*, *supra* note 11, at 712 (arguing the Ninth Amendment is the least appropriate constitutional provision to use to support "an expansive interpretation of the Fourteenth Amendment's Due Process Clause").

250. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 848 (1992) (stating that the Ninth Amendment shows 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"); *see also* Griswold v. Connecticut, 381 U.S. 479, 486-87 (1965) (Goldberg, J., concurring) (arguing that the Ninth Amendment supports the concept that the rights protected by the Due Process Clauses are not limited to rights mentioned in the Bill of Rights).

perhaps the most obvious concern with substantive due process.[251] By contrast, the Ninth Amendment explicitly refers to unenumerated rights.[252]

Second, the Ninth Amendment's textual support for the existence of unenumerated natural rights can support the Court's legitimacy when the Court protects such rights. Specifically, the Ninth Amendment provides "cognizable roots in the language . . . of the Constitution"[253] that the Constitution protects unenumerated rights.[254]

Third, the Ninth Amendment can provide sensible limits to substantive due process. The Court has expressed concern that substantive due process adjudication is too "open-ended" without "guideposts"[255] and appears limited in scope only by the preferences of the Members of the Court.[256] However, when the Court decides cases involving unenumerated rights, it relies on "reasoned judgment," as it does in every case involving constitutional interpretation.[257] Thus, the Court can suitably determine the existence of natural rights, which is determined by reason.[258] A sensible limit on protection of unenumerated individual natural rights is that they may not be exercised in a way that interferes with other people's ability to exercise their natural rights.[259]

Fourth, concerns about the Court's legitimacy cut two ways in cases involving unenumerated rights because such cases, when challenging state laws, also involve unenumerated state police powers.[260] Constitutional textual support for unenumerated rights is arguably as strong as or stronger than textual support for unenumerated state police powers, partially due to the Ninth Amendment.[261] Furthermore, stronger protection of unenumerated rights at the expense of unenumerated state police powers will arguably enhance the legitimacy of the Constitution and laws made pursuant to it.[262] The Court therefore should provide greater protection of unenumerated rights by partially

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251. *See supra* note 31.

252. U.S. CONST. amend. IX; *see also* Lash, *A Textual-Historical Theory*, *supra* note 2, at 901 (acknowledging that the Ninth Amendment implies that unenumerated rights exist and ought to be respected to the same degree as enumerated rights); *see also* Randy E. Barnett, *The Ninth Amendment*, *supra* note 11, at 78 (same).

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

254. *See supra* note 252.

255. Albright v. Oliver, 510 U.S. 266, 271-72 (1994) (plurality opinion).

256. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 121 (1989) (plurality opinion) (quoting Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 502 (1977) (plurality opinion)).

257. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849 (1992).

258. *See, e.g.*, Alford, *supra* note 148, at 659.

259. Barnett, *Police Power*, *supra* note 22, at 446.

260. *Id*. at 430-31.

261. *Id*. (arguing the Ninth and Fourteenth Amendments support the existence of unenumerated individual rights, whereas the Tenth Amendment reserves powers for the states and the people without specifying which); *see also supra* notes 239-240 and accompanying text.

262. Barnett, *Police Power*, *supra* note 22, at 433; *see also* Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111 (2003).

relying on the Ninth Amendment because otherwise the Tenth Amendment's police powers may unduly swallow natural rights.[263]

iii. Courts May Enforce the Ninth Amendment

Federal and state courts may enforce the natural rights retained by the Ninth Amendment. Perhaps an understated aspect of federalism as a structural protector of liberty[264] is the federal government's power to void state laws that infringe people's individual rights.[265] Some Members of the U.S. Supreme Court have criticized the notion that courts can use the Ninth Amendment to strike down laws.[266] However, this view is unpersuasive because it permits governing majorities to violate people's natural rights.[267] This view also largely renders the Ninth Amendment without effect, which the Court tries to avoid doing to constitutional provisions.[268] Similarly, all state and federal judges in the United States take an oath to uphold the Constitution, including the Ninth Amendment.[269]

B. The Ninth Amendment Provides Textual Support for the U.S. Supreme Court to Use Substantive Due Process to Protect the Right to Same-Sex Marriage

The Ninth Amendment's textual protection of unenumerated rights[270] provides support for the protection of the right to same-sex marriage under

263. *See generally* Barnett, *Police Power*, *supra* note 22, at 452-95 (expressing the concern of state police powers swallowing natural rights).

264. *See, e.g.*, Printz v. United States, 521 U.S. 898, 921 (1997) ("This separation of the two spheres [of state and federal government] is one of the Constitution's structural protections of liberty.").

265. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 459-60 (1991) (citing the supremacy clause, U.S. CONST., Art. VI, cl. 2); *see also id*. at 458-59 (" '[T]he general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. . . . If [the people's] rights are invaded by either [the federal government or state government], *they can make use of the other as the instrument of redress*.' " (citing THE FEDERALIST NO. 28, at 180-181 (Alexander Hamilton) (Clinton Rossiter ed., 1961)) (emphasis added)); *id*. at 459 ("[A] double security arises to the rights of the people. The *different governments will control each other*, at the same time that each will be controlled by itself." (citing THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961))) (emphasis added); *id*. at 458 (stating that balancing power between the states and the federal government "will reduce the risk of tyranny and abuse from either front").

266. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 91-92 (2000) (Scalia, J., dissenting) (arguing courts cannot use the Ninth Amendment to strike down laws, although it retains certain rights for the people).

267. *See, e.g.*, Barnett, *A Response to A Textual-Historical Theory supra* note 187, at 940-42 (arguing James Madison proposed the Ninth Amendment to reduce the possibility of majoritarian governments violating people's natural rights).

268. Marbury v. Madison, 5 U.S. 368, 387, 1 Cranch 137, 174 (1803).

269. U.S. CONST., art. VI, cl. 3; *see also* Griswold v. Connecticut, 381 U.S. 479, 491 (1965) (Goldberg, J., concurring).

270. *See supra* note 202.

substantive due process. Although the U.S. Supreme Court has not directly addressed whether states may constitutionally prohibit same-sex marriage,[271] it has used broad language that suggests states may not.[272] The Ninth Amendment provides further support for this proposition, for several reasons.

First, the U.S. Supreme Court has used the Ninth Amendment to support a broad view of substantive due process to protect unenumerated rights,[273] including marriage-related freedom.[274] Even when using substantive due process without citing the Ninth Amendment for support, the Court has recognized that the Ninth Amendment could be a legitimate source for protecting unenumerated rights.[275] Accordingly, the Ninth Amendment supports the proposition that protection of the substantive due process right to marriage should be expanded to protect the right to marry a person of the same sex.

Second, the Ninth Amendment counters the argument that traditional prohibition of same-sex marriage is a sufficient reason for a court to uphold such a prohibition.[276] Framing past marriage cases as protecting only the right to opposite-sex marriage may too narrowly frame the fundamental right being protected.[277] But even if those cases are properly framed that narrowly, the Ninth Amendment shows that tradition does not mark the outer limits of substantive due process.[278] For example, traditional prohibition of inter-racial marriage did not prevent the Court from correctly striking down such a

271. Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971), *cert. denied*, 409 U.S. 810 (1972).

272. Zablocki v. Redhail, 434 U.S. 374, 384 (1978) ("the right to marry is of fundamental importance for *all individuals*") (emphasis added).

273. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 848 (1992) (The Ninth Amendment shows 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."); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (nothing that the Ninth Amendment and other provisions in the Bill of Rights have penumbras that create a right to privacy); *see also id*. at 486-87 (Goldberg, J., concurring) (arguing that the Ninth Amendment supports the concept that the rights protected by the Due Process Clauses are not limited to rights mentioned in the Bill of Rights).

274. *Griswold*, 381 U.S. at 485-86 (protecting the unenumerated right of married couples to use contraceptives).

275. Roe v. Wade, 410 U.S. 113, 153 (1973) (relying on substantive due process instead of the Ninth Amendment to protect the right to privacy but noting that the district court did not incorrectly rely on the Ninth Amendment to protect that right).

276. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 998 (N.D. Cal. 2010) (analyzing whether traditional prohibition of same-sex marriage is a sufficient reason to uphold such a prohibition); *see also* Perry v. Brown, 671 F.3d 1052, 1092-93 (9th Cir. 2012) (same).

277. *See, e.g.*, *Casey*, 505 U.S. at 847-48 (refusing to define constitutionally-protected practices "at the most specific level").

278. *See supra* note 273 and accompanying text.

prohibition.[279] Thus, tradition is merely the starting point of the substantive due process inquiry and not necessarily the end point.[280]

Furthermore, tradition is irrelevant to the inquiry of which natural rights the Ninth Amendment protects. People inherently have natural rights, independently of whether or not the government protects those rights.[281] Therefore, a history of government prohibition of certain conduct would merely show that the government may have historically violated people's natural rights by prohibiting that conduct,[282] rather than that the prohibited conduct is not a natural right.

Third, the Ninth Amendment also counters the argument that states may prohibit same-sex marriage in order to protect the rights of people who oppose same-sex marriage.[283] The Ninth Amendment protects natural rights,[284] which include the right to do anything that does not interfere with other people's ability to exercise their natural rights.[285] Entering into a same-sex marriage does not interfere with other people's ability to exercise their natural rights because it has no effect on their rights.[286] Therefore, the government needs to have a compelling reason to prohibit same-sex marriage,[287] which it does not have.[288]

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279. *Casey*, 505 U.S. at 847-48 (stating that the Court had correctly used substantive due process to strike down a ban on interracial marriage, although the Bill of Rights does not mention marriage and interracial marriage had traditionally been illegal in the United States) (citing Loving v. Virginia, 388 U.S. 1, 12 (1967)).

280. Lawrence v. Texas, 539 U.S. 558, 572 (2003).

281. *See, e.g.*, Barnett, *Police Power*, *supra* note 22, at 442-48 (explaining how the framers' beliefs in limitless inherent natural rights shaped the Ninth Amendment).

282. *See, e.g.*, *id.* at 442-43 (arguing that propriety of government commands is judged by adherence to natural rights).

283. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1000-01 (N.D. Cal. 2010) (analyzing whether a same-sex marriage ban protects the rights of people who oppose same-sex marriage); *see also* Perry v. Brown, 671 F.3d 1052, 1091-92 (9th Cir. 2012) (analyzing whether a same-sex marriage ban protects religious liberty and parents' right to educate their children).

284. *See supra* note 202.

285. *See, e.g.*, Barnett, *Police Power*, *supra* note 22, at 446.

286. *See, e.g.*, Diamond v. Charles, 476 U.S. 54, 66-67 (1986) (holding that appellant's "claim of conscientious objection to abortion does not provide a judicially cognizable interest"); *see also* Lawrence v. Texas, 539 U.S. 558, 577-78 (2003) (holding that " 'the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice' ") (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)); *see also* Bowers v. Hardwick, 478 U.S. 186, 213 (1986) (Blackmun, J., dissenting) ("[M]ere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest[.]"); *see also Perry*, 704 F. Supp. 2d at 1001 (holding that a same-sex marriage ban does not affect the legal rights of persons who do not wish to enter into a same-sex marriage).

287. *See, e.g.*, Barnett, *Police Power*, *supra* note 22, at 446 (arguing that government needs a compelling justification to prohibit conduct that does not interfere with other people's natural rights).

288. *See infra* Conclusion.

Fourth, the Ninth Amendment counters the argument that a state may ban same-sex marriage in order to protect certain perceived benefits of opposite-sex marriage, including perceived benefits as to parenting.[289] Allowing same-sex marriages does not interfere with any benefits of opposite-sex couples,[290] so denying same-sex couples the perceived benefits of marriage is not only counter-intuitive[291] but is a violation of their natural rights.[292] Furthermore, a state may not consider "private biases and the possible injury they might inflict" when trying to protect children, including private biases against certain marriage arrangements.[293]

Finally, the Ninth Amendment counters the argument that same-sex marriage may be banned because of notions that it is immoral.[294] A person's ability to exercise his or her natural rights is not limited by notions of morality, but instead is limited only by whether his or her conduct interferes with other people's ability to exercise their natural rights.[295] Although the U.S. Supreme Court did not rely on the Ninth Amendment, the Court accepted a similar argument by holding that a state may not rely on notions of morality to infringe individual rights protected by substantive due process.[296]

CONCLUSION

Because the right to marry is fundamental for all persons[297] and laws that significantly interfere with that right receive strict scrutiny,[298] laws that deny same-sex couples that right should also receive strict scrutiny. Like the law

289. *See Perry*, 704 F. Supp. 2d at 999-1000 (N.D. Cal. 2010) (analyzing whether a same-sex marriage ban rationally promotes opposite-sex-couple parents over same-sex-couple parents); *see also* Perry v. Brown, 671 F.3d 1052, 1086-87 (9th Cir. 2012) (same).

290. *See supra* note 286.

291. *See Perry*, 704 F. Supp. 2d at 1000 ("The inability to marry denies same-sex couples the benefits, including stability, attendant to marriage.").

292. *See, e.g.*, Barnett, *Police Power*, *supra* note 22, at 446 (arguing that a person's natural rights permit that person to do anything that does not interfere with other people's ability to exercise their natural rights).

293. Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (holding that a state's substantial interest in protecting children does not justify granting custody of a child to the child's father on the ground that the child's mother's inter-racial marriage might lead to injury to the child due to private biases against inter-racial marriage) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

294. *See Perry*, 704 F. Supp. 2d at 1002-03 (discussing whether notions of morality suffice to uphold a ban on same-sex marriage); *see also Perry*, 671 F.3d at 1092-93, 1094 (same).

295. *See supra* note 292.

296. Lawrence v. Texas, 539 U.S. 558, 577-78 (2003); *cf.* Tribe, *supra* note 152, at 1951 (arguing the U.S. Supreme Court will and should use *Lawrence v. Texas* to protect same-sex marriage).

297. Zablocki v. Redhail, 434 U.S. 374, 384 (1978).

298. *Id.* at 383 ("Since our past decisions make clear that the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that 'critical examination' of the state interests advanced in support of the classification is required.").

struck down in *Zablocki v. Redhail*, bans on same-sex marriage entirely prohibit certain people from marrying, which significantly interferes with the right to marry.[299] Even if a law banning same-sex marriage classifies on the basis of sexual orientation,[300] and even if such classification receives mere rational-basis scrutiny,[301] a ban on same-sex marriage still must receive strict scrutiny for significantly interfering with a fundamental right,[302] regardless of the statute's classification scheme.[303] To satisfy strict scrutiny, a law "may be justified only by compelling state interests, and must be narrowly drawn to express only those interests."[304] Similarly, under the natural-rights view of the Ninth Amendment,[305] government should not significantly interfere with a natural right without a "compelling" justification.[306]

A ban on same-sex marriage likely would not satisfy the high demands of strict scrutiny. Plausible asserted state interests behind such a ban are unlikely to be compelling, given the fact that some federal courts have found some such

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299. *Id.* at 387.

300. *See, e.g.*, In re Marriage Cases, 183 P.3d 384, 440-41 (Cal. 2008) (holding that a ban on same-sex marriage classified on the basis of sexual orientation); Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010) (same).

301. Romer v. Evans, 517 U.S. 620, 632 (1996) (using rational-basis-scrutiny language by holding that the law in question that discriminates on the basis of sexual orientation violates the Equal Protection Clause because it "lacks a rational relationship to legitimate state interests"); *see also* Perry v. Brown, 671 F.3d 1052, 1082 (9th Cir. 2012) (citing *Romer*, 517 U.S. 620) (applying rational-basis scrutiny to a ban on same-sex marriage); *Perry*, 704 F. Supp. 2d at 997-1002 (holding that California's ban on same-sex marriage does not withstand rational-basis scrutiny under the Equal Protection Clause). *But see In re Marriage Cases*, 183 P.3d at 444-47 (explaining why a law that classifies on the basis of sexual orientation is subject to strict scrutiny under state constitution's Equal Protection Clause); *Perry*, 704 F. Supp. 2d at 997 (stating that strict scrutiny likely is the appropriate standard of review for a legal classification on the basis of sexual orientation) (citations omitted).

302. Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (applying strict scrutiny to a law that significantly interferes with the fundamental right to marry); *see also Romer*, 517 U.S. at 631 (a law is subject to rational-basis scrutiny if it "neither *burdens a fundamental right* nor targets a suspect class") (emphasis added); *see also Perry*, 704 F. Supp. 2d at 994 (holding that a same-sex marriage ban is subject to strict scrutiny for interfering with the fundamental right to marry) (citing Zablocki v. Redhail, 434 U.S. 374, 388 (1978)). *But see* Turner v. Safley, 482 U.S. 78, 94-99 (1987) (holding that a prison regulation that interferes with the constitutional right to marry is subject to rational-basis scrutiny because of the prison context). *See also Perry*, 671 F.3d at 1082 (declining to decide whether same-sex marriage is a fundamental right and accordingly applying rational-basis scrutiny to a ban on same-sex marriage).

303. *Zablocki*, 434 U.S. at 383 (explaining that, even under an equal-protection challenge, the Court must determine which level of scrutiny to apply by looking at the "individual interests affected," not only at the "nature of the classification").

304. Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977); *see also* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) (explaining that a law subject to strict scrutiny is constitutional only if "narrowly tailored" to achieve a "compelling" government interest).

305. *See supra* Parts II.C., III.A.i.

306. Barnett, *Police Power*, *supra* note 22, at 446.

interests to be illegitimate.[307] Furthermore, even if such asserted state interests are compelling, they are unlikely narrowly tailored to achieving those interests, given the fact that some federal courts have held that a ban on same-sex marriage bears no rational relationship to achieving such interests.[308]

The U.S. Supreme Court should accept the natural-rights interpretation of the Ninth Amendment and thereby supplement and expand the scope of substantive due process. Accordingly, the Court should hold that substantive due process's protection of the fundamental right to marriage includes the right to marry a person of the same sex.

307. *See supra* notes 95, 101-103, 115-119 and accompanying text.

308. *See supra* notes 96-100, 114 and accompanying text.