

# ShortCircuit270

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## SPEAKERS

Anthony Sanders, Josh Windham

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### J Josh Windham 00:24

Americans like their rights. And perhaps because we like our rights more than we like our government, we, time and again, have put baby Ninth Amendments in our constitutions to protect those rights, even though we do not spell all those rights out. In order for those protections to have full effect, however, it falls to judges to enforce them. That's a quote from a forthcoming book called *Baby Ninth Amendments: How Americans Embrace Unenumerated Rights and Why It Matters*. I'm Josh Windham attorney at the Institute for Justice and your host for today's episode. I'm joined by your usual host, Anthony Sanders, Director of IJ's Center for Judicial Engagement and author of the book I just quoted, who's going to tell us all about Baby Ninth Amendments and why they matter. Anthony, congrats on the book, and welcome to Short Circuit.

### A Anthony Sanders 01:09

Thank you, Josh. It's nice to be on the other side of this microphone, and you do make a lovely host.

### J Josh Windham 01:16

Well, thanks a bunch. Why don't you tell folks before we get started, about where they can find the book.

### A Anthony Sanders 01:22

Yes. So you may be listening to this before the book comes out, or you may be listening to it while it comes out or long after that. But it is scheduled to be released on May 9. You can find it in the show notes at a link we'll put there. You can also find it in most places you buy books

online. Search for Baby Ninth Amendments, it's published by University of Michigan Press. And it is available for a decent price at a paperback or hardback. But if you'd like the electronic version, it's actually going to be available for free. And there will be an audio version as well. I don't know if that'll be ready at publication time, but it should be soon thereafter.

**J** Josh Windham 02:10

Great. Well, some folks may have heard of the Ninth Amendment, hopefully, but maybe others have not heard of Baby Ninth Amendments. So why don't you just give us a brief introduction to what this book is about, and why you wrote it?

**A** Anthony Sanders 02:23

Yes. So first of all, let me define what we are throwing around here, Baby Ninth Amendments, and then I'll get into the background for what the book is about. So, you hopefully have heard of the Ninth Amendment, if you're an American listening who's into the Constitution. The Ninth Amendment is one of the original Bill of Rights adopted in 1791, shortly after the Constitution itself was adopted. And it says that the enumeration of rights in the Constitution shall not be construed to deny or disparage others retained by the people. The Supreme Court has never really done much with the Ninth Amendment over the years, here and there, just a little tiny bit, but usually not in majority opinions. And what most people don't understand though, and just don't know about is that the language from the Ninth Amendment has been readopted in state constitutions over the years. And it's actually had more of a life in those state constitutions in their courts, not a big life, but a bit of a life. And it's been adopted 33 times over the last couple centuries in various state constitutions. So my book is about what these provisions in state constitutions mean, what rights they protect, how they've been interpreted over the years, why they were placed in state constitutions, and then a little bit of the end of the book about what that then means for the US Constitution itself, including the Ninth Amendment itself, but also more generally, for this whole concept of unenumerated rights. Rights that are not explicitly spelled out in a constitution, whether the federal or state constitutions, but that nevertheless are constitutionally protected. How do they work? Why would you have them in a constitution? And these Baby Ninths are kind of a way to understand how that might happen.

**J** Josh Windham 04:41

You use the example in the book of a lady named Jane to demonstrate what unenumerated rights are and how they work. Why don't you just give us a bit of a taste of that discussion?

**A** Anthony Sanders 04:53

Yes, yeah. So open, in the introduction, it's actually a device that was suggested to me by our colleague, Dana Berliner, a few years ago, and I think it's a great way to think about why we would have unenumerated rights in the first place. So the introduction opens with Jane, this American and her day. So what does she do during the course of a day? Well, all the normal things, she gets up, she chooses what she eats, she maybe goes to work, if she has kids she

takes them to school, she goes and gardens at some point, she maybe goes out with friends and plays a game, maybe she plays basketball, maybe she plays poker, maybe she does some work at home to fix up her house. And all of these mundane things, some pretty minor, I give it an example of stamp collecting that I harp on for for a while. And some really important, like, where you work or what school you choose for your children. They're all choices that you make in your life, that in just about all state constitutions, and definitely the Federal Constitution, there's nothing that says explicitly, that's a right that is protected. But all of us would say that these are important liberties, right, your right to earn a living, as we always talk about at IJ. Your right to garden, we had a case few years ago, where a Florida community said you can't have a garden vegetable garden in your front yard that was actually enforced by that city. So these are all important liberties that Jane has, but they're not protected. So say a law comes along and says you can't do that. You can't garden in your front yard, you can't work that occupation. Say it's hair braiding, as many people know us for our cases about hair braiding and licensing over the years. You can't work that occupation unless you have this nonsensical license, or you can't do all kinds of other things. You can't rent out your basement to someone that you know, because you live in a single family community, and so we're going to make it illegal for you to provide housing to someone. So pick whatever it is, if it's not something that's explicitly in the Federal Bill of Rights or your state bill of rights. Well, seems like at first, you're out of luck. And a lot of people who say you know, unenumerated rights are illegitimate, they're just made up by judges out of whole cloth would say, yeah, I guess you're out of luck, unless you have a political solution you can't go to court to protect that liberty, even if well, yeah, it does seem pretty important. So my point is, Jane looks in her state bill of rights, also her Federal Bill of Rights, sees this language, that's the Ninth Amendment or is very similar to the Ninth Amendment as the Baby Ninths are. And that language seems to indicate to her that there are rights beyond just those listed. And so perhaps, her right that she's worried about, is going to be protected by the Constitution as well. So my book then tries to answer that question. Does this language in her state constitution protect these unenumerated rights? How does it do that? How do we interpret this language? How do we put it into action in court? And then what is the kind of the broader takeaway from that?

**J** Josh Windham 08:36

So in trying to figure out, does this language protect unenumerated rights and how, you have a pretty lengthy discussion of the different historical iterations of Baby Ninth Amendments, when they were adopted, and what the delegates might have been saying about them when they are being adopted, or at least proposed. So tell us about that, was there any debate among delegates in these states over their adoption? What were the major arguments at the time? Give us a sketch of that.

**A** Anthony Sanders 09:07

Yeah, so this for some people might be the fun part of the book, the history where these provisions come from what people have said about them over the years. This is like the the nitty gritty of digging into transcripts from constitutional conventions in the 1840s is one thing I did to put this book together. Some people will be more into the later stuff, more of the philosophy and the jurisprudence, but the history side I have to say was a lot of fun to put together most of it has been in a couple previous law review articles that are now put into the book, but there's some new stuff in there too. So the fun thing to think about in thinking about

unenumerated rights and state constitutions is you get this whole historical sweep of America. And you don't really get that when you just think about the US Constitution. And I think this is something maybe for people to take away from the book who maybe are ambivalent or aren't struck by the whole concept of unenumerated rights. What you learn about constitutionalism and American constitutionalism, from studying the history of state constitutions, not just, you know, 1787, and then reconstruction, as most people think about American constitutionalism. So if you think about the founding of the nation, and when state constitutions started to be written, which was as early as early 1776, Americans were kind of building the plane while flying it, for lack of a better metaphor. The English, British historical background, didn't have written constitutions, but Americans started writing them so they had a way to organize their governments and then also protect against these governments because they didn't want them to be tyrannical like they saw King George and parliament were tyrannical. And so they they write provisions in there to protect rights and bills of rights, along with the other things you have in constitutions to protect against tyranny, like separation of powers. And along the way, they started writing provisions that were kind of broad. So there were plenty of things like freedom of the press, cruel and unusual punishment. You know, those are two real standards that are in most state constitutions, if not all state constitutions. And then they'd have broad statements like protect the pursuit of happiness. That sounds pretty broad. Most of Jane's rights I think would be protected by that. And then the Ninth Amendment comes along, which is a whole discussion in itself about what that means that I try to leave aside in the book, frankly, because I want to send kind of an olive branch to people who disagree, say, with most libertarians on what the Ninth Amendment means, and say, okay, you can believe that about the US Constitution, but when it comes to state constitutions, I think we can agree that it's more protective than you think the Ninth Amendment is of individual rights. But anyway, we get to a point and that's in 1819, so that's 30 years after the Ninth Amendment was fully drafted in Congress. And two states, Alabama and Maine, are setting up their new states. So they're setting up their constitutions for the first time, and they put language in there that's they're both a little bit different, but it's basically the Ninth Amendment. And why are they doing that? There's been constitutions between the Ninth Amendment and these states that didn't have Ninth Amendment language, Baby Ninth language, but they do. And then over the course of decades after that, states slowly start putting this language more and more into their constitutions. Not all states, but more. And so you get to the Civil War and there's a dozen states that have done this. After the Civil War and Reconstruction, there's more, again not all, but more. And the further you get in the US history, the more and more states put Ninth Amendment language into their constitutions. And the latest actually is Illinois, which its current constitution was adopted in 1970. And that constitution, adopted Baby Ninth Amendment language, Ninth Amendment language. So over the course of US history, you go from zero to 33. 0% to 66%, have this kind of language. Now, Your original question, Josh, was what did they say along the way? It's interesting studying constitutional conventions because as a lot of listeners may know, the US constitutional convention, the famous one in 1787, we don't have a transcript of what they said. We do have Madison's notes, which were published years later and there's a few other sources here and there and about what was discussed. That's also often true of state constitutional conventions. So especially some of the early ones we just don't know what was said, we have a journal, you know, there was a motion to add this language. It was voted on. Often we don't even know what the vote was. And then we know what was spat out at the end of the process. But some we do have transcripts. Over the years it was more common, although unfortunately for historians not as common as you'd like for conventions to write down what everyone said, or at least have some kind of committee report, that kind of thing. And by and large, when these provisions have been talked about in state constitutional conventions, people have just assumed that these rights are protected, so unenumerated rights are protected. In fact, most of the debate, where there has been debate,

is between people who say, well, let's have this Ninth Amendment language in there so we can also not have other rights left out. And sometimes they go as far as to say they're protected. And then there are people who say, why do we even need that, everyone knows these rights are also our rights. Just because we don't list it in the Constitution doesn't mean it's a right. But the implication being that those are still rights that are retained by the people, that are protected. Now, they usually don't get too down the rabbit hole of you know what all that that means as a judge might say, but that was just kind of assumed that rights of a certain kind, I think that they're usually meaning natural rights or rights that have long been understood to be protected in our culture, that they are protected from what the state might do to you in the future. That's a pretty profound difference than kind of the more positivist view you might have today, where a lot of people like Justice Scalia was perfect example of this would say, okay, if it's spelled out in the Constitution, that the right is protected, like free speech, yes, that right is protected. But if it's not in there, then it might be a right that you have in a certain philosophical sense, but it's not a right that binds the government in some way, that has to be a right of positive law. They just didn't think that way in it seems in the 19th century, when they were when they were talking about this. And indeed, even through the 20th century, this was not that controversial of the thing, which is to just say, okay, and then we have other rights out there. I say in the book, often that these are kind of, et cetera clauses. So you list a bunch of rights, and then you say, et cetera, et cetera. Now, thankfully, they they say a bit more than that, as to figure out what these rights are. But they were okay with that idea, and I think that shows that when we interpret our constitutions, whether federal or state, you can't interpret them with whatever the latest fad and modern philosophy is, whether it's positivism or something else. You kind of have to meet them on their own terms. And their own terms are, yeah, a bunch of Americans got together, we tried to figure out what we wanted to say, we meant what we said, and we meant the Constitution to protect liberty, which is at the end of the day what these kinds of clauses are supposed to do.

**J** Josh Windham 18:10

You know, a lot of provisions in the Constitution in any constitution might seem like they make sense or are understandable, or are easily enforceable when you first read them. But then you realize it takes some interpretation to figure out what would fall under the scope of those provisions. So I mean, that may have been partially what was motivating Justice Scalia, regarding the Ninth Amendment right. Which is, how do we objectively figure out what rights would be protected as judges under the Ninth Amendment? And how do we do that in an objective way, without delving into judicial policymaking or stepping on a judicial activism landmine, right? So what in your view is the most objective or historically founded way to go about reading Baby Ninth Amendments, so that you can figure out which rights fall under them and which rights don't?

**A** Anthony Sanders 19:06

Yeah, so great question. And, essentially, so this is gonna sound a little flippant, but essentially, yeah, we read them, we take them seriously, and then we try to put them into action. Now, Justice Scalia, he was actually more extreme I think than most people who have been on the Supreme Court about not enforcing the Ninth Amendment. But he did say in a case in a dissent that the Ninth Amendment articulates certain rights, but I as a judge don't have the power to enforce them. The Ninth Amendment and the Baby Ninth Amendments don't say that. They say

what they say and they say what they say just like the other provisions of the Bill of Rights. So I think at a minimum we have to say, look, whatever your state bill of rights is, we now all understand that they are judicially enforceable. I mean, they bind all governmental actors, they bind the legislature, they bind the governor, they bind your local cop, your local mayor, and they also have to be taken seriously by judges, and judges can enforce them. But then you still have to get to the question, okay well, what does it really mean? Now, I quoted the Ninth Amendment itself earlier, just about all of us a few little exceptions, just about all Baby Ninths, are written essentially the same way. A lot use the word impair, instead of deny or disparage or in addition to. I think maybe because impair is kind of a stronger verb, that you are not to impair these other rights retained by the people just because some rights are enumerated. Now, we don't we don't have to go fully down the discussion in our limited time today, Josh, about how you parse the language of the Ninth Amendment, the language of Baby Ninth Amendments, because that can get a little technical. But kind of the the top line view that I give is, you're right, when you really get into the language of constitutional law, and how to operationalize it, you have a kind of another level. You know, some people call this the construction zone of how you operationalize the meaning of the language into how it actually comes to life in court. And this is where we get things, you know, such as scrutiny, right? So our listeners on short circuit know all about talking about strict scrutiny, intermediate scrutiny, rational basis scrutiny. I know some constitutional lawyers and professors think that that is just a framework we should junk. And instead just to kind of like is a right infringed or isn't it infringed? I'm actually okay with scrutiny. I think judges eventually are going to do something like that, so it's something useful to be to be used. But to cut through a long argument, I think that these Baby Ninths, they all use this word retained. So really what the Baby Ninths come down to when you're trying to operationalize them, is what does retained mean? And then separately when it says deny or disparage, not to deny or disparage others retained by the people, what does that mean vis a vis the other rights that are listed? And so there's two things to take away then. One on the other rights that are listed, however you're enforcing the other rights, so the freedom of speech, the freedom of religion, that's otherwise enumerated in your bill of rights, that you need to enforce whatever these other rights are the same way. So you give them strict scrutiny, you have to give the other rights strict scrutiny. You give them intermediate scrutiny, you have to give the other rights intermediate scrutiny. I think that is a way that we operationalize. I'm not going to say whether this is construction or meaning. I know some originalist scholars get really into that. I just mean, you have the text on the page, and then you operationalize it when you're in court. And I think that's a way to do that. But then that still leaves the big question of what retained means? Usually when people have looked at this, and I think the majority consensus is right, that at least on this particular question, that retained is a term of the social contract. So your listeners probably have heard about social contract theory. So this is something that John Locke, the English philosopher of the 17th century talked about a lot, and other people believed in as a method of thinking through human society, not necessarily as a historical reality. I definitely don't think the social contract is at least as it's fleshed out by these philosophers, is a historical reality. But it is a way to think about how we organize a society and definitely how we organize a constitution, which is the highest law in that little society. And so retained is invoking this idea of a social contract where people come together and they give up some of their rights they had in the, "state of nature," and in return, they get benefits, which is essentially the protection of the government and the things we do together, as some politicians like to say, as a government, but they retain rights. So the main takeaway I try to emphasize when I talk about this and write about this in various context is that our constitutions both the US Constitution or various state constitutions, assume Locke, not Hobbes. All these delegates weren't sitting around reading John Locke's Second Treatise of Government and saying, okay, we're gonna make this the constitution, that's not what I mean. In the back of their minds and their philosophical framework, they think of a

Lockean sense, they don't think of a Hobbesian sense. So Hobbes famously is the guy who comes up with the idea of Leviathan. So, that that term originally from the Bible, is now when people hear Leviathan, right, they think like absolute dictator, because that's what Hobbes talked about. We all come together, we want to escape this terrible state of nature, and so we give up all our power to the Leviathan, who then is going to take care of us. And then we got to obey that guy.

J

Josh Windham 26:25

I mean, Hobbes says he'll be benevolent, you know, so not a big deal, right?

A

Anthony Sanders 26:29

Of course, there's nothing to worry about there. Well, like, no state constitutional convention ever says, hey, let's go with Hobbes, right? They don't mention Locke very much at all, either. But in what they want to set up, they want to give up some of their rights to this state government, yes, but we're going to retain a whole bunch. And often you get even more than just Baby Ninth Amendments, you get all kinds of other language in state constitutions that is like we're only giving up as much as we need to here. So that's the framework that is in the background, when you see this word retained. So retained by the people, there are rights that we retain, they are state of nature type rights. So I do not mean, and I take pains to spell this out in the book, I do not mean that our state constitutions when they have a Baby Ninth Amendment, just encapsulate Lockean state of nature theory and that is our law. I do not mean that. But the general idea that you have a state of liberty in the state of nature, and then you give up some of that liberty, but you keep what some of what you came in with, quite a bit of what you came in with, is the way to think about it. So what does that mean? It means that rights like Jane has, right to garden, right to choose a school for your child as a voluntary contract with someone else, right to earn a living, right to rent your basement out to someone to earn a little extra money, right to collect stamps, those are all Lockean liberties that you could have in the state of nature and then you retain them when you come into society. It doesn't mean other kinds of rights, such as positive rights. So a right to be provided an education or a right to healthcare be provided for you or something like that. It also doesn't mean certain, and I equivocate a little bit of this in the book, and I'd be curious what people think of my argument, but it doesn't really mean other procedural rights, like say, your right to confront a witness in court. That is a very important right. It's a right, that's actually spelled out in many constitutions. It's a right that I think, is implicit in the concept of due process, which is, you know, a separate provision in most constitutions or the the equivalent law of the land clauses, as lot of state constitutions have. But your retained rights, it's not those rights. And so those are the rights that are protected by these Baby Ninth Amendments. Now, how does that come up? So you say you go into court and you say, this is a retained right, it's not otherwise spelled out in the Bill of Rights, but it is a liberty right. Say it's your right to garden in your front yard, and you say this has been infringed by the government, and so I want an injunction to stop my city from preventing me from doing that. Okay, so that is an invocation of that right, but that doesn't necessarily mean you're going to win. Just like in any lawsuits involving rights, then the government can come in and say, oh, you know, we have this evidence that shows that this is a really needed ordinance and so we have to enforce it to protect public health and safety, or whatever it is. There's a lot you could argue about there, there's a lot of facts you could come up with. But essentially, it has to be some real level of protection, it can't be the

federal rational basis test, for example, because we all know that then leads to essentially no protection. Doesn't necessarily have to be strict scrutiny. And maybe some libertarians are going to be angry with me for, you know, not mandating strict scrutiny for every single one of these rights in a Baby Ninth Amendment. I could live with a world where it's not strict scrutiny, but it's actually real scrutiny and really protects people, and we expect judges are going to enforce this. But that's what it means. So very long answer to your question, Josh, it means these state of nature rights with some kind of real protection at the same level as other rights that are actually spelled out in your constitution.

J

Josh Windham 31:09

Now, one thing I didn't quite get, and then maybe you can help me understand is whether you think that different state's citizens retain different rights. Or whether because we're talking about the same kind of state of nature theory, retained rights are basically the same for Americans, regardless of which state they happen to live in. What's your view on that?

A

Anthony Sanders 31:33

Yeah. So the short answer is for Baby Ninth Amendments, with a couple possible exceptions because they're worded differently, those rights are going to be the same. But I want to emphasize a lot of this comes down to how the constitution is written. And here, and I'm open to criticism, the viewpoint I put forward in the book is maybe much more kind of based on textualism than other people, including other libertarians might view how to interpret our state and federal constitutions. So you could have a provision, going back a little bit to what I said before, but in answer to your question, you could have a provision that protects unenumerated positive rights. I think it would be a terrible idea by the way, and I think it would be hard for judges to enforce, because enforcing positive rights we've learned through various examples, even if you really like positive rights, it is hard for judges to enforce that for kind of more obvious practical reasons. You know, they don't have the sword or the purse, for example. But you could word a constitution that way, it's just they're not worded that way. So then we look at how Baby Ninth Amendments are worded, they all use this word retained. And there's no reason to think, and I go into this a bit in the book because I write the book from an originalist background. I don't think at all you need to be an originalist to interpret Baby Ninth Amendment the same way I do. But I come from this background, I try to be open about it, like I believe in the fixation thesis, which is kind of the bedrock of what all originalist believe, that the meaning of a text doesn't change over time. And so I say, okay, what does retain mean? What did it mean in 1819 or 1820, when the Maine constitution was adopted? That's actually the oldest continuous Baby Ninth. Alabama's had a number of constitutions over the years, but Maine's just had the one. To Illinois in 1970, or indeed, Rhode Island, which readopted a Baby Ninth in the new constitution in 1986, right. Does the meaning change over time, so those rights are different. So the meanings not going to change because the constitution is adopted at a time where people believe in rights maybe a little differently, which of course, they do in 1970 and to 1820. It's whether the language has a different meaning at that time. And what I show, as people who could probably guess, the word retained, especially in a rights context, ever since the founding of the country it's basically had this Lockean meaning. You could protect rights with different language, but you don't and so that means that in these various provisions, it's going to be the rights that you would have in a state of nature. Again, not something that actually exists or has existed, but it's the way to think about how those rights

are protected. That is what these Baby Ninths protect. And Josh, you're probably thinking, I have this long passage in chapter six in my book where I kind of go down a thought experiment about like, does it protect just rights you happen to have at any one time, like even rights in statutory law, are they protected by your constitution? And I think I show although you might think that, once you really dig down into the meaning it just can't mean that otherwise you get some absurd results. So at the end of the day, yeah, I think it is the same at different time periods in US history, because they're all using this kind of same philosophical framework.

**J** Josh Windham 35:51

What about states that don't have a Baby Ninth Amendment? So about a third of US states don't have one of these. I've litigated in one of them, Pennsylvania, multiple times actually. I wonder what you think about whether unenumerated rights are protected in these states or whether maybe a different provision in their constitutions sort of can do the same lifting as a Baby Ninth? What do you think?

**A** Anthony Sanders 36:16

Yeah. So, yes they can. Pennsylvania especially, because as Josh knows more than just about anyone, it has this wonderful, opening provision to its bill of rights that talks about the very broad rights like I was talking about earlier. The right to liberty, I can't do it off the top of my head, but pursue happiness, acquire, protect and defend property, I think is another one. So that's a different kind of clause that Steven Calabresi, our friend at IJ has written about in some some wonderful work that he's done. He calls them Lockean natural rights guarantees. Sounds kind of familiar, right? Lockean rights to what's going on and Baby Ninth. And I see those as, depending on how they're worded, they're kind of getting at the same thing as Baby Ninths are, which is broadly protecting rights. Those are the most immediate example that answers your question, especially in Pennsylvania. Is their broad language that could refer to all kinds of human activity, all kinds of Lockean human activity. And so a lot of states have both, like they'll have a Lockean natural rights guarantee of this flowing language that originally drafted by George Mason in 1776 and then at the end they'll have a Baby Ninth. And you might even say why do you have both? And the answer is, because delegates who draft constitutions are okay with redundancy. The rule against surplusage is something we've talked about on Short Circuit before about how you can't have language that doesn't do anything, just because there's other language in the Constitution, and so it has to have its own meaning. Well, I mean, those two, that's true to a point, but there's times where the rule against surplusage shouldn't come into play, and other methods of interpreting text come into play, I think, especially with constitutions. You couldn't have delegates who are writing a constitution who are really concerned about, say, a certain kind of future abuse of the government, or maybe they're concerned about making sure the government does something for the people, maybe even a positive right in a certain way. Like they say, when you're writing an essay, you tell them, you tell them what you told them, and you tell them again. And so you might have the same right, protected three different times in a constitution, because they were very concerned about that. But I don't think that means that we should read them as not doing anything. So you have some state constitutions that have that kind of broad language, and not a Baby Ninth Amendment. And I don't think we should think, well, they knew about Baby Ninth Amendments and they didn't include that so they didn't believe in unenumerated rights. I don't think you should conclude that at all. Now, there are some states without either of those and they may

have say a due process clause. And due process clauses, I know this is more controversial, which is actually part of the reason I wrote the book, whether the concept of due process protects due process of law or due course of law protects unenumerated rights. And I think the evidence for that is that they generally do. And so if you're in court in a state that just has a due process or due course of law clause, depending on the history and what it says, you're gonna have to dig into that. But, you know, as a facial matter, yeah, I think they should be interpreted to protect unenumerated rights. However, I would say to those critics out there of substantive due process, who usually, you know, people who are big critics of substantive due process they're also big critics of unenumerated rights, and they kind of see him at the same thing. In fact, a great disservice that has been done in by of all people, Westlaw, and Lexis, is if you look at cases about unenumerated rights, and you get down to like the headnote, it'll say, substantive due process, and then it'll have the little quote from the case that, you know, if you click on the little button, it'll take you down to where it is. Non lawyers have no idea what I'm talking about, but any lawyer knows that's how Lexis and Westlaw work. It takes you down to the case where it talks about, often those cases don't even mention due process, but it says substantive due process. Why? Because substantive due process has become a code word for unenumerated rights. Whereas the way unenumerated rights are designed to be protected in most state constitutions and I would also say the US Constitution, has nothing to do with due process clauses, and yet we always call it substantive due process. So if you think substantive due process is a dumb idea, I mean, I don't, but if you think it's a dumb idea because it's contradictory and meaningless, well, come over to me and see these Baby Ninths amendments or maybe these other provisions that are written differently. And what about these? Do they protect unenumerated rights? And if you just off off the top of your head without looking into the what I've talked about, what people like Steven Calabresi have talked about and say, oh, no, those don't protect unenumerated rights either, then really you're just reflectively disagreeing with the idea of unenumerated rights, not with how these constitutions were actually put together. And you're not open to the idea, which is not at all nuts, that maybe someone would write a constitution to protect unenumerated rights and they'd actually have language in there that essentially says, at cetera, et cetera. And that's one kind of bottom line at the end of the book, that I try to emphasize, is it is not crazy to think that someone would write a constitution, maybe you disagree, maybe you're like if I was at that convention, I would object vociferously and think that is a dumb idea. Well, you weren't there and the other people were, and they wrote it this way. And it's not crazy to think, well, they actually were trying to protect unenumerated rights. So what do you do as a state judge, when you're interpreting this provision? Well, you should do what the constitution says. If you a state judge, actually, as a policy matter, think unenumerated rights is, oh my gosh, what are we going to get into if we actually do that? That's not what the delegates put together, you're supposed to interpret what the Constitution says, right? I hear this over and over again from conservatives who are supposed to do what the Constitution says, well if the Constitution says protect unenumerated rights, that's what the judges are supposed to do. And so I asked people who read the book, to be open minded, even if you don't like unenumerated rights as an idea, and you think substantive due process is an oxymoron, that doesn't mean unenumerated rights can't be interpreted in a different way. All that being said, I do think for different reasons that this book isn't about at all that due process clauses, due process of law clauses can be a way to protect unenumerated rights. And indeed, when people were putting together state constitutions, especially after the founding era, and they knew that courts were protecting unenumerated rights through due process clauses, which is a history that goes back a long way, it's not crazy at all to think well, they put that in there and and you know that that meaning at that time was that it protected unenumerated rights. But then there were other people who put together state constitutions who wanted to maybe tell you what they meant, tell you what they told them, and tell you again.

J

Josh Windham 44:38

Well, I want to wrap up with one final question for you. Obviously, you think it's important that folks start to take Baby Ninth Amendments seriously, including state judges. How do you think we go from a place where that hasn't really happened historically, to where you'd like to see us go?

A

Anthony Sanders 44:55

Yeah. There's an easy answer and a hard answer. The easy answer is judges should start, one being more open to unenumerated rights, and we're in this period, you know, after the Dobbs decision where it seems like unenumerated rights are on the retreat. Which unfortunately, as always happens in the modern day and age of unenumerated rights, everyone's minds head to the abortion question. Whereas there's a heck of a lot of other things to talk about when it comes to unenumerated rights. But what should happen is when these provisions come up in various states when they're litigated, judges should enforce them the way that I argue they should be enforced, that they should have some kind of real scrutiny and that they actually do protect rights and not just suggest protections of rights beyond just those enumerated. Now, that's easier said than done for a couple reasons. One is there's not a lot of case law out there about these provisions. Funnily enough, the little that there is out there, judges do generally recognize that these unlike, you know, maybe what Justice Scalia says about the Ninth Amendment itself, that they protect unenumerated rights so they get that. But then what you always get, and I think this is just part of the reflectiveness of the judicial restraint that we always criticize here at the Center for Judicial Engagement, is that they'll have a large degree of deference, so essentially have rational basis for these rights. Whereas the text, if it means anything else, the text of the Baby Ninths should put them on the same footing as enumerated rights, but judges generally haven't done that. There are some cases in the case law, and I talk about these in the book, and I actually expand on these a bit more recently on the Center for Judicial Engagement blog. So if people are interested in hearing more of say, the stories of Baby Ninths, that I didn't, you know, fill the book with to pad the pages, you can go read about them on the blog about how different people they had a problem, they have this background, they were helped out, because the judge found that their right was protected by a Baby Ninth Amendment. So there are some examples of that, but generally, what's happened, it's funny, generally what's happened with these Baby Ninths Amendments over the years is they're just forgotten about both by judges, but also more importantly by lawyers. So judges, if he's doing his job right, is only going to rule on a case on the arguments that are presented, and that is up to the lawyers. And as we have bemoaned in various ways over the years here on Short Circuit, especially when it comes to state constitutions, lawyers sometimes aren't the most creative. And I think some of this is whatever the case law is, so kind of the problem builds upon itself that while there aren't cases about Baby Ninths, so we'll do this. Usually, just like in the story in federal court and the US Constitution, when unenumerated rights are protected in state court under state constitutions, generally it's a case about a due process clause or the equivalent. And so the idea of substantive due process as the way you protect unenumerated rights is just kind of there in the case law. And again, I think that partly is the judges, but it's also the lawyers. So going forward what should happen is we should have these, innovative, young, rockstar litigators like Josh Windham going in the court where there's a Baby Ninth Amendment in that state and using that as a claim and explaining I mean, they can they can cite to my book, they don't need to, that look, this protects rights beyond just those enumerated. I

realized that with the case law being what it may be that that's not maybe an argument that's going to win you in trial court all the time, although it has over the years in the cases that I talked about. But, I think that especially as we're at a time when the kind of textualist revolution has been around for a few decades now of taking text seriously. Originalism too, but I think it's more just a textualism thing. That if you bring up the text of the state constitution, and look this has to mean something, it means there's rights beyond just those in the constitution, it's a much more comfortable way of doing it than talking about substantive due process. I mean, especially, politically even in 2023, that that should be the way that we protect unenumerated rights. And that in doing that, we're going to protect more rights than just those, you know, handful of unenumerated rights, that in the modern era have been protected. So that means economic liberty gets a fair shake, property rights gets a fair shake, other kinds of personal liberties that have been rejected get a fair shake. And at the end of the day, I think we'll all not only have more rights protected in a way that still allows for this common good of the government to do its thing in a way that doesn't violate our rights. For those worried out there about how I'm trying to bring down state governments with Baby Ninth Amendments, that's not what I'm doing. But constitutions strike a balance between rights and government. This is a way to reinsert that balance into our constitutional law and do it in a way that is true to what "the people" actually adopted in their constitution. So in that way, I think there's a message for both conservatives who are maybe suspicious of unenumerated rights, and also for progressives who are maybe suspicious about certain kinds of unenumerated rights like economic liberty. This is a way, hopefully, we can kind of have a bit of a compromise there and protect rights in a way that has a balance of everyone knowing that the government in the future could do some bad things, so let's have let's going forward have an agreement that we're going to err on the side of liberty, even though we still going to allow this state government we've come together to create to do certain things.

**J** Josh Windham 52:01

As Oprah would say, you get a right, and you get a right, and you get a right. Well, thanks Anthony for coming on today and for bringing attention to these important state constitutional provisions. I hope that everybody will take some time to read the book, learn more about Baby Ninth Amendments, and most importantly, get engaged.