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THE HISTORY OF THE ENACTMENT OF THE NINTH
AMENDMENT AND ITS RECENT DEVELOPMENT

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The ninth amendment declares:

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

This amendment, which had remained essentially unnoticed through the turbulent conflicts generated by the rest of the Bill of Rights, has been suddenly catapulted into prominence through efforts to limit governmental intrusion into man's daily personal habits and pursuits.

Prior to 1965, the unimportance of the ninth amendment in the scheme of constitutional history and its irrelevance to individual liberties secured by the Bill of Rights could hardly be disputed. The activist role of the federal courts in the 1950's made the application of many of the first eight constitutional amendments common knowledge. The state's rights counterattack resuscitated the dormant tenth amendment. But many of us, if candid, would have to admit total ignorance of the content and meaning, if not the existence of the ninth

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¹ U.S. CONST. amend. IX.

amendment. Except for an occasional passing historical or judicial reference, acknowledgment, or mournful lament at its desuetude, the ninth amendment remained essentially ignored for 175 years by historians, legal scholars, and judges. By general agreement of those few who could claim to have knowledge of the amendment, it was simply a legalistic rule of construction appended to the first eight amendments, more accurately characterized as a dead letter, devoid of substantive meaning.² The dramatic rebirth of the ninth amendment in 1965 was due solely to the concurring opinion of Justice Goldberg in the landmark decision by the United States Supreme Court in *Griswold v. Connecticut*.³ In determining that the Connecticut anti-birth control statute was unconstitutional because it violated the ambit of the ninth amendment, Justice Goldberg unleashed a spectacular concentration of scholarly introspection and prompted an unprecedented reevaluation of the constitutional protection of personal freedoms.

Had the Bill of Rights not been demanded by a majority of the delegates to the ratification conventions, there would have been no need for the ninth amendment. Obviously, without the "enumeration" of the first eight amendments, the ninth amendment would have never been considered. Its inclusion in the Bill of Rights and its specific application to the entire Constitution raise vital questions which could be determinative of the future role of the amendment. The most vital issue in the current development and growth of the ninth amendment is the need to interpret and define the key word "others" as used in the amendment. What were the unenumerated rights which the people, although not specifically designating them in the Bill of Rights or elsewhere in the Constitution, did not relinquish to the new central government? If those rights could somehow be catalogued, are they the only ones protected by the ninth amendment, or should post-

² E. DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 63-64 (1955).

³ 381 U.S. 479 (1965).

1791 rights, like the freedom to obtain and use birth control information and supplies, also be included?

After its adoption, the ninth amendment was all but forgotten. Although no specific individual right found protection under the amendment prior to the *Griswold* decision, there were a few judicial decisions which considered it, and an occasional writer who sought its meaning and urged its relevance. The minor attention paid to the ninth amendment during its 175 year period of gestation deserves close scrutiny because it became very significant when present day jurists sought solutions to modern legal problems. The post-*Griswold* expansion of the ninth amendment, and logical extensions which can be expected in the future, seem to support the parallel contentions that the ninth amendment will continue to mature as a touchstone for individual freedom and will soon earn a place of importance alongside the fourteenth amendment. In this study, we shall examine the formulation of the ninth amendment, its judicial interpretation, the concept of unenumerated rights, and the recent flurry of judicial activity involving the ninth amendment.

THE RATIFICATION CONVENTIONS, THE 1789
CONGRESS AND THE NINTH AMENDMENT

Apparently, the Constitutional Convention delegates gave little thought to the inclusion of a bill of rights. The framers were concerned principally with strengthening the national government; and perhaps the common understanding that the central government was one of enumerated powers only, plus the fact that the Articles of Confederation contained no bill of rights, convinced the delegates that such a task could be safely avoided.

Delegates to many of the state ratification conventions disagreed as to the need for a bill of rights. Antifederalists based their attack upon the Constitution on its absence. They were joined by pro-ratification elements which were genuinely concerned that the federal government, under the "necessary and proper" clause, the power of taxation and other

newly granted powers, could encroach upon the liberties previously guaranteed by the states. As a result, several states proposed numerous amendments to the Constitution, some aimed at crippling the power of the new government, but most either specifying individual rights or prohibiting government action. Massachusetts recommended 9 amendments for consideration by the first Congress; New York suggested 32; Pennsylvania, 15, from the convention's minority report; Maryland, 28, including the convention's minority report; Virginia, 40; North Carolina, 46 (Virginia's and North Carolina's recommendations were divided into a Declaration of Rights and proposed amendments); New Hampshire, 12; and South Carolina, 4.⁴ Although almost all of the suggested amendments were rejected by Congress, they constitute an invaluable source for discovery of those "other" rights which may have been referred to in the ninth amendment.

The number and scope of the proposals were ludicrous and clearly designed by the Antifederalists to impede or defeat ratification. They coupled the proposals with a call for a second constitutional convention to consider all amendments, a plan which ultimately would make ratification impossible. The clamor for a bill of rights became a matter of great concern to the Federalists, for the very existence of the infant nation was at stake. They vigorously challenged the need for a bill of rights, both in the *Federalist* papers and in the state ratification conventions. These *Federalist* arguments are singularly important because they resulted in the addition of the ninth amendment.

Hamilton, in *Federalist* papers 83 and 84, disputed the contention of the anti-constitutionalists (as expounded principally by Patrick Henry and George Mason) that the failure to append a bill of rights implied a negation of such rights.

⁴ 2 DEBATES *passim* (J. Elliott ed. 1937). When Rhode Island ratified the Constitution in 1790 it proposed 21 amendments, but they were not considered because they were presented after the Bill of Rights had already been adopted.

After pointing out that the citizens of several states, including New York, were no less secure in their individual liberty because their state had no bill of rights, and that the Constitution as adopted contained many specific protections, he elucidated the technical reasons for his viewpoint. Hamilton pointed out that under the British system, because that government is based upon the rights of the king, a bill of rights is essential to limit the monarchial domain. But the American system, he argued, is based on the rights of the people, and the government has only such powers as are granted by the people. "The people surrender nothing, and as they retain every thing, they have no need of particular reservations."⁵ Not only is a bill of rights unnecessary, Hamilton continued, but any attempt to specify the rights reserved to the people would be potentially dangerous. Referring indirectly to the common law maxim *expressio unius exclusio est alterius* (which in this context means that by specifying particular rights, all other rights would be excluded by implication), he said of a bill of rights:

They would contain various exceptions to powers which are not granted, and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?⁶

Madison also feared that it would be insurmountably difficult to draft specific reservations of rights which could not later be subverted by narrow constructions. For example, he believed strongly in a broadly defined right of conscience, and was concerned about the inability to express fully the concept in writing.⁷ He wrote to Jefferson in October, 1788, stating his view that, by enumerating certain rights, "some of the

⁵ THE FEDERALIST No. 84, at 578 (J. Cooke ed. 1961) (Hamilton).

⁶ *Id.* at 579.

⁷ Kelly, *Clio and the Court, An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 152-53.

most essential rights could not be obtained in the requisite latitude.”⁸

Madison’s opposition to a bill of rights began to weaken when he saw the wide support the Antifederalists had engendered for a bill of rights. Jefferson had also announced his support. In order not to jeopardize ratification in Virginia, Madison promised the convention that Congress would give first priority to amendments embodying a bill of rights and that he would personally use his influence and efforts to that end. Similar assurances were given to other conventions in which ratification was questionable. Based partly on these representations, the necessary number of states ratified the Constitution, attaching their proposed amendments merely as recommendations.

When Congress first met in April, 1789, it faced the monumental task of establishing the new government. The higher priorities of organizing the executive and judicial departments forced postponement of consideration of the amendments proposed by the states. Because he had promised prompt action on amendments, Madison feared that unless the House took up the subject, the states would become suspicious of national power and the precarious Union might collapse.⁹ During the early weeks of the session, Madison had carefully studied and worked over the numerous proposed amendments, discarding both the obvious duplications and those that were anathemas to supporters of a strong central government. Relying heavily on the Virginia proposals, he prepared suggested amendments for congressional action. After delays by the House, he finally persuaded the members that, at the very least, proposed amendments should be introduced. On July 8, 1789, Madison presented to the House his suggestions for

⁸ U.S. CONSTITUTIONAL SESQUICENTENNIAL COMMISSION, *HISTORY OF THE FORMATION OF THE UNION UNDER THE CONSTITUTION* 293 (1941).

⁹ B. MITCHELL & L. MITCHELL, *A BIOGRAPHY OF THE CONSTITUTION OF THE UNITED STATES* 192 (1964).

incorporating amendments into the body of the Constitution.¹⁰ In spite of objections,¹¹ Madison's proposals were referred to a Committee of the Whole House,¹² and later on July 21, to a select committee consisting of one representative from each state.¹³

Madison's fourth suggested amendment contained ten sections which he desired to be inserted between clauses 3 (prohibiting bills of attainder and ex post facto laws) and 4 (prohibiting direct taxation) of article I, section 9, of the Constitution. The last of the ten sections provided:

The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.¹⁴

After introducing all of his proposals, Madison defended the adoption of a bill of rights and countered the Federalist opposition. After reminding the representatives of their obligation to the many dissidents in the states to whom a bill of rights was essential, he countered the argument against enumeration:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were conse-

¹⁰ 1 ANNALS OF THE CONGRESS OF THE UNITED STATES 433 (J. Gales, Sr. ed. 1851).

¹¹ *Id.* at 442.

¹² *Id.* at 450.

¹³ *Id.* at 664.

¹⁴ *Id.* at 435. The wording of Madison's proposal 4(10) is quite similar to the Virginia ratification convention amendment 17. 3 DEBATES 661 (J. Elliot ed. 1937). See also E. DUMBAULD, *supra* note 2, at 188-89, 198.

quently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system, but, I conceive, that it may be guarded against. I have attempted it, so gentlemen may see by turning to the last clause of the fourth resolution.¹⁵

The select committee reported back to the House one week later. The committee had changed Madison's original language in proposition 4(10) to the exact wording of what became the ninth amendment, and the committee's recommended language was ultimately accepted by the House without debate.¹⁶ Having decided to append the proposed amendments instead of incorporating them into the body of the Constitution, on August 24, 1789, the House adopted the articles of amendment, designating Madison's original proposition 4(10) as article 15 of seventeen articles.¹⁷

On September 2, the Senate began considering the House proposals. Only passing reference to article 15 is made in the Senate Journal. The reporter noted that, on September 7, while considering article 15, the Senate rejected another proposed amendment. After a brief conference between chambers, on September 25, 1789, both houses concurred on twelve

¹⁵ 1 ANNALS, *supra* note 10, at 439.

¹⁶ 1 ANNALS, *supra* note 10, at 767. Madison's proposal 4(10) had by then been designated as the eighth proposition.

¹⁷ 1 ANNALS, *supra* note 10, at 779. See B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT 14-15* (1955). Patterson deems this change of great significance. He argues that, having decided to append the proposals to the Constitution, the House should have reinserted the words "here or elsewhere" from the original draft since those words were unnecessary if the proposal had been incorporated into the body of the Constitution. He concludes that this omission was partly the cause for a limited application of the ninth amendment. Because the ninth amendment applies by its express language to the entire Constitution, not just to the amendments, the "here or elsewhere" phrase seems redundant. If it had been as important as Patterson suggests, surely Madison, an opponent of appending the amendments, would have insisted on inclusion of the phrase.

amendments to be presented to the states for ratification.¹⁸ Madison's proposition 4(10) had become article 11 of the proposed amendments. The Senate did not alter the wording from the House proposal. When the first two articles failed to obtain state approval, article 11 became the ninth amendment.¹⁹

PRE-GRISWOLD NARRATIVE AND JUDICIAL INTERPRETATION
OF THE NINTH AMENDMENT

The first known commentary on the ninth amendment was a curious statement by Edmund Randolph who described it as "an opiate . . . which is merely plausible."²⁰ Other early interpretations seemed to recognize its significance. In 1833, in Bayard's handbook on the Constitution, the ninth and tenth amendments are lumped together and rather vaguely described as showing,

. . . the jealousy with which the people regarded the new government, and the care with which the people guarded against any unauthorized exercise of its power. . . . These are important articles, and express the sense of the people, on points of highest consequence.²¹

Commentaries on the Constitution of the United States, written in 1833 by Joseph Story, the earliest scholarly treatise on the Constitution, contains only a terse explanation of the amendment, undoubtedly based on conclusions drawn from

¹⁸ 1 ANNALS, *supra* note 10, at 76.

¹⁹ The two proposed amendments (numbers 1 and 2) which were not ratified by the states provided for a specific ratio of representation in the House of Representatives to population, and prohibited Congress from making a change in the salary of its members which would be effective before the next election of Representatives.

²⁰ Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 633 (1956).

²¹ J. BAYARD, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 140 (1833).

Madison's argument in Congress in support of enumeration. Story states:

This clause was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and, *e converso*, that a negation in particular cases implies an affirmation in all others. The maxim, rightly understood, is perfectly sound and safe; but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies. The amendment was undoubtedly suggested by the reasoning of the

Federalist on the subject of a general bill of rights.²² Story's explanation established the ninth amendment as a rule of construction to aid in the interpretation of other parts of the Constitution, primarily the first eight amendments. The clear implication is that the amendment has no substantive import and cannot, by itself, recognize any individual rights. Another great constitutional law authority, Thomas M. Cooley, ignored the amendment altogether.²³

Until 1936, when the first interpretive essay was published dealing exclusively with the ninth amendment, no textual treatment of the amendment appeared. Essentially unaided by judicial decision, Knowlton Kelsey, an attorney, published a monograph that year entitled "The Ninth Amendment of the Federal Constitution." Basing his opinion on the concept approved by the Supreme Court that each provision in the Constitution has special meaning and none can be superfluous, he took the novel position that the ninth amendment must mean more than Story had signified. He asserted that the framers must have meant it also to be a repository of other existing rights which could be protected against governmental encroachment. Without any real historical basis,

²² 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 651 (5th ed. 1905).

²³ 1 T. COOLEY, CONSTITUTIONAL LIMITATIONS 66 (8th ed. 1927).

Kelsey concluded somewhat prophetically that the ninth amendment,

. . . must be a positive declaration of existing, though unnamed rights, which may be vindicated under the authority of the Amendment whenever and if ever any governmental authority shall aspire to ungranted power in contravention of "unenumerated rights."²⁴

This radical suggestion that the ninth amendment had substantive content, in addition to its role as a rule of construction applicable to the first eight amendments, must certainly have surprised those jurists and constitutional scholars who may have read the article.

An examination of the reported judicial decisions which, by 1936, had even mentioned the ninth amendment, discloses as little recognition of the amendment's significance as suggested by the commentaries.²⁵ The first important legal disputes which sought the meaning of the amendment were the TVA cases in 1936 and 1939.²⁶ The opponents of the Tennessee Valley Authority claimed that, by engaging in the electric power business, the Authority had prevented private individuals from using their property and earning a living. They urged that this constituted a violation of a fundamental right protected by the ninth amendment. The Supreme Court rejected this argument, finding that the federal government, under article IV, section 3, of the Constitution, which gives Congress the power to make regulations concerning the property of the United States, had specific authority for its activities. The Court found no violation of the ninth amendment, noting that the amendment did not *withdraw* rights expressly granted to the central government.

²⁴ Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309, 323 (1936).

²⁵ For the citation of all reported decisions involving the ninth amendment, see Appendix A.

²⁶ *Ashwander v. TVA*, 297 U.S. 288 (1936).

It seems appropriate to characterize the period between the TVA cases and *Griswold*, even though more than 140 years subsequent to the adoption of the amendment, as the early developmental stage of the ninth amendment. It was during this time that we learned what the amendment did *not* mean, and it was a period of speculative writing by scholars who wondered if they had missed something all those years.

Between the TVA cases and the 1965 *Griswold* pronouncement, various state and federal courts passed upon the applicability of the ninth amendment. In the sixteen reported decisions, not one tribunal held the amendment to protect the right being asserted. In the Hatch Act case,²⁷ the plaintiff asserted that citizens have a fundamental right to engage in political activity and campaigns, free of governmental interference. The Court acknowledged the existence of political rights and implied that this specifically claimed right, in the absence of a congressional grant of power to the executive branch of the federal government, would be protected under the ninth amendment. Justice Reed concluded:

Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail. Again this Court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government.²⁸

This distinction between constitutional rights in the people and congressional power in the government has been severely criticized both as an unwarranted emasculation of the ninth

²⁷ *United Pub. Workers of America (CIO) v. Mitchell*, 330 U.S. 75 (1947).

²⁸ *Id.* at 96.

amendment and as an unfounded basis for the dominance of the central government.²⁹

In another case, the seizure of the steel mills by presidential order was held unconstitutional in 1952 by a federal district judge as beyond the scope of executive authority. The court, in a footnote, indicated that the ninth amendment limited the power of the executive and other branches of the federal government.³⁰ More recently, when the Colorado Supreme Court sustained the constitutionality of that state's fair housing law, it rejected a contention that citizens have a fundamental right, protected by the ninth amendment, to discriminate against Negroes. Although dictum, the court observed that, based on the ninth amendment, every man has an unenumerated inalienable right to acquire a home for himself and his family, uninhibited by discrimination on account of race, creed or color.³¹ The seeds of *Griswold* were planted.

These early decisions were also important because they created a new interest and a new controversy. The comparatively large number of cases in which a ninth amendment right was asserted prompted research by historians and legal scholars. They speculated at its dormancy, its meaning (if any), its application. In 1955, a useful book was written promoting the long neglected role of the amendment. In language previously reserved for some of the first eight amendments, the author entreats the judiciary to revitalize the ninth amendment:

We hope that some day our courts, when called upon

²⁹ Call, *Federalism and the Ninth Amendment*, 64 DICK. L. REV. 121, 130 (1960); Abrams, *What Are the Rights Guaranteed by the Ninth Amendment?*, 53 A.B.A.J. 1033, 1035 (1967); Kelley, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814, 826 (1966).

³⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569 (D.D.C. 1952), *aff'd* 343 U.S. 579 (1952) (the Supreme Court affirmed without mention of the ninth amendment).

³¹ *Colorado Anti-Discrimination Comm'n v. Case*, 380 P.2d 34 (Colo. 1962).

to do so, in the vindication of one of the unenumerated rights, will find or rediscover the Ninth Amendment with the full force of its meaning.

It is now covered with the "dust of antique time", but it is hoped that the dust may be swept away and the clouds removed, and that the "mountainous error" has not been piled so high that "truth cannot o'er peer it."

We will ultimately find that this amendment is a succinct expression of the inherent dignity and liberty of the individual and a recognition of the soul of mankind, a belief in his spiritual nature, and an humble acknowledgment of the infinity of our Creator and our nature.³²

Samplings of other pre-*Griswold* writers demonstrate a wide divergence of views, both as to the meaning and scope of the amendment. But one question nagged all of the writers. Why had the issue remained unexplored for so many years? Those who followed Story's interpretation found it quite natural that a non-essential amendment had received scant attention. As late as 1957, one writer considered it a "dead letter":

The Ninth Amendment was not intended to add anything to the meaning of the remaining articles in the Constitution. It was simply a technical proviso inserted to forestall the possibility of misinterpretation of the rest of the document. . . . It was adopted in order to eliminate the grant of powers by implication as the result of any language in the Constitution which might contain a "negative pregnant." . . . It is destitute of substantive effect.³³

If the ninth amendment was designed merely as a precaution, then such thorny constitutional problems as (1) its applicability to the states through the fourteenth amendment, (2) the "other" unenumerated rights encompassed by the amend-

³² B. PATTERSON, *supra* note 17, at 26.

³³ E. DUMBAULD, *supra* note 2, at 63-64.

ment, and (3) whether the "other" rights are limited to those existing only at the time of ratification or include newly discovered rights, do not arise. But one analyst, an authority on civil law, who believes that the ninth amendment is a rule of construction for the first eight amendments and not a storage compartment for individual rights, also finds the amendment has a special task far more extensive than its supposed domain.

It is the mission of the Ninth Amendment not only to prevent the weakening of the Second Constitution [the Second Constitution refers to the Bill of Rights], but to provide for the development of such texts to control historically new situations. It is not therefore a text consecrating natural rights without content, natural law with a variable content;³⁴ but it is a text of juridical method. It is a text concerning the judiciary power. . . . The great role of the Ninth Amendment thus becomes clearer. It requires the consistent judicial development of the first eight amendments to control novel situations which are not immediately subject to the Second Constitution.³⁵

If the amendment has this particular function, why has it gone so long unrecognized? Some possible answers may help explain the reason that, pre-*Griswold*, the ninth amendment was not a vital force. These same answers should also define the status of the amendment prior to that decision.

Constitutional interpretation during the Nineteenth century was greatly influenced by the writings of the pre-eminent

³⁴ This was essentially the view of Roscoe Pound as stated in his introduction to Patterson's book. Pound argued that "[t]he Ninth Amendment is a solemn declaration that natural rights are not a fixed category of reasonable human expectations in civilized society laid down once for all in the several sections of the Constitution." Pound, *forward* to B. PATTERSON, *supra* note 17, at iv.

³⁵ Franklin, *The Relation of the Fifth, Ninth and Fourteenth Amendments to the Third Constitution*, 4 How. L.J. 170, 176-77 (1958).

scholars, Story and Cooley. Because Story gave scant recognition to the ninth amendment, and then only as a rule of construction, it was a natural outcome that the amendment received similar inattention from the legal community, and that early constitutional issues involved only the first eight amendments. In addition, when the Bill of Rights was held to be inapplicable to the states in 1833,³⁶ the potential development of a concept of universal protection of unenumerated rights became limited to situations involving encroachment by the central government, where adequate protections seemed to be in force. Perhaps most important, however, was the comparatively late development of post-ratification fundamental rights. In spite of the tumult raised in the revolutionary period, meaningful expansion of individual rights did not occur until after the Civil War. Since that time, the due process and equal protection clauses of the fifth and fourteenth amendments have been principally utilized to protect those rights. The ninth amendment seemingly became obsolete before its development began. Its value, if it had any, as a repository of unenumerated rights, was usurped by other constitutional provisions.

A sneak preview to *Griswold* came in 1962 in the form of an article by Norman Redlich, a law professor. While *Griswold* was pending in the lower federal courts, almost a certainty to reach the Supreme Court, the author wondered whether the rights of citizens would ultimately be limited to those specified in the first eight amendments or elsewhere in the Constitution. As the plaintiff was asserting a fundamental right of privacy against state infringement, not specifically protected by the Constitution, would this not be a good case to reevaluate the role of the ninth amendment? He invited the Court to hold that the ninth amendment reserved to a married couple the fundamental right to maintain the intimacy of the marital relationship, without government regu-

³⁶ *Barron v. Baltimore*, 32 U.S. (7 Pet.) 464 (1833).

lation or interference.³⁷ He vigorously advocated that the ninth amendment stands for the proposition that all fundamental rights were not stated in the Constitution and first eight amendments, and that through the fourteenth amendment the ninth amendment should be extended to the states. No one, other than perhaps Professor Redlich, foresaw the impact of *Griswold* on the ninth amendment.

GRISWOLD AND THE NINTH AMENDMENT

The *Griswold* case was the second challenge in the Supreme Court to the Connecticut anti-birth control legislation. The first case³⁸ had not resulted in a decision on the substantive issues due to technical difficulties. In *Griswold*, perhaps spurred by Professor Redlich's argument, the opponents of the statute urged that state interference with the practice of birth control by a married couple was an infringement of their right of privacy, a fundamental right protected by the first, ninth and fourteenth amendments. The Court, divided seven to two, held the statutes unconstitutional primarily because they violated the first amendment freedoms of speech and association. In the terminology of Justice Douglas, who wrote the opinion of the Court, the right of privacy is within the "periphery" and "penumbra" of the guarantees of these first amendment protections, applicable to the states through the fourteenth amendment.³⁹ While Douglas' opinion was itself a radical departure from customary constitutional terminology, it is Justice Goldberg's concurring opinion that is of

³⁷ Redlich, *Are There "Certain Rights . . . Retained By The People"?*, 37 N.Y.U.L. REV. 787, 796 (1962).

³⁸ *Poe v. Ullman*, 367 U.S. 497 (1961).

³⁹ In Justice Douglas' terminology, ". . . specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. . . . We have had many controversies over these penumbral rights of 'privacy and repose'. . . . These cases bear witness that the right of privacy which presses for recognition here is a legitimate one." 381 U.S. at 484-85.

dramatic importance. Not content to rely on the protection offered the right of privacy by the first and fourteenth amendments, Goldberg felt that the significance of the ninth amendment was of such magnitude as to justify separate treatment. He began discussion of the ninth amendment by saying, "I add these words to emphasize the relevance of that Amendment to the Court's holding."⁴⁰

After briefly tracing the history of the enactment of the ninth amendment, Justice Goldberg first concluded that it was

. . . clear that the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people.⁴¹

After noting that the amendment had received meager recognition by the Supreme Court, he defended his determination to rely upon it as the basis for his concurring opinion:

The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the [specific language of the] Ninth Amendment. . . .⁴²

Eschewing any notion that he was attempting either to enlarge the power of the Court or to make the ninth amend-

⁴⁰ *Id.* at 487.

⁴¹ *Id.* at 490.

⁴² *Id.* at 491.

ment applicable to the states through the fourteenth amendment, Justice Goldberg guardedly enunciated his concept of the role of the ninth amendment:

Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government. Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive.⁴³

Because he determined that the unenumerated right of marital privacy was fundamental to personal liberty, he concluded that the ninth amendment was relevant to show that such right could be protected against state infringement by the fourteenth amendment. In sum, Goldberg ostensibly retained the "rule of construction" interpretation of the ninth amendment, but at the same time indicated that the amendment could be a powerful force to limit state infringement of fundamental personal rights.

Goldberg's disclaimer that the ninth amendment constitutes an "independent source of rights" should not be considered a limitation on the scope of the now revitalized amendment. For historically none of the amendments, nor the Constitution itself, is the source of the natural rights of man. These are rights, however ultimately defined, which the political state must respect because every man by his very nature possesses them. They are rights which may neither be relinquished to, nor bestowed by, a government. Thus one may accept Goldberg's statement, yet consistently maintain that the ninth amendment is a repository and descriptive of man's fundamental liberties to the same degree as the first eight amendments.

Goldberg's concurring opinion in *Griswold* has been char-

⁴³ *Id.* at 492.

acterized as a "tour de force," without adding substance to the concept of fundamental rights;⁴⁴ and as "a curious mixture of law-office (i.e. advocative, not impartial) history and vaulting legal logic."⁴⁵ Justice Black, in a stinging dissent, criticized Justice Goldberg, accusing him of playing with words. For Black, the ninth amendment and the due process clause of the fourteenth amendment means the same thing, and Goldberg's utilization of the ninth amendment was unjustified and dangerous. Black argued that the Court was peculiarly ill-suited to determine the "collective conscience of our people" and would thus substitute its own notion of "fundamental principles of liberty and justice" in reviewing the legislative enactments of the federal and state governments. Unable to find a scintilla of constitutional authority bestow-

⁴⁴ Kauper, *Penumbrae and Peripheries*, 64 MICH. L. REV. 235, 254 (1965). Professor Kauper, a respected authority on constitutional law, felt that the same decision could have been made without use of the ninth amendment.

⁴⁵ Kelly, *supra* note 7, at 150. Professor Kelly described the *Griswold* decision as an "astonishing resuscitation of the Ninth Amendment." Kelly, *supra* note 7, at 149. He believes that Goldberg misread Madison's intentions and that his statements in the opinion are historically inaccurate. Professor Kelly asserts that Goldberg's "notion of pulling new natural rights from the air to allow for an indefinite expansion can hardly be considered to be within the original spirit of the amendment, even if we assume that Madison was attempting a vague guarantee of rights that he did not care to enumerate." Kelly, *supra* note 7, at 155. Kelly perhaps overlooks the fact that, although the boundaries of natural law were in Madison's time the fairly definite "rights of Englishmen" parameter, those rights were of necessity spelled out because of the supremacy of Parliament. With the concept of limited delegated powers prevailing under the American constitutional system, there was no need to delineate each natural right of man. Professor Kelly's interpretation of the ninth amendment (which could hardly be different from his view on the first eight amendments) must logically lead to the discredited concept of a static Constitution.

ing such power on the Court, Black warns that to permit such a subjective resolution of constitutional issues would transform the Court into a veto wielding super authority.⁴⁶

Justice Stewart also wrote a separate dissenting opinion. He characterized Goldberg's application of the ninth amendment as "turning somersaults with history,"⁴⁷ and concluded that the amendment merely states a platitude. In Justice Stewart's view, the amendment could not, under any circumstances, form the basis for declaring a state law unconstitutional.

More approving commentaries hailed Goldberg's "rediscovery" of ninth amendment protections as the first major judicial treatment of the amendment which may

. . . heighten the prospects for judicial support, case by case, for a broader range of "privacy" situations and of other hard-to-classify interests which, despite their vagueness, should be "retained by the people" in a democratic public order strongly committed to preserving individuality.⁴⁸

At least one scholar disagrees with Justice Black's analysis, concluding that Goldberg's position is generally supported by the history of the enactment of the ninth amendment.⁴⁹ He finds Black's concern about the absence of a specific provision dealing with privacy to be unconvincing.

Before discussing the judicial aftermath of *Griswold* and the insights which these cases may give to the future role of the ninth amendment in the scheme of individual rights, it is necessary to focus upon two important problems highlight-

⁴⁶ Justice Black's dissent is important because he presents a totally different concept of the ninth amendment, both as to its history and its meaning.

⁴⁷ 381 U.S. at 527.

⁴⁸ Dixon, Jr., *The Griswold Penumbra: Constitutional Charter For an Expanded Law of Privacy?*, 64 MICH. L. REV. 197, 207 (1965).

⁴⁹ Abrams, *supra* note 29, at 1035.

ed by the Goldberg and Black opinions. It is clear that Black assigns no real significance to the amendment, while in contrast Goldberg envisions it as a judicial rule of construction at the very least, and perhaps even as a catch basin for use along with the fourteenth amendment. Initially then, we must ascertain the several possible roles which the ninth amendment can presently perform, and then select those most logically and historically fitting. Without such guidelines, any attempt at speculative inquiry concerning the amendment's application would be meaningless. The second issue, although not a new one in the constitutional domain, arises from Goldberg's belief that the ninth amendment protects rights which are basic and fundamental to our society. How, as Black demanded, can we determine which rights, zealously asserted from time to time, meet the high standards of unenumerated guarantees of the ninth amendment that exist along with those specified in the first eight amendments? Are the Goldberg tests so subjective as to make the determination solely one based on the individual personal prejudices of the members of the Supreme Court? If Black's incisive criticism is to be meaningfully rejoined, what standards can and should be used by the Court when it reflects upon the constitutional quality of an asserted right?

As pointed out in the treatment of the pre-*Griswold* era, the ninth amendment was then considered principally as a rule of construction,⁵⁰ a statement of intent showing that the framers knew that rights other than those specified in the first eight amendments were reserved to the people. Professor Franklin suggests that the amendment had the additional function of directing the judiciary to expand the literal language of the first eight amendments to cover new situations.⁵¹ This additional role assigned to the ninth amendment has a proper historical basis because it is clear Madison intended that all of the natural rights of the people should be protect-

⁵⁰ See note 22 *supra* and accompanying text.

⁵¹ See notes 42 and 43 *supra* and accompanying text.

ed by the Bill of Rights. Other pre-*Griswold* tasks proposed for the ninth amendment include both that of a counterbalance to the "necessary and proper" clause of article 1, section 8, which gives Congress broad lawmaking authority,⁵² as well as a counterpart for the individual to the general welfare clause in the Preamble, which protects public rights.⁵³ Finally, Dean Roscoe Pound postulated that the ninth amendment was meant to insure the growth and development of natural law:

The Ninth Amendment is a pronouncement of a solemn warning to the agencies of government that there are reasonable expectations of individual men living in civilized society which the people retain and for which recognition and security may be demanded.⁵⁴

What, if anything, has *Griswold* added to the part to be played by the ninth amendment? Despite Goldberg's cautious admonition, the ninth amendment has subsequently had, and potentially will have, a greatly expanded role in the protection of individual rights.

Starting with the accepted constitutional principles that (1) the first eight amendments protect individual citizens against infringement of certain specific (and in the case of the fifth amendment, rather vague) fundamental natural rights⁵⁵ and (2) such protection has, through the fourteenth amendment, been extended in most respects to state action, Justice Goldberg concludes that the ninth amendment "is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal

⁵² Rogge, *Unenumerated Rights*, 47 CALIF. L. REV. 787, 793 (1959); Kelly, *supra* note 7, at 152.

⁵³ B. PATTERSON, *supra* note 17, at 57.

⁵⁴ Pound, *Forward* to B. PATTERSON, *supra* note 17, at vi.

⁵⁵ The term "natural rights," in the context of American jurisprudence, has become almost synonymous with "constitutional rights."

infringement.”⁵⁶ This is the most revolutionary passage from his opinion, for it advances a new dual sphere of influence for the amendment. Goldberg goes beyond the “rule of construction” concept (that the amendment merely prevents judicial disparagement of those rights not enumerated) by asserting that the ninth amendment affirmatively demonstrates the existence of individual rights of equal importance to those enumerated in the first eight amendments. In the context of the interpretation of the Constitution as a dynamic, up to date, frame of government, the ninth amendment must then be considered as authority to support the existence of newly discovered fundamental rights. It is more than a passive receptacle for pre-ratification rights. The ninth amendment now encompasses in its scope modern day revelations of basic personal freedoms through the development of natural rights.

Furthermore, since fundamental individual rights are now protected from state abridgement, the ninth amendment seems destined to become applicable through the fourteenth to the states. This may not occur directly, but the same practical result should not come as a surprise. If the asserted privilege is of such magnitude to be considered a fundamental right, and thus included within ninth amendment protection, it is inconceivable that the Supreme Court would deny such protection from state action.⁵⁷ This enlargement of the role of the ninth amendment would be a marked extension of the purview of the Bill of Rights and would exceed even Madison’s expressed desires for a positive declaration of natural rights.

The definitional problem with respect to “fundamental

⁵⁶ 381 U.S. at 493.

⁵⁷ Patterson urged that the amendment was intended to and should be applicable to the states, giving nine reasons to support his viewpoint. B. PATTERSON, *supra* note 17, at 37. For a contrary opinion, see E. DUMBAULD, *supra* note 2, at 138. Dumbauld seems, however, to confuse the ninth and tenth amendments.

rights" is no less difficult than determining the role of the ninth amendment. Because the Supreme Court has previously dealt with this concept in formulating the rights encompassed under the fifth and the fourteenth amendments, it has not found it necessary to conceive new principles of constitutional law. An individual right or freedom is fundamental if it is: ". . . a principle of liberty and justice which lies at the base of all our civil and political institutions";⁵⁸ ". . . implicit in the concept of ordered liberty . . . of the very essence of a scheme of ordered liberty . . . a fair and enlightened system of justice would be impossible without them";⁵⁹ ". . . a principle of justice so rooted in the tradition and conscience of our people";⁶⁰ or ". . . lies at the foundation of a free society."⁶¹

While these concepts of a fundamental right vary from an absolutely essential standard to a "conscience of the people" test, the principal notion is that, to be entitled to constitutional protection, the asserted right must be at least a substantial tenet of our particular republican form of democracy, the violation of which would do serious injustice under the American system.⁶² As Professor Redlich has sug-

⁵⁸ *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (in which the Court invalidated Oregon's criminal syndicalism statute).

⁵⁹ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (holding that the fifth amendment proscription against double jeopardy does not prohibit a state through the fourteenth amendment from retrying a defendant under all circumstances).

⁶⁰ *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (which dealt with the right of an accused to be present at all stages of his trial).

⁶¹ *Shelton v. Tucker*, 364 U.S. 479, 486 (1960).

⁶² A student has advanced the proposition that John Stuart Mill's ON LIBERTY contains the most acceptable criteria for determining rights protected under the ninth amendment. Comment, *Unenumerated Rights—Substantive Due Process, the Ninth Amendment, and John Stuart Mill*, 1971 WIS. L. REV. 922. Mill's concept of balancing the interests of the individual and that of the collective society seems archaic in the context of our modern technological society.

gested, the measuring standard under the ninth amendment is the entire Constitution and amendments. "[R]ights reserved were to be of a nature comparable to the rights enumerated."⁶³

In *Griswold*, Goldberg felt no need to chart new ground to refute Black's challenge that fundamental rights will ultimately consist solely of current judge-made ideas. He seemingly adopted an amalgam of the standards enunciated in prior decisions:

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." *Snyder v. Massachusetts*. The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . ." "Liberty" also "gains content from the emanations of . . . specific [constitutional] guarantees" and "from experience with the requirements of a free society." *Poe v. Ullman*.⁶⁴

But Goldberg's use of language from Justice Douglas' dissent in *Poe v. Ullman*⁶⁵ adds an entirely new dimension to rather well-formulated boundaries. The quantum of "experience" Justice Goldberg would insist upon is problematical; the potential enormous expansion of fundamental rights entitled to protection under the ninth amendment is certain. Since *Griswold*, the standard of such rights could conceivably be measured by comparatively ill-defined, hastily conceived notions concerning the current popular demands, hardly the kinds of natural rights rising to the hallowed aura of the Consti-

⁶³ Redlich, *supra* note 37, at 810.

⁶⁴ 381 U.S. at 493-94.

⁶⁵ 367 U.S. 497 (1961).

tution. Some of the judicial descendants of *Griswold*, apparently invited by Goldberg's test of fundamental justice, have given protection to an extensive array of newly discovered personal rights.⁶⁶ At the very least, *Griswold* has established a capacity for development of "a broad protection against unexperienced temporal powers . . . against newly discovered governmental inroads of freedom."⁶⁷

If *Griswold* has resulted in "the declaration of a new Bill of Rights for the 20th Century" as one writer has observed,⁶⁸ or more realistically has significantly expanded the concept of dynamic natural rights, where does the historian or jurist look for the source of those fundamental rights which the ninth amendment guarantees? The difficult tests which have been formulated to guide the courts in their search for the meaning and scope of natural rights provoke this inquiry—where should historians, judges, and prospective claimants search for the traditions, roots, fundamental principles of liberty and justice, and conscience of our people? Does history provide us with legitimate sources upon which to base an assertion of unenumerated "fundamentalness" entitled to ninth amendment protection? The problem of locating the antecedent for a specific right, sought to be protected under the ninth amendment, will be treated in the next section.

SOURCES OF UNENUMERATED RIGHTS

The ninth amendment, considered merely as a rule of construction, means at the least that Madison did not intend to spell out all of the rights and freedoms of the individual citizen which were protected from government abridgment. The implication of *Griswold* is that the specific right, for

⁶⁶ These cases are discussed under the headings, *THE NINTH AMENDMENT SINCE 1965* and *THE FUTURE OF THE NINTH AMENDMENT*.

⁶⁷ C. ANTIEU, *RIGHTS OF OUR FATHERS* 2 (1968).

⁶⁸ Carroll, *The Forgotten Amendment*, *NATION*, Oct. 6, 1965 (No. 201), at 121-22.

which protection is sought under the amendment, must be traced to another recognized source.⁶⁹ While there is no requirement that the origin of the right pre-exist the adoption of the Bill of Rights (privacy, for example, has been formalized as a legal right only comparatively recently⁷⁰), the more venerable the source, the greater likelihood that a court will deem the right fundamental. We shall briefly mention here the more important early source materials, and conclude with speculation on sources for "new" freedoms.

All of the rights enumerated in the Constitution and the Bill of Rights can be traced to written antecedents, often summarized in *Blackstone's Commentaries* as the rights of personal security, personal liberty and private property. These were the natural rights of Englishmen for which the Revolutionary War was purportedly waged. By that time, the colonists had, in various documents, specified many freedoms and privileges which their English counterparts either had not considered a natural right or were unable to obtain from the monarchy. They expressed these fundamental personal and property rights in their earliest documents. The most important references in this period are the colonial charter grants and the various agreements entered into by the colonists to establish a frame of government. Only those documents which contain potential fundamental rights unenumerated in the Constitution or Bill of Rights will be discussed.

One of the earliest attempts at a comprehensive statement of personal liberties was the *Massachusetts Body of Liberties*, enacted in 1641.⁷¹ The first known formulation of

⁶⁹ Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 227 (1965).

⁷⁰ M. ERNST & A. SCHWARTZ, *PRIVACY, THE RIGHT TO BE LET ALONE passim* (1962).

⁷¹ All documents mentioned in this section can be found in the principal reference work for the period, *THE FEDERAL AND STATE CONSTITUTIONS* (F. Thorpe ed. 1909). The first volume contains, at pages 38-86, the relevant Commissions,

the asserted privilege to travel is contained in paragraph 17, where the citizens are granted the right to leave the colony with their families at any time. Free hunting and fishing rights seemed important enough to be mentioned as a liberty. Preceding the English Bill of Rights by eight years, the inhabitants of West New Jersey in 1681 specified as fundamental law that the governing executive had no authority to suspend the effectiveness of the laws of the colony.⁷² This basic liberty, still not a part of our Constitution, was the first freedom specified in the English Bill of Rights:

That the pretended power of suspending laws, or the execution of laws, by regal authority, without the consent of parliament, is illegal.⁷³

Other fundamental personal liberties which appear in the English Bill of Rights, but which were omitted from specific mention in the first eight amendments, include the prohibition of standing armies in peacetime, without parliament's consent,⁷⁴ and the right of free parliamentary elections.⁷⁵ The limitation against standing armies was enacted by the First Continental Congress,⁷⁶ and many colonies included both of these rights when drafting their 1776 Constitutions.

The doctrine of natural rights got its biggest boost in 1776 when the Continental Congress severed ties with England. Asserting that a people has the right ". . . to assume among the Powers of the earth, the separate and equal station to which the laws of Nature and Nature's God entitle them . . .," Congress began by summarizing certain unalienable rights,

Charters and Plans of Union for the period 1492-1754. The remainder of the work contains all of the documents antecedent to and including the Constitution of each state.

⁷² WEST NEW JERSEY PROVINCE AGREEMENTS § 2 (Nov. 25, 1681).

⁷³ ENGLISH BILL OF RIGHTS § 1 (Dec. 16, 1689).

⁷⁴ *Id.* at § 6.

⁷⁵ *Id.* at § 8.

⁷⁶ DECLARATIONS AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS, Resolution 9 (Oct. 14, 1774).

among others. It then enunciated a new natural inherent right; under certain circumstances, “. . . it is the right of the people to alter or to abolish it [the government], and to institute new government. . . .”⁷⁷ Several states incorporated this privilege in their first constitution, and several more proposed it to the first Congress as an amendment. Madison even included a limited right of revolution in his initial proposals. In spite of almost complete acceptance, this freedom was omitted from the Bill of Rights. But the deletion should be inconsequential since no greater fundamentalness than as already stated in the Declaration of Independence could be required for an unenumerated natural right.

After being encouraged by the First Continental Congress to establish their own constitutional frameworks, each of the colonies enacted a written plan of government. Fresh from abuses of natural law rights, the constitutional conventions of Delaware, Maryland, Massachusetts, New Hampshire,⁷⁸ North Carolina, Pennsylvania and Virginia enacted comprehensive Declarations or Bills of Rights, usually prefacing the Constitution for added emphasis. The rights designated in those documents constitute a catalogue of the natural rights of the day, no longer merely the rights of Englishmen, but the unalienable privileges and immunities of embryonic Americans.

The first, and by far the most influential, bill of rights was adopted by the Virginia constitutional convention on June 12, 1776. Written by George Mason, it served as the archetype for other state constitutions and Madison's draft for the amendments to the United States Constitution. Mason listed the fundamental rights of Virginians in sixteen concise paragraphs. Those basic freedoms which remained unenumerated in the first eight amendments to the United States Constitution included a limited right of revolution, no standing armies

⁷⁷ DECLARATION OF INDEPENDENCE (July 4, 1776).

⁷⁸ The New Hampshire Constitution of 1776 contained no bill of rights. One was included in the Constitution of 1784.

in peace time, free and frequent elections, and prohibition against the power to suspend the laws without legislative consent. It is ironic that Mason did not include a ninth amendment type of provision in his Bill of Rights, since an amendment later proposed by the Virginia delegation served as the model for the ninth amendment.

Madison recognized the importance of state constitutions as a compendium of natural rights. In the congressional debate on the Bill of Rights, he observed:

It may be said, indeed it has been said, that a bill of rights is not necessary, because the establishment of this Government has not repealed *those declarations of rights which are added to the several State Constitutions*; that those rights of the people, which had been established by the most solemn act, could not be annihilated by a subsequent act of that people, who meant, and declared at the head of the instrument, that they ordained and established a new system, for the express purpose of securing to themselves and posterity the liberties they had gained by an arduous conflict.⁷⁹ (Emphasis added).

In the ratification conventions, the lengthy debates on the subject of a Bill of Rights generated numerous proposals and demands for consideration by the first Congress. The Articles of Confederation of 1781, which contained no enumeration of individual rights, created no such furor. The fact that the new central government was so much more powerful hardly explains the rather sudden universal concern for specifications. Most of the state constitutions with their awesome declarations of rights, were enacted prior to the Articles of Confederation. But spurred by the Declaration of Independence, the evolution of natural rights inexplicably blossomed forth in the voluminous proposals for the Bill of Rights.⁸⁰

⁷⁹ 1 ANNALS, *supra* note 10, at 438.

⁸⁰ The total number of proposed amendments officially presented to Congress was 186. Eliminating duplications, there were 80 substantive proposals.

A definite prohibition against a standing army in peace time seemed of utmost importance to the states. Six of the seven states which submitted proposals included this freedom from governmental domination. In Massachusetts, an attempt to include this right was defeated.⁸¹ Earlier, Connecticut and New Jersey had unsuccessfully attempted to include it as an amendment to the Articles of Confederation.⁸² During the ratification debates, Luther Martin, of Maryland and George Mason objected to its omission from the Constitution.⁸³ After considerable discussion, a watered-down version offered by Mason was rejected by the federal constitutional convention, even though supported by Madison,⁸⁴ and did not even appear in Madison's original proposals to the House of Representatives.

There were several other guaranteed protections which the state ratification conventions urged Congress to include in the Bill of Rights, but which were not adopted. The states sought assurances for their citizens against monopolies created by the Federal government, against suspension of laws, for free and frequent elections, and for the right to challenge a jury. Madison sought to include a "right of conscience" to what became the first amendment, and to make the Bill of Rights applicable to each state as well as the federal government.⁸⁵

These propositions, which were shunned by Congress, and reasonable "emanations" from them, should legitimately be the source of unenumerated natural rights. They meet the *Griswold* tests of both the conscience of the people and roots

⁸¹ 2 DEBATES, *supra* note 4, at 97-98, 136-37.

⁸² 1 DEBATES, 87-88 (J. Elliott ed. 1937).

⁸³ *Id.* at 370-71, 496 (Luther Martin's letter to the Maryland Legislature on January 27, 1788, and George Mason's objections to the Constitution).

⁸⁴ 5 DEBATES 544-45 (J. Elliott ed. 1937).

⁸⁵ 1 ANNALS, *supra* note 10, at 434-35 (Madison's proposals 4 and 5).

of American tradition. That we might take those rights for granted and that an attempt by the federal government to assert power in these areas might be successfully thwarted under another amendment, cannot be sufficient reasons to downgrade their importance as potential ninth amendment rights. The Douglas doctrine of "penumbras" and "emanations" could logically provide an argument to expand the "no standing army" prohibition to legislation and executive action concerning the misty Vietnam "war." This doctrine could also cause serious legal and political problems, based on the no "suspension of laws" limitation, in connection with domestic disorders. Also, the use of the ninth amendment, instead of the fifth and fourteenth amendments, could "simplify judicial opinions, facilitate logical analysis, and, in some cases, place less strain on credulity."⁸⁶ How refreshing it would be to find a judicial opinion pointing directly to an unenumerated fundamental right protected by the ninth amendment instead of reading the semantics of a due process or equal protection opinion.

The Constitution is a dynamic charter which recognizes the necessity for growth of personal rights and freedoms to keep pace with the development of society and government. Newly discovered natural rights, to protect the individual against unreasonable expansion or application of governmental powers, seldom bring forth anguished cries any more from the traditionalist who seeks a static interpretation of the Constitution. There are at least two methods for recognition of post-Bill of Rights fundamental human freedoms, exclusive of the amendatory procedure provided for in the Constitution.⁸⁷ The first is through the development of state constitutions, both in their enactment and interpretation, and the

⁸⁶ Comment, *Ninth Amendment Vindication of Unenumerated Fundamental Rights*, 42 TEMP. L.Q. 46, 54 n. 53 (1968).

⁸⁷ Of the 16 post-Bill of Rights amendments adopted, only the reconstruction amendments and the two voting changes (sex and age) enhance personal rights. Thus the amendatory procedure has not been actively used to expand the freedoms of the Bill of Rights.

other is through multi-national documents, such as the United Nations Charter.

Following the examples of the original states and the central government, each new state adopted a constitution, and generally a declaration of rights, upon admission to the Union. Almost all of the state charter documents have undergone substantial changes or complete revisions several times since enactment. The expansion of state bills of rights, through amendment and judicial construction, to the extent that a particular "new" freedom is widely recognized, must be a revelation of the "conscience of the people" regarding that human right. Reliance upon its specific acceptance by numerous state constitutions should make a very persuasive argument for those seeking to obtain federal judicial approval of an asserted right. Furthermore, broad state judicial recognition of a claimed freedom should be an important indication of the "roots" of society. In those states which included a ninth amendment type of provision in their declaration of rights, such judicial determinations should be even more relevant.⁸⁸

By historical definition, in the context of personal freedom for Americans, natural rights have always been viewed as a product of Anglo-American political and social development. But because the doctrine of natural rights, or perhaps more accurately constitutional rights, is a changing concept, there is no reason to so limit the "sources" of human freedom. The adoption in 1948 of the Universal Declaration of Human Rights by the United Nations General Assembly gave worldwide recognition to several political and civil rights which are not enumerated in the first eight amendments. While these "new" natural rights, like the economic and social rights contained in the Declaration,⁸⁹ are statements of what freedoms

⁸⁸ Presently, 36 of the state constitutions contain a ninth amendment type of provision. *See, e.g., OKLA. CONST. art. II, § 33.*

each man ought to have rather than the rights he presently possesses, they represent a consensus of universal moral precepts of paramount importance, “. . . categorical rights nobody could find any excuse for not respecting.”⁸⁰ The test for fundamental human rights of the Declaration squarely meets the requirements of *Griswold*. Some of the Declaration’s natural rights are already encompassed by the ninth amendment. Those that have not as yet been “discovered” deserve serious consideration in the future.

THE NINTH AMENDMENT SINCE 1965

Whether the correct interpretation of the scope of *Griswold* should be strictly limited to the specific factual circumstances of the case—the right of marital privacy—or whether, as suggested, the several opinions could form the basis for broad new protections under the first, fifth, ninth and fourteenth amendments, the result of the decision has been an assertion, both in a judicial setting and by constitutional seers, of an extensive panoply of novel fundamental personal rights. The sheer number of reported decisions⁸¹ indicates widespread use of the ninth amendment as one of the constitutional bases for protection of individual freedoms, and dispels the gloomy forecast that “there remains grave doubt that the Ninth

⁸⁰ Economic and social rights include the right to a decent standard of living, to equal pay for equal work, and to a free basic education.

⁸⁰ M. CRANSTON, *WHAT ARE HUMAN RIGHTS?* 37 (1962).

⁸¹ State trial court rulings and many federal district court decisions are not accompanied by a written opinion. These decisions are not published, and thus are not a source of information. Furthermore, even in the reported cases, ninth amendment claims may have been raised but ignored by the court in its opinion, either because the asserted right found protection under other amendments, the ninth being deemed unnecessary, or because the ninth amendment was determined to be inapplicable.

Amendment has a significant future."⁹² The current success ratio for asserted ninth amendment rights has been so phenomenally large that an attorney today would almost be derelict if he did not at least include the amendment in his claim for constitutional guarantees of the particular personal freedom being advocated.

In analyzing post-*Griswold* decisions, it must be remembered that the Supreme Court, in construing other amendments, has historically protected certain familial rights which it deemed to be fundamental. These freedoms fall under the broad right of privacy, and in each instance the Court made the required determination that the governmental authority had no compelling interest to abridge that basic right. Such family interests as the right to send children to a private school⁹³ and the right to teach foreign languages in public schools⁹⁴ have been protected. In 1942, the Supreme Court held the Oklahoma Habitual Criminal Sterilization Act unconstitutional as violative of the basic right to marry and have offspring.⁹⁵ Shortly after *Griswold*, the Court, in a case invalidating the Virginia anti-miscegenation statute, determined that freedom to marry was a fundamental family right.⁹⁶ Thus, *Griswold* was precedentially sound in affording constitutional, if not ninth amendment, protection to matters primarily of private family concern.

The most important outgrowth of the extension of marital privacy following *Griswold* has been the repeatedly declared claim that restrictive state criminal abortion laws violate the ninth amendment right of a woman, married or single, to

⁹² Emerson, *supra* note 69, at 227. Professor Emerson, one of the attorneys representing *Griswold*, believed that the development of the ninth amendment was "some decades" away.

⁹³ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

⁹⁴ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁹⁵ *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

⁹⁶ *Loving v. Virginia*, 388 U.S. 1 (1967).

choose whether or not to have children. This right, it is argued, follows from the right of privacy in matters related to marriage, family and sex, and as applied to the doctor-patient relationship, forbids undue limitations on the type of treatment which may be prescribed. Former Justice Tom Clark, one of the members of the Court which decided *Griswold*, believes that since 1965, an entire "zone of individual privacy" exists around the "marriage, home, children and day-to-day living habits," fully protected by the ninth amendment, unless the state or federal government clearly demonstrates a compelling interest which outweighs these individual rights. "This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution."⁹⁷ He finds the question of abortion, except under certain limited circumstances, to be a matter to be determined entirely between the woman, her physician and other counsellors, free from substantial abridgment by the state under its criminal sanctions.

The constitutionality of abortion statutes has been challenged before various state and federal courts, on several grounds. Some tribunals, even though invalidating the law, have declined to use the ninth amendment as a basis for their decision.⁹⁸ Others have held abortion laws unprotected by the ninth amendment.⁹⁹ But several significant federal and state court rulings have extended ninth amendment coverage to strike down state abortion statutes which were unduly restrictive. A three judge federal district court,¹⁰⁰ citing *Griswold*,

⁹⁷ Clark, *Religion, Morality and Abortion; A Constitutional Appraisal*, 2 LOYOLA U. (L.A.) L. REV. 1, 8 (1969).

⁹⁸ *People v. Belous*, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970).

⁹⁹ *Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F. Supp. 1217 (E.D. La. 1970); *Steinberg v. Brown*, 321 F. Supp. 741 (N.D. Ohio 1970); *State v. Scott*, 255 So. 2d 736 (La. 1971).

¹⁰⁰ Normally a federal district court composed of three judges is necessary under federal law to rule upon the constitutionality of a state statute.

found the Texas abortion statutes unconstitutional on their face as violative of the right, secured by the ninth amendment, "of choice over events which, by their character and consequences, bear in a fundamental manner on the privacy of individuals."¹⁰¹ The Georgia and Wisconsin laws were similarly determined to violate a pregnant woman's ninth amendment right of privacy.¹⁰² The trial court, in the Wisconsin case, reaffirmed the concept of privacy as it relates to the home, and justified the application of the ninth amendment to the abortion laws; stating that:

Obviously, there is no topic more closely interwoven with the intimacy of the home and marriage than that which relates to the conception and bearing of progeny.¹⁰³

The consensus of the judges who conclude that highly restrictive abortion laws violate the ninth amendment guarantees is that such statutes, in the language of *Griswold*, operate directly on the intimate relation of husband and wife "and have a maximum destructive impact on that relationship."¹⁰⁴ Thus,

While the Ninth Amendment right to choose to have an abortion is not unqualified or unfettered, a statute designed to regulate the circumstances of abortions must restrict its scope to compelling state interests.¹⁰⁵

Proponents of many other "fundamental" personal freedoms, unenumerated in the Constitution, have urged protection under the ninth amendment. Some of the claims have involved crucial issues, some trivial. Some are logical *Griswold* "emanations," some wholly new demands without real or

¹⁰¹ *Roe v. Wade*, 314 F. Supp. 1217, 1221 (N.D. Tex. 1970).

¹⁰² *Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970); *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970), *vacated on other grounds*, 401 U.S. 66 (1971).

¹⁰³ *Babbitz v. McCann*, 310 F. Supp. 293, 299 (E.D. Wis. 1970), *vacated on other grounds*, 401 U.S. 66 (1971).

¹⁰⁴ 381 U.S. at 485.

¹⁰⁵ *Roe v. Wade*, 314 F. Supp. 1217, 1223 (N.D. Tex. 1970).

even tangential precedent. The twofold importance of these decisions merits at least a brief summary of the rulings of the more important cases. For not only do these decisions define and shape the "new" post-*Griswold* ninth amendment, they also have established certain new freedoms protected by the amendment.

Perhaps one of the most pressing matters concerning today's teenagers is school dress and hair codes. Being appendages of the state, these regulations clearly bear the mark of state action and must not violate federal constitutional limitations. The earliest federal case came from Louisiana, soon after *Griswold*. A student argued that the school regulation prescribing hair length violated the ninth amendment and other amendments. The court discussed *Griswold* and concluded that the regulation was permissible since, first, the asserted right was not based on privacy nor did it emanate from other specific rights and, second, the "right of free choice of grooming" was not so sacred as to be classified as fundamental.¹⁰⁶ But a federal district court in Vermont ruled that

¹⁰⁶ *Davis v. Firment*, 269 F. Supp. 524 (E.D. La. 1967). See also *Bishop v. Colaw*, 316 F. Supp. 445 (E.D. Mo. 1970), *rev'd* 450 F.2d 1069 (8th Cir. 1971); *Freeman v. Flake*, 320 F. Supp. 531 (N.D. Utah 1970), *aff'd* 448 F.2d 258 (10th Cir. 1971); *Valdes v. Monroe Co. Bd. of Pub. Instruction*, 325 F. Supp. 572 (S.D. Fla. 1971); *Jeffers v. Yuba City Unified School Dist.*, 319 F. Supp. 368 (E.D. Cal. 1970); *Neuhaus v. Torrey*, 310 F. Supp. 192 (N.D. Cal. 1970); *Gere v. Stanley*, 320 F. Supp. 852 (M.D. Pa. 1970); *Karr v. Schmidt*, 320 F. Supp. 728 (W.D. Tex. 1970); *Miller v. Gillis*, 315 F. Supp. 94 (N.D. Ill. 1969). A more serious "hair" case was brought by a National Guard member who had been declared an unsatisfactory participant at three reserve meetings for failure to maintain a "neat and soldierly appearance". This resulted in his being called to active duty. While the court noted that, as a civilian, the plaintiff's ninth amendment claims would merit serious consideration, it ruled that there is no ninth amendment right of personal appearance for the military. *Anderson v. Laird*, 437 F.2d 912 (7th Cir. 1971). An interesting dissent empha-

a school code of dress prescribing hair length and style is an unconstitutional intrusion into the broad category of fundamental personal liberty, and absent a compelling state interest, violates the ninth and other amendments.¹⁰⁷ While the decisions are about equally divided¹⁰⁸ as to whether personal grooming and dress fashions are fundamental rights within the *Griswold* standards, since other issues are more pressing, it seems unlikely that the Supreme Court will see fit to resolve the conflict.¹⁰⁹

sized the respect which the ninth amendment rights must be accorded in the domain of a citizen's private life.

¹⁰⁷ *Dunham v. Pulsifer*, 312 F. Supp. 411 (D. Vt. 1970); *accord*, *Bishop v. Colaw*, 450 F.2d 1064 (8th Cir. 1971); *Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1970); *Berryman v. Hein*, 329 F. Supp. 616 (D. Idaho 1971); *Martin v. Davison*, 322 F. Supp. 318 (W.D. Pa. 1971); *Dawson v. Hillsborough Co., Florida School Bd.*, 322 F. Supp. 286 (M.D. Fla. 1971); *Crossen v. Fatsi*, 309 F. Supp. 114 (D. Conn. 1970); *Murphy v. Pocatello School Dist. #25*, 480 P.2d 878 (Idaho 1971).

¹⁰⁸ Many personal appearance cases have been decided under the first or fourteenth amendments. Only those rulings listed in notes 106 and 107 have utilized the ninth amendment as a basis for the decision.

¹⁰⁹ The Supreme Court denied review in *Oloff v. East Side Union High School Dist.*, 40 U.S.L.W. 3332 (U.S., Jan. 17, 1972). Noting the irreconcilable conflict in the federal court decisions, Justice Douglas strongly dissented. He urged that the Court should decide the issue, suggesting that since *Griswold* the ninth amendment protection of "liberty" includes safeguarding the right of personal taste:

One's hair style, like one's taste for food, or one's liking for certain kinds of music, art, reading, recreation, is certainly fundamental in our constitutional scheme—a scheme designed to keep government off the backs of people. 40 U.S.L.W. at 3332.

Review has been denied in two other cases, one of which sustained, and the other overruled, the school board. *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970); *Jackson v. Dorrier*, 424 F.2d 213 (6th Cir. 1970), *cert. denied*, 400 U.S. 850 (1970).

When the asserted right has a substantial relation to privacy, the courts have been much more receptive to claims for ninth amendment protection. In reviewing the dismissal of a teacher grounded on a charge of immorality, a court ruled that a letter from the teacher to a former student, which contained coarse vulgarities, was protected as a private communication under the ninth amendment and reinstated the teacher.¹¹⁰ Similarly, when a postmaster terminated an employee because he was living with a woman to whom he was not married, a federal court held that such action, based on the private sex life of the employee, violated his ninth amendment right of privacy.¹¹¹ Based on the right of privacy, a federal district court in Arizona recently protected the professional and business reputations of defendants from adverse pre-trial publicity which might have arisen from inadmissible evidence in a criminal case,¹¹² and the Supreme Court of California prevented the disclosure of personal financial information required by ordinance of every public officer and candidate.¹¹³

Generally, the courts have rejected requests for ninth amendment protection of suggested fundamental rights which bear little relationship to "the conscience of our people" or the right of privacy. Such legislation as the federal Gun Control Act of 1968,¹¹⁴ the Demonstration Cities and Metropolitan

¹¹⁰ *Jarvella v. Willoughby-Eastlake City School Dist.*, 233 N.E.2d 143 (Ohio C.P. 1967).

¹¹¹ *Mindel v. U.S. Civil Service Comm'n.*, 312 F. Supp. 485 (N.D. Cal. 1970). *See also* *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969) (where dismissal for immorality, not affecting the employee's job, was reversed); *Morrison v. State Bd. of Educ.*, 461 P.2d 375 (Cal. 1969) (where the court recognized that a general ban on immoral conduct would raise serious ninth amendment privacy questions).

¹¹² *Hooper v. Gooding*, 282 F. Supp. 624 (D. Ariz. 1968).

¹¹³ *City of Carmel-By-The-Sea v. Young*, 466 P.2d 225 (Cal. 1970).

¹¹⁴ *United States v. Mathews*, 438 F.2d 715 (5th Cir. 1971).

Development Act,¹¹⁵ state marijuana laws,¹¹⁶ crash helmet statutes¹¹⁷ and a law permitting the sale of vehicle registration lists to junk mail distributors¹¹⁸ have been held not to violate the ninth amendment right of privacy. Claims that the Selective Service Act is an unconstitutional interference with the unenumerated "right to life," as guaranteed by the ninth amendment, have been summarily rejected.¹¹⁹ Neither confinement of a state prison inmate in maximum security,¹²⁰ confinement in overcrowded jail facilities resulting in physical and homosexual attacks,¹²¹ a statute prohibiting transportation or possession of a dangerous weapon during a declared state of emergency under an emergency curfew ordinance,¹²² a law providing that automobile drivers must consent to a chemical test to determine the alcohol content of his blood,¹²³ a regulation requiring applicants for real estate salesman's or

¹¹⁵ 42 U.S.C.A. §§ 3301-13 (1970). *Benson v. City of Minneapolis*, 286 F. Supp. 614 (D. Minn. 1968).

¹¹⁶ *Commonwealth v. Leis*, 243 N.E.2d 898 (Mass. 1969); *Miller v. State*, 458 S.W.2d 680 (Tex. Crim. App. 1970).

¹¹⁷ *State v. Edwards*, 177 N.W.2d 40 (Minn. 1970); *State v. Fetterly*, 456 P.2d 996 (Ore. 1969). *But see American Motorcycle Ass'n v. Davids*, 158 N.W.2d 72 (Mich. Ct. App. 1968), where the court ruled that the Michigan Crash Helmet Statute bore no relationship to public health, safety and welfare and therefore infringed on the ninth amendment right to be let alone.

¹¹⁸ *Lamont v. Comm'r of Motor Vehicles*, 269 F. Supp. 880 (S.D.N.Y. 1967).

¹¹⁹ *United States v. Diaz*, 427 F.2d 636 (1st Cir. 1970); *United States v. Cook*, 311 F. Supp. 618 (W.D. Pa. 1970). In *United States v. Dorris*, 319 F. Supp. 1306 (W.D. Pa. 1970), the court ruled that the right to life was a fifth, not ninth, amendment freedom. *See also United States v. Uhl*, 436 F.2d 773 (9th Cir. 1970).

¹²⁰ *Burns v. Swenson*, 430 F.2d 771 (8th Cir. 1970).

¹²¹ *Kish v. County of Milwaukee*, 441 F.2d 901 (7th Cir. 1971).

¹²² *Bright v. Nunn*, 448 F.2d 245 (6th Cir. 1971); *State v. Dobbins*, 178 S.E.2d 449 (N.C. 1971).

¹²³ *People v. Fidler*, 485 P.2d 725 (Colo. 1971); *People v. Brown*, 485 P.2d 500 (Colo. 1971).

broker's licenses to be fingerprinted,¹²⁴ nor a statute prohibiting public distribution of obscene materials,¹²⁵ violates the amendment. The asserted right to engage in political activity, which received a hint of recognition in the *Hatch Act* case,¹²⁶ has received unfavorable treatment in two post-*Griswold* decisions. In one case, the statute was again held not to violate the ninth amendment.¹²⁷ In the other ruling, the court held that the "fairness doctrine" of section 315 of the Federal Communications Act of 1934¹²⁸ did not infringe on the right to engage in political activity because free time to respond was required.¹²⁹ Other declared fundamental freedoms which have been rebuffed as ninth amendment guaranteed rights include the right to teach in the public schools,¹³⁰ the right to waive jury trial without governmental consent,¹³¹ the right to be free from eavesdropping and recording of conversations in a criminal case,¹³² and the right to sue the federal government.¹³³ In a recent decision, a United States Court of Appeals ruled that, as against the federal government, the State of Arizona had no fundamental right, under the ninth amendment, to

¹²⁴ *Hamilton v. New Jersey Real Estate Comm'n*, 117 N.J. Super. 345, 284 A.2d 564 (Super. Ct. 1971).

¹²⁵ *Gornto v. State*, 178 S.E.2d 894 (Ga. 1970).

¹²⁶ See note 27 *supra* and the accompanying text.

¹²⁷ *Fishkin v. U.S. Civil Service Comm'n*, 309 F. Supp. 40 (N.D. Cal. 1969).

¹²⁸ 47 U.S.C. § 315 (1962).

¹²⁹ *Red Lion Broadcasting Co. v. FCC*, 381 F.2d 908 (D.C. Cir. 1967), *aff'd* 395 U.S. 367 (1969).

¹³⁰ *Ahren v. Board of Educ.*, 327 F. Supp. 1391 (D. Neb. 1971).

¹³¹ *Singer v. United States*, 380 U.S. 24 (1965).

¹³² *United States v. Kahn*, 251 F. Supp. 702 (S.D.N.Y. 1966). *But see Katz v. United States*, 389 U.S. 347 (1967).

¹³³ *Gardner v. United States*, 446 F.2d 1195 (2d Cir. 1971). In this case the court rejected the claim that the right to sue the United States Government was carried over, by the ninth amendment, from the common law "Petition of Right" against the king.

assert on behalf of its citizens claims of unfair treatment by a federal agency.¹³⁴

One of the most interesting, if not the most critical, of the post-*Griswold* cases involved a local ordinance which prohibited participation in, or presence at, a cockfighting exhibition. The defendant, apparently unable to find any historical basis to assert a long standing unenumerated right relating to cockfighting, claimed that the ordinance violated his freedom of movement, which he argued was part of the broad right of privacy.¹³⁵ The Supreme Court of Hawaii, where cockfighting may have deep roots, struck down the statute as an unconstitutional invasion of the right of privacy guaranteed by the ninth amendment.¹³⁶ The curious, and perhaps most consequential, aspect of the decision was the language used in a concurring opinion. After concluding that the ninth amendment was most definitely a "source" of substantive rights, the judge stated:

The Ninth Amendment is a reservoir of personal rights necessary to preserve the dignity and existence of men in a free society. . . . [T]he Ninth Amendment is the place to which we must turn for protection of individual liberty from infringements not enumerated, *and perhaps not contemplated*, by the founding fathers.¹³⁷ (Emphasis added).

It is hard to conceive of a more dynamic concept of the ninth amendment.¹³⁸

¹³⁴ *Arizona State Dep't of Pub. Welfare v. Department of Health, Educ. & Welfare*, 449 F.2d 456 (9th Cir. 1971).

¹³⁵ This should not be confused with the right to travel, which has long been recognized as occupying "a position fundamental to the concept of our Federal Union." *United States v. Guest*, 383 U.S. 745, 757 (1966).

¹³⁶ *State v. Abellano*, 441 P.2d 333 (Hawaii 1968).

¹³⁷ *Id.* at 337, 339.

¹³⁸ Even applying the more restrictive *Griswold* standards, it would be difficult to defend this decision and the language of the concurring opinion from Justice Black's admonitions against judge-made law.

THE FUTURE OF THE NINTH AMENDMENT

The development of the ninth amendment, especially since the *TVA* cases, displays a rapid expansion of its protection for personal rights, consistent with the concept of a dynamic constitution. However, certain asserted freedoms have not met the *Griswold* test of fundamentalness, and thus have not been accorded constitutional safeguard from governmental infringement. With a working knowledge of the well-established, albeit rather elusive and subjective *Griswold* guidelines, and with some notion of acceptable sources for the repository of natural rights, we can engage in responsible speculation as to the nature of "other" unenumerated rights which courts may properly accord ninth amendment protection.¹³⁹ In this concluding section, while we will caution that theoretical development will have to ultimately await clarifying decisions of the Supreme Court, we will suggest, first, that there is ample potential for near term growth of ninth amendment protections, substantially within *Griswold* standards; and, second, that erosion of the *Griswold* requirements will probably occur, as Justice Black warned, resulting in further application of the ninth amendment.

The impact of *Griswold*, whether or not merited, has been incalculable. Without its prestige, the ninth amendment may have withered. Now revitalized, it must be actively promoted to prevent its slipping back into obscurity. Further judicial recognition is the only certain method to sustain the amendment's importance. In seeking protection for unenumerated personal freedoms, those which meet the *Griswold* tests for

¹³⁹ Whether the "due process" and "equal protection" limitations on governmental action, plus the "penumbras" of the first eight amendments with their even more ambiguous terminology, will continue to provide the principal safeguards for human rights, placing the ninth amendment in a role of limited importance, is less ponderable. Because the ninth amendment is a more direct and facile receptacle for some personal liberties, it should continue to develop its own special role.

fundamentalness should logically receive the most favorable reception by the judiciary. Of these, the basic liberties which are supported by substantial historical antecedents are most likely to be accorded protection, if at all, under the ninth amendment.¹⁴⁰

One of the most hallowed natural rights of man was the right to be free from the potential oppressiveness of a peace time army. In almost every charter of government from the English Bill of Rights through the colonial and post-revolu-

¹⁴⁰ A pre-*Griswold* recognition of a fundamental unenumerated right with historical antecedents can be found in *Thiede v. Town of Scandia Valley*, 14 N.W.2d 400 (Minn. 1944). In construing a state constitutional provision similar to the ninth amendment, the Minnesota Supreme Court held invalid a statute permitting removal of paupers from their homestead to a poor relief settlement without their consent. The court declared that each man has a long standing fundamental right to occupy his own home irrespective of wealth:

The fact that the declaration in Magna Carta that no man shall be disseized of his freehold except for crime was not incorporated in our Constitution does not prevent us from recognizing that principle as one of fundamental law, for as was said in *Town of Dummerston v. Town of Newfane . . . supra*: ". . . the rule forbidding the removal of a person as a pauper from his freehold estate is a rule of humanity and policy. . . . It is a rule resting upon the best feelings of our nature for its foundation, and we think that the provisions in Magna Charta, which has been referred to, was intended not so much to confer a new privilege as to recognize one already existing."

14 N.W.2d at 406. *But see In re Reitz*, 191 N.W.2d 913 (Wis. 1971), where the Wisconsin Supreme Court held that a statute authorizing the return to his legal settlement of a dependent person who is receiving relief at another place in the state does not violate the right of privacy under the ninth amendment. The dependent person had lived in Milwaukee for four years when his town of legal settlement for relief purposes instituted the suit to force him to return or face the loss of the benefits.

tionary documents, man sought to prohibit the central regime from maintaining an army when unnecessary for protection against foreign dangers. Its absence from the governing document often was met by strong protest.¹⁴¹ While draft laws have been consistently held to be constitutional, they may be subject to serious challenge if continued beyond the current "war." Although the courts will assuredly give "peace time" a narrow definition, and respond favorably to the claim of "compelling governmental interest," a preventive army in the absence of any current or imminent conflict, may violate a presently unrevealed ninth amendment guarantee against unduly large peace time armies. The combined danger to personal freedoms and the enormous economic drain inherent in a substantial military force should support historical ninth amendment arguments.¹⁴²

During the course of the ratification conventions, several states became concerned that the increased powers granted to the central government would permit it to bestow broad economic licenses and privileges upon favored groups. Four states proposed that the Bill of Rights contain a provision prohibiting the creation of monopolies by the federal government. One additional state included such a provision in its own Declaration of Rights. While the Federal Trade Commission and the Department of Justice have the responsibility to prevent monopolies created through private manipulations, no such congressional sanctions exist against the federal or state governments. Any government authorized monopoly

¹⁴¹ 1 DEBATES, *supra* note 82, at 370-71, 496 (Luther Martin's letter to the Maryland Legislature and George Mason's objections to the Constitution).

¹⁴² *But see* United States v. Uhl, 436 F.2d 773 (9th Cir. 1970) (which held that the draft law, even during the absence of a dire national emergency, did not violate the ninth amendment); *accord*, United States v. Sowul, 447 F.2d 1103 (9th Cir. 1971); United States v. Zaugh, 445 F.2d 300 (9th Cir. 1971); United States v. Farrell, 443 F.2d 355 (9th Cir. 1971).

should be subject to a ninth amendment challenge to the extent that a compelling overriding interest for such activity cannot clearly be established. In addition, a government monopoly might itself be unconstitutional. For example, exclusive governmental ownership and operation of all passenger railroad service, even though perhaps economically advisable, might impermissibly conflict with an individual's right not to be subjected to the evils of centralized control. In spite of the broad powers of Congress under the commerce clause, the ninth amendment may yet serve as a protection against either form of governmental monopoly.

Newer "non-historical" fundamental rights, in accordance with the concept of a dynamic Constitution, equally deserve ninth amendment consideration. *Griswold* granted protection to privacy, a relative late-comer to the personal rights arena. If it is true that ". . . the door is wide open for the results of research, the proper construction of this Amendment, and enumeration of the rights [with] which the Government or anyone, has no power to interfere,"¹⁴³ then newly demanded political and civil rights must be carefully examined both for their validity and potential coverage by the ninth amendment. Particularly significant in the field of expanding human freedoms is the Universal Declaration of Human Rights of the United Nations which contains several important civil liberties not enumerated in our Bill of Rights. Article 12 specifically prohibits arbitrary interference with privacy, the family, home and correspondence; article 14 recognizes the right to political asylum; and article 16 acknowledges that freedom to marry and have a family is fundamental. By signing the Declaration, the United States government presumably adheres to the concept that all people should possess those freedoms. Assuming these rights are of paramount importance because they are included in the Declaration, they should

¹⁴³ Hamlin, *The Bill of Rights or the First Ten Amendments to the United States Constitution*, 68 *COM. L.J.* 236 (1963).

therefore logically find judicial recognition and support based upon the ninth amendment.

Economic and social rights, unknown to the development of natural rights, are also a part of the Declaration of Human Rights. Because political and civil rights can mean so little to the economically deprived citizen, a court should be receptive to the assertion that the ninth amendment guarantees a decent standard of living to every man, the import of article 25 of the Declaration. The struggle for a better life for the migrant workers, residents in Appalachia and prisoners in ghetto slums might find favorable judicial reaction to the advocacy of ninth amendment sanctions.¹⁴⁴

The greatest area of potential growth for the ninth amendment is in the expansion of the "zone of privacy" conceived by Justice Clark. The amendment should mature through its dual role of striking down existing statutory incursions into the zone and guarding against any new governmental attempts at interference with the private sector of a citizen's life. Within the *Griswold* framework, the ninth amendment should serve as the basis for denial of enforcement by federal and state agencies of laws and regulations which restrict private conduct concerning which the government has no specific overriding interest.

Foremost among the advocates of broader ninth amend-

¹⁴⁴ One current writer views the economic sphere as the most significant area for the development of ninth amendment rights. He suggests that the right to work is an important freedom that deserves ninth amendment protection. Kent, *Under the Ninth Amendment What Rights are the "Others Retained by the People?"*, 29 FED. B.J. 219 (1970). Because these economic "rights" have, to a large extent, already received meaningful recognition and protection through congressional action and fourteenth amendment interpretations, it would appear that the role of the ninth amendment in the economic domain might be better suited to establishing broad guidelines for minimum living standards.

ment application to privacy are individuals who engage in "abnormal" sexual conduct. Long the subject of severe criminal penalties, homosexuals have been urging publicly and in the courts that statutes which restrict consensual private sexual conduct violate the ninth amendment. They challenge the validity of criminal laws which prohibit sodomy, fornication, cohabitation and homosexual relations between consenting adults in private. Arguing that they are as much entitled to the privacy protections of *Griswold* as are married couples, they assert that the state has no justification for such restrictions, much less an overriding and compelling reason. The initial results of their pleas indicate judicial receptiveness to these arguments. Two recent decisions by three-judge federal district courts have ruled that the Indiana and Texas sodomy statutes are unconstitutional, at least insofar as they reach the private consensual acts of married couples.¹⁴⁵ While both cases involved only first and fourteenth amendment claims for privacy, both the "zone of privacy" concept and the language of the court in *Buchanan v. Batchelor*¹⁴⁶ create a persuasive argument that the ninth amendment protection is appropriate. In defending its conclusion that the Texas statute invaded personal liberties, the court stated:

Sodomy is not an act which has the approval of the majority of the people. In fact such conduct is probably offensive to the vast majority, but such opinion is not sufficient reason for the State to encroach upon the liberty of married persons in their private conduct. Absent some demonstrable necessity, matters of (good or bad) taste are to be protected from regulation.¹⁴⁷

¹⁴⁵ *Cotner v. Henry*, 394 F.2d 873 (7th Cir. 1968); *Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex. 1970), *vacated on other grounds*, 401 U.S. 989 (1971).

¹⁴⁶ 308 F. Supp. 729 (N.D. Tex. 1970), *vacated on other grounds*, 401 U.S. 989 (1971).

¹⁴⁷ 308 F. Supp. at 733. *But see Dawson v. Vance*, 329 F. Supp. 1320 (S.D. Tex. 1971) (in which a federal judge in another district in Texas held that the state sodomy laws were constitutional and the ninth amendment inapplicable).

Assuming that *Griswold* protects private sodomous conduct by married couples, there can be no logical reason why the ninth amendment should not similarly restrain state prohibition of similar conduct, whether heterosexual or homosexual. If private consensual sexual mores and conduct is really to be private, and if the government really has no substantial compelling interest to override the fundamental right of privacy, then the ninth amendment should surely offer protection from abridgment of that right.¹⁴⁸

Although unable to command the reverence of *Griswold*, the multitude of personal appearance cases, which have arisen from individual challenges to high school dress codes, should influence the development of the ninth amendment far beyond the immediate decision of reinstatement or exclusion of the student. Pronouncements in these rulings extend the rather narrow confines of family privacy protected under *Griswold*, and vastly enlarge the concept of basic liberty. In one of the "hair" cases, *Richards v. Thurston*,¹⁴⁹ a federal circuit court, probably responding to a suggestion that the asserted right was trivial, proclaimed:

We do not say that the governance of the length and style of one's hair is necessarily so fundamental as those substantive rights already found implicit in the "liberty" assurance of the Due Process Clause, requiring a "compelling" showing by the state before it may be impaired. Yet "liberty" seems to us an incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with those personal aspects of our lives which have no direct bearing on the ability of others to enjoy their liberty. . . . Indeed, a narrower view of liberty in a free society might, among other things, allow a state

¹⁴⁸ It is clear that the *Griswold* right of privacy in the marital domain is not without limits. The Supreme Court of Minnesota has recently held that a statute prohibiting marriage of persons of the same sex does not violate the ninth amendment. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

¹⁴⁹ 424 F.2d 1281 (1st Cir. 1970).

to require a conventional coiffure of all its citizens, a governmental power not unknown in European history. We think the Founding Fathers understood themselves to have limited the government's power to intrude into this sphere of personal liberty, by reserving some powers to the people.¹⁵⁰

No longer will it be necessary, if *Richards* correctly reflects the present meaning of liberty under the ninth amendment, to establish the hallmark of *Griswold* as the *sine qua non*. A freedom may not have to be "momentous" to be entitled to ninth amendment protection. An asserted right need not measure up to a basic principle which lies at the roots of all our civil and political institutions. Black's warning was prophetic, since the *Richards* decision speaks of liberty in the ultra-subjective sense—as it "seems to us"—which is no more than a euphemism for judge-made standards. Thus, in a radical departure, *Richards* discards the "fundamentalness" test of *Griswold* for the less demanding standard of non-encroachment. Under that doctrine, personal liberty is entitled to protection from governmental abridgment so long as the asserted right has "no direct bearing on the ability of others to enjoy their liberty." Building upon *Richards*, the Supreme Court of Idaho, under similar circumstances, did not hesitate to broaden further the scope of the ninth amendment in the case of *Murphy v. Pocatello School Dist. #25*:¹⁵¹

Neither from the words themselves nor from the records and other contemporaneous material concerning the creation of the Ninth Amendment is it exactly clear what "rights" are retained by the people. What is clear from an examination of the history and origin of the Ninth Amendment is that the absence of a specific constitutional provision dealing with the rights of privacy, personal taste, the right to be left alone, and the like, does not compel the conclusion that no such right exists. On the contrary, the opposite conclusion is compelled. As in the Fifth and Four-

¹⁵⁰ *Id.* at 1284.

¹⁵¹ 480 P.2d 878 (Idaho 1971).

teenth Amendment due process cases which have interpreted and necessarily expanded what life, liberty and pursuit of happiness mean, the determination of *what* rights exist and in *which* situations under the broad and general language of the Ninth Amendment is clearly, and again necessarily, left to judicial determination. Therefore, under both the Idaho Constitution . . . and under the Ninth Amendment of the United States Constitution made applicable to the states by the Fourteenth Amendment (under *Griswold*, supra), we hold the right to wear one's hair in a manner of his choice to be a protected right of personal taste not to be interfered with by the state unless the state can meet the "substantial burden" criteria similar to that set out in the cases holding in favor of the student. . . .¹⁵²

Recently, conservationists have suggested that every man has a fundamental right to a healthy environment and an unpolluted wilderness.¹⁵³ Others have asserted with equal vigor the right to an adequate old age pension, the freedom to develop one's natural gifts to the fullest extent, and the right to practice one's profession.¹⁵⁴ From these preliminary statements further coverage for the ninth amendment may be sought. Just this year, in a case involving an incarcerated black militant, the assertion was made that the ninth amend-

¹⁵² *Id.* at 883-84.

¹⁵³ Beckman, *The Right to a Decent Environment Under the Ninth Amendment*, 46 L.A.B. BULL. 415 (1971). Mr. Beckman contends that the ninth amendment protects inalienable rights "waiting for changing conditions of life to cause them to surface in the society and demand protection." Beckman, *supra* at 421. See also Roberts, *An Environmental Lawyer Urges: Plead the Ninth Amendment*, 79 NATURAL HISTORY 18 (1970). But one court, while sympathetic to the environmentalists' pleas, rejects the ninth amendment as a basis for relief. *Environmental Defense Fund, Inc. v. Corps of Eng'rs*, 325 F. Supp. 728 (E.D. Ark. 1971).

¹⁵⁴ *Grannis v. Board of Medical Examiners*, 19 Cal. App. 3d 551, 96 Cal. Repr. 863 (Ct. App. 1971).

ment recognized "freedom from gratuitous humiliation at the hands of the State."¹⁵⁵

Richards and *Murphy* have added to the panoply of ninth amendment coverage the rights of personal appearance and personal taste, perhaps as offshoots of the right of privacy, but certainly not limited to the *Griswold* familial setting. More important, they have established precedent for total departure from *Griswold* standards. A new base of operations has been constructed in the sphere of privacy—that of personal taste. If given wide judicial acceptance, the non-encroachment test must result in an ever broadening expansion of personal liberties. It is clear that vigorous post-*Griswold* development of the ninth amendment protection continues.¹⁵⁶

Meaningful and lasting conceptual development of the ninth amendment must ultimately await the slow process of case by case rulings of the United States Supreme Court. Like the gradual and continuing expansion of the scope of the fourteenth amendment since its adoption in 1868, the ninth amendment will finally mature only through decisions by the high Court. Without discounting the importance of the rash of lower court decisions, their durability and influence are limited, first, to the court's geographical jurisdiction and, second, because many of these decisions are diametrically opposite to rulings by courts of equal stature.¹⁵⁷ Until specific cases are

¹⁵⁵ *Davis v. Lindsay*, 321 F. Supp. 1134 (S.D.N.Y. 1970). The court did not rule on the ninth amendment claims presented in the case.

¹⁵⁶ A conscientious objector group attempted to expand the concept of privacy by suing the Secretary of Defense to obtain an injunction prohibiting surveillance by the army of civilian political activity. An appellate court has ruled that a claim for relief has been properly stated, and has remanded the case to the trial court for hearing. *Tatum v. Laird*, 444 F.2d 947 (D.C. Cir. 1971).

¹⁵⁷ This divergence is especially pronounced in the personal appearance and abortion cases. Three of the several abortion cases which have been appealed have been argued before the Supreme Court and should be decided this term.

decided by the Supreme Court, we can only forecast developments with a conviction tempered by the unpredictable. While Madison understood (and it is accepted constitutional dogma today), that new situations would arise which would need the protection of the Bill of Rights, and while the historic guidelines—maximum individual freedom consistent with the compelling needs of the government—should continue to receive judicial recognition, the probable response of the Supreme Court to specific post-*Griswold* developments is at best conjectural.

APPENDIX A

TABLE OF CASES CONSTRUING THE NINTH AMENDMENT

- Ahren v. Board of Educ., 327 F. Supp. 1391 (D. Neb. 1971).
 American Motorcycle Ass'n v. Davids, 158 N.W.2d 72 (Mich. Ct. App. 1968).
 Anderson v. Laird, 437 F.2d 912 (7th Cir. 1971).
 Arizona State Dep't of Pub. Welfare v. Department of Health, Educ. & Welfare, 449 F.2d 456 (9th Cir. 1971).
 Ashwander v. TVA, 297 U.S. 288 (1936).
 Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis. 1970), *vacated on other grounds*, 401 U.S. 66 (1971).
 Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971).
 Benson v. City of Minneapolis, 286 F. Supp. 614 (D. Minn. 1968).
 Berryman v. Hein, 329 F. Supp. 616 (D. Idaho 1971).
 Bishop v. Colaw, 316 F. Supp. 445 (E.D. Mo. 1970), *rev'd* 450 F.2d 1069 (8th Cir. 1971).
 Bright v. Nunn, 448 F.2d 245 (6th Cir. 1971).
 Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970).
 City of Carmel-By-The-Sea v. Young, 466 P.2d 225 (Cal. 1970).
 Clay v. City of Eustis, 7 F.2d 141 (S.D. Fla. 1925).
 Commonwealth v. Leis, 243 N.E.2d 898 (Mass. 1969).
 Commonwealth & S. Corp. v. SEC, 134 F.2d 747 (3rd Cir. 1943).
 Colorado Anti-Discrimination Comm'n v. Case, 380 P.2d 34 (Colo. 1962).
 Crossen v. Fatsi, 309 F. Supp. 114 (D. Conn. 1970).
 Davis v. Firment, 269 F. Supp. 524 (E.D. La. 1967).
 Davis v. Lindsay, 321 F. Supp. 1134 (S.D.N.Y. 1970).
 Dawson v. Hillsborough Co., Fla. School Bd., 322 F. Supp. 286 (M.D. Fla. 1971).

- Dawson v. Vance, 329 F. Supp. 1320 (S.D. Tex. 1971).
 Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970).
 Environmental Defense Fund, Inc. v. Corps of Eng'rs, 325 F. Supp. 728 (E.D. Ark. 1971).
 Fishkin v. U.S. Civil Service Comm'n, 309 F. Supp. 40 (N.D. Cal. 1969).
 Freeman v. Flake, 320 F. Supp. 531 (N.D. Utah 1970), *aff'd*—F.2d—(10th Cir. 1971).
 Gardner v. United States, 446 F.2d 1195 (2d Cir. 1971).
 Gere v. Stanley, 320 F. Supp. 852 (M.D. Pa. 1970).
 Gernatt v. Huiet, 16 S.E.2d 587 (Ga. 1941).
 Gornto v. State, 178 S.E.2d 894 (Ga. 1970).
 Grannis v. Board of Medical Examiners, 19 Cal. App. 3d 551, 96 Cal. Rptr. 863 (Ct. App. 1971).
 Griswold v. Connecticut, 381 U.S. 479 (1965).
 Hamilton v. New Jersey Real Estate Comm'n, 117 N.J. Super. 345, 284 A.2d 564 (Super. Ct. 1971).
 Hooper v. Gooding, 282 F. Supp. 624 (D. Ariz. 1968).
In re Reitz, 191 N.W.2d 913 (Wis. 1971).
 International Ass'n of Machinists v. Sandsberry, 277 S.W.2d 776 (Tex. Civ. App. 1954), *aff'd* 295 S.W.2d 412 (Tex. 1956).
 Jarvella v. Willoughby-Eastlake City School Dist., 233 N.E.2d 143 (Ohio C.P. 1967).
 Johnson v. Board of Co. Comm'rs, 75 P.2d 849 (Kan. 1938).
 Jeffers v. Yuba City Unified School Dist., 319 F. Supp. 368 (E.D. Cal. 1970).
 Kape v. Home Bank & Trust Co., 18 N.E.2d 170 (Ill. 1938).
 Karr v. Schmidt, 320 F. Supp. 728 (W.D. Tex. 1970).
 Katz v. United States, 389 U.S. 347 (1967).
 Kish v. County of Milwaukee, 441 F.2d 901 (7th Cir. 1971).
Ex Parte Kurth, 28 F. Supp. 258 (S.D. Cal. 1939).
 Lamont v. Comm'r of Motor Vehicles, 269 F. Supp. 880 (S.D.N.Y. 1967).
 Livingston v. Moore, 32 U.S. 551 (1833).
 Martin v. Davison, 322 F. Supp. 318 (W.D. Pa. 1971).
 Miller v. Gillis, 315 F. Supp. 94 (N.D. Ill. 1969).
 Miller v. State, 458 S.W.2d 680 (Tex. 1970).
 Mindell v. U.S. Civil Service Comm'n, 312 F. Supp. 485 (N.D. Cal. 1970).
 Morrison v. State Bd. of Educ., 461 P.2d 375 (Cal. 1969).
 Murphy v. Pocatello School Dist. #25, 480 P.2d 878 (Idaho 1971).
 National Maritime Union v. Herzog, 78 F. Supp. 146 (D.D.C. 1948).

- Neuhaus v. Torrey, 310 F. Supp. 192 (N.D. Cal. 1970).
 Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969).
 People v. Brown, 485 P.2d 500 (Colo. 1971).
 People v. Fidler, 485 P.2d 725 (Colo. 1971).
 Red Lion Broadcasting Co. v. FCC, 381 F.2d 908 (D.C. Cir. 1967), *aff'd* 395 U.S. 367 (1969).
 Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970).
 Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970).
 Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217 (E.D. La. 1970).
 Roth v. United States, 354 U.S. 476 (1957).
 Singer v. United States, 380 U.S. 24 (1965).
 State v. Abellano, 441 P.2d 333 (Hawaii 1968).
 State v. Dobbins, 178 S.E.2d 449 (N.C. 1971).
 State v. Edwards, 177 N.W.2d 40 (Minn. 1970).
 State v. Fetterly, 456 P.2d 996 (Ore. 1969).
 State v. Scott, 255 So. 2d 736 (La. 1971).
 State v. Sprague, 200 A.2d 206 (N.H. 1964).
 Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970).
 Tatum v. Laird, 444 F.2d 947 (D.C. Cir. 1971).
 Tennessee Elect. Power Co. v. TVA, 306 U.S. 118 (1939).
 United Pub. Workers of America (CIO) v. Mitchell, 330 U.S. 75 (1947).
 United States v. Cook, 311 F. Supp. 618 (W.D. Pa. 1970).
 United States v. Diaz, 427 F.2d 636 (1st Cir. 1970).
 United States v. Dorris, 319 F. Supp. 1306 (W.D. Pa. 1970).
 United States v. Farrell, 443 F.2d 355 (9th Cir. 1971).
 United States v. Fujimoto, 102 F. Supp. 890 (D. Hawaii 1952).
 United States v. Kahn, 251 F. Supp. 702 (S.D.N.Y. 1966).
 United States v. Mathews, 438 F.2d 715 (5th Cir. 1971).
 United States v. Painters Local Union No. 481, 79 F. Supp. 516 (D. Conn. 1948).
 United States v. Sowul, 447 F.2d 1103 (9th Cir. 1971).
 United States v. Uhl, 436 F.2d 773 (9th Cir. 1970).
 United States v. Zaugh, 445 F.2d 300 (9th Cir. 1971).
 Valdes v. Monroe Co. Bd. of Pub. Information, 326 F. Supp. 572 (S.D. Fla. 1971).
 Woods v. Miller, 333 U.S. 138 (1948).
 Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569 (D.D.C. 1952), *aff'd* 343 U.S. 579 (1952).