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THE NINTH AMENDMENT: A SURVEY OF THEORY AND PRACTICE IN THE FEDERAL COURTS SINCE GRISWOLD V. CONNECTICUT

BY LYMAN RHOADES,* RODNEY R. PATULA**

[T]he bills of rights in the American constitutions have not been drafted for the introduction of new law but to secure old principles against abrogation or violation.

—*Weimer v. Bunbury*[1]

CONTENTS

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[1] 30 Mich. 201, 214 (1874).

INTRODUCTION

THE ninth amendment to the Constitution of the United States reads: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." For nearly two centuries this language was cited for little more than the general principles of federalism and limited constitutional government.[2] Indeed, the ninth amendment was uniformly read in conjunction with the tenth as a rule of construction limiting the power of the federal government.[3] No substantive unenumerated rights under the ninth were articulated by the Court. Mr. Justice Jackson, in 1955, characterized his understanding of the amendment:

> What are those other rights "retained by the people?" . . . [T]he ninth amendment rights which are not to be disturbed by the federal government are still a mystery to me.[4]

Since 1965, however, new attention has been given the ninth amendment. In that year, the Supreme Court delivered its now famous decision in *Griswold v. Connecticut*,[5] marking the first instance of the ninth amendment's use in finding an unenumerated, substantive right — the right of privacy in the marital relationship. The issues resolved and those left unanswered by *Griswold's* application of the amendment have been the subject of much judicial and academic argument.

In *Griswold* the appellants were convicted in state court of advising married people in the use of contraceptives. The Court reversed the Connecticut convictions and struck down the statute in a 7-2 decision, embodying six separate opinions.

The decision is typically cited for the establishment of a right to privacy in the marital relationship. Of interest to students of the ninth amendment, however, *Griswold* also stands as a promise, as yet unfulfilled, of substantive meaning for the

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[2] *See* United Public Workers v. Mitchell, 330 U.S. 75 (1947):

> [W]hen 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.

Id. at 96. *See also* Beaney, *The Griswold Case and the Expanding Right to Privacy*, 1966 WIS. L. REV. 979; Kelley, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814 (1966); Van Loan, *Natural Rights and the Ninth Amendment*, 48 B.U.L. REV. 1 (1968).

[3] *See* Moore, *Ninth Amendment: Its Origins and Meaning*, 7 NEW ENGLAND L. REV. 215 (1972).

[4] R. JACKSON, THE SUPREME COURT AND THE AMERICAN SYSTEM OF GOVERNMENT 74-75 (1955).

[5] 381 U.S. 479 (1965).

amendment. The right of marital privacy is arguably the first unenumerated, substantive right recognized, at least in part, under the ninth amendment, and it is conceivable that more such rights could be "discovered." This article explores the promise of *Griswold* and the subsequent federal decisions which address the ninth amendment.[6] Beginning with three basic formulations of the amendment set forth in *Griswold,* and tracing these formulations through subsequent case law, the authors offer a synthesis of ninth amendment doctrine — a synthesis describing not only the current status of such doctrine, but also one suggesting future uses of the amendment.

I. From *Griswold*: Three Views of the Ninth Amendment

Of the six opinions in *Griswold,* there are three distinct views of the ninth amendment. These include (1) Douglas' majority opinion, (2) the Goldberg concurrence, and (3) the two dissents authored by Justices Stewart and Black. Neither the Harlan nor the White opinions addressed the ninth amendment.

A. *The Douglas Position*

The majority opinion in *Griswold,* written by Justice Douglas, has been widely hailed as the source of the so-called penumbral theory of marital privacy. Douglas reasons that the right of marital privacy is the product of "penumbras, formed by emanations"[7] of those guarantees in the first, third, fourth, fifth, ninth, and fourteenth amendments — penumbras that provide the "life and substance" of the enumerated rights guaranteed by each of these amendments.[8] This penumbral theory suggests to Douglas the existence of a constitutional "zone of privacy"[9] which cannot be invaded by the state.

It is unfortunate that Douglas does not explicitly describe the precise manner in which he uses the ninth amendment. In listing the amendments whose emanations create this zone of privacy, Douglas articulates substantive rights for each amendment *except the ninth.* He simply cites the ninth in full,[10] leaving his intended use of the amendment in doubt. This leads one to question whether marital privacy is a substantive right,

[6] The restriction of this article to federal cases is not to suggest that federal decisions are necessarily representative of all decisions which mention the ninth amendment.

[7] 381 U.S. at 484.

[8] *Id.*

[9] *Id.*

[10] *Id.*

unenumerated by the Bill of Rights, and found in the ninth amendment, or is it in fact a penumbral product of all the amendments mentioned. Phrased differently, is the ninth amendment, as used by Douglas, an actual source of a substantive right, or is it an enabling amendment when used in conjunction with other constitutional amendments?

Justice Stewart, in his dissent, remarks, ". . . I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court."[11] Stewart attacks the majority opinion for using the ninth amendment as a source of the unenumerated right of privacy. Even treating the ninth as an "enabler," however, suggests that the amendment is a necessary vehicle by which Douglas fashions a substantive right from the enumerated rights found in the other cited amendments.

We are thus left with two possible interpretations of the Douglas position. Either the ninth amendment is the source of a substantive right of marital privacy, or else the ninth is an enabling clause, requiring the Court to construe the Constitution as liberally as a spirited reading of the Bill of Rights demands. Under either of these interpretations, the ninth is an essential force in the recognition of rights not enumerated in the Constitution.

B. *The Goldberg Position*

Justice Goldberg's concurrence relied heavily on the ninth amendment. After tracing the historical development of the amendment,[12] the opinion sets out a series of disclaimers, expressing the manner in which the ninth was *not* to be used. It is not, Goldberg asserts, to be incorporated into the fourteenth amendment for use against the states; nor is it to be used as an independent source of rights:

> 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.[13]

Later, Goldberg hedges his disclaimers that the ninth should not be read through the fourteenth:

> In sum, the Ninth Amendment simply lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Govern-

[11] *Id.* at 530.

[12] *Id.* at 487-91. An extensive history of the ninth amendment is developed in Van Loan, *supra* note 2.

[13] 381 U.S. at 492.

> ment or the States is not restricted to rights specifically mentioned in the first eight amendments.[14]
>
> . . . .
>
> . . . I believe that the right of privacy in the marital relation is fundamental and basic — a personal right "retained by the people" within the meaning of the Ninth Amendment. Connecticut cannot constitutionally abridge his fundamental right, which is protected by the Fourteenth Amendment from infringement by the States.[15]

Goldberg, then, seems to affirm and deny at once a "fundamental rights" argument for the ninth amendment. While there are no rights of substance therein, the amendment somehow is further evidence of a general concept of "liberty" as expressed in the fifth and fourteenth amendments.[16]

An outstanding feature of the Goldberg position, and the one which most clearly distinguishes it from the Douglas position, is Goldberg's use of the term "liberty." Goldberg argues that "the concept of *liberty* protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights."[17] To rule otherwise "is to ignore the Ninth Amendment and to give it no effect whatsoever."[18] Thus, Goldberg treats the ninth, like the fifth and fourteenth, as an amendment embodying a concept of liberty basic to the Constitution. To Goldberg, the ninth precludes the Court from denying a right implicit to liberty simply because the right may not be enumerated in the Constitution. A failure to recognize a right of marital privacy would constitute a denial of constitutional liberty, and therefore the right must be guaranteed.

An eternal concern of constitutional theorists is the means by which rights, once recognized as constitutional in stature, may be appropriately circumscribed. For Justice Black, rights only existed to the extent they were specified in the language of the Constitution. Consequently, an unenumerated right was not a constitutional right at all. But for Goldberg, a right might be unenumerated and still be of a constitutional quality, so long as it was essential to the concept of liberty. Goldberg was at least aware of the obvious problem of limiting rights by a principle as broad as liberty:

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[14] *Id.* at 493.
[15] *Id.* at 499.
[16] Though both Justice Goldberg and Chief Justice Warren, who joined Justice Goldberg in this opinion, have since left the Court, this concurrence retains its precedential importance, since nearly half the *Griswold* majority took part in it, and because Justice Brennan, who also joined in the opinion, remains on the Court.
[17] 381 U.S. at 486 (emphasis added).
[18] *Id.* at 491.

> I do not see how [the ninth amendment applied in this manner] broadens the authority of the Court, rather it serves to support what this Court has been doing in protecting fundamental rights.[19]

In contrast, Douglas viewed the marital privacy right as either (1) a product of the various amendments discussed earlier, with the ninth as an enabling vehicle, or (2) founded upon the ninth amendment itself with the other amendments serving as evidence of the framers' intent to protect certain "penumbral" interests of the individual. Whether either interpretation of Douglas' position offered sounder principles for limiting recognition of unenumerated rights than did Goldberg's "liberty theory" was a question which denied a precise answer in 1965. But as this article suggests, a much clearer answer is now possible. A survey of subsequent federal case law makes one fact certain: it is the belief in the potential or the fear of lack of potential for circumscribing unenumerated rights that has substantially controlled the lower courts' acceptance of the Douglas or Goldberg positions.

C. *The Dissents*

Justice Stewart's dissent goes to the heart of the *Griswold* controversy over ninth amendment use:

> [T]o say that the Ninth Amendment has anything to do with this case is to turn somersaults with history. The Ninth Amendment like its companion, the Tenth, . . . was . . . simply to make clear that the adoption of the Bill of Rights did not alter the plan that the *Federal Government* was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual States.[20]

Essentially, the Stewart and Black dissents look to the long-standing principles of limited government and federalism, shunning the potential of both the Douglas and Goldberg positions. Black's dissent adds still another dimension to the limited government and federalism arguments. He suggests that the ninth amendment reasoning of Douglas and Goldberg are both really due process formulations for a concept of "natural justice,"[21] and consequently he argues against the applicability of either:

> [T]hey require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is of course that of a legislative body.[22]

[19] *Id.* at 492-93.
[20] *Id.* at 529-30 (emphasis added).
[21] The concurrences of both Justices Harlan and White relied on due process arguments to invalidate the Connecticut statute.
[22] 381 U.S. at 511-12.

The thrust of the Stewart and Black dissents is clear. They would retain the established rule of applying the ninth (with the tenth) only to limit federal incursions into state autonomy, and reject any notion that the ninth amendment is a potential source of substantive personal rights. To them it is manifest that the "people" alluded to in the ninth exist only through the legislatures of the states:

> If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it.[23]

It is worthy of note that the dissents' "natural justice" attack on the Douglas and Goldberg positions as well as their own restrictive view of the ninth amendment constitute a rejection of the "substantive due process" nature of both the penumbral and liberty approaches outlined earlier. When Justice Black expresses his unwillingness to rely upon judicial "appraisal of what laws are unwise or unnecessary,"[24] he is arguably reacting to the potential limitlessness of constitutional rights produced by the Douglas and Goldberg formulations of the amendment in *Griswold.*

II. The Post-*Griswold* Response

For the legal community today, *Griswold* remains as the only "definitive" statement of the ninth amendment. The Supreme Court has largely refused to entertain ninth amendment arguments inspired by *Griswold;* however, there are 15 Supreme Court and 154 lower federal court cases[25] which discuss the amendment. These cases suggest two common themes. First, certain Supreme Court Justices, most notably Douglas, have modified and refined their positions with respect to the ninth amendment.[26] Second, the lower federal courts have generally avoided a direct response to ninth amendment claims. This is due, in part, to the absence of principles to delimit recognition of unenumerated constitutional rights and, in part, to a general confusion surrounding a "proper" interpretation of *Griswold.* For the most part, those unenumerated rights asserted have not been acknowledged under the aegis of the ninth amendment. A few district courts, however, have boldly reached into the language of the amendment to dis-

[23] *Id.* at 531 (Stewart, J., dissenting).

[24] *See* text accompanying note 22 *supra.*

[25] The 154 lower federal court cases include 42 in the circuit courts of appeals and 112 in district courts, as of June 15, 1973.

[26] *See* text pp. 170-72 *infra.*

cover unprecedented and unenumerated rights.[27] But such a creative use of the amendment has not spread to the higher federal courts.[28]

One district court opinion is illuminative of the problems the federal courts face in understanding *Griswold* and the ninth amendment. Judge Dumbauld, of the western district of Pennsylvania, called *Griswold* an "amusing case,"[29] explaining his "understanding" in these terms:

> [I]t might be argued that Negrich [an inmate in a Pennsylvania prison] has a Ninth Amendment right to privacy, to be free from unjustified intrusion by government . . . . But it would be unseemly for a court of first instance, absent further illumination by lightnings from Olympus, to base its decisions upon so "penumbral" or nebulous a doctrine.[30]

In only two Supreme Court decisions since *Griswold* has a ninth amendment claim been raised and addressed by the majority opinion.[31] In neither case did the Court provide the "lightnings from Olympus" requested by Judge Dumbauld. The following survey of post-*Griswold* decisions dramatically underscores the need for such guidance.

A. *Personal Rights*

1. The Student Long Hair Cases

The asserted right of public school students to wear long hair has been a prolific source of ninth amendment arguments. Such claimed rights, based in whole or in part on the ninth, have reached the federal courts in 26 cases since *Griswold*.

In two high court decisions,[32] certiorari was denied students seeking reinstatement in their schools after being sus-

[27] *See, e.g.*, Davis v. Meek, 344 F. Supp. 298 (N.D. Ohio 1972), where school officials were enjoined from enforcing a rule excluding married high school students from engaging in extracurricular activities on the ground that the rule constituted an unwarranted invasion of the students' penumbral right of privacy.

[28] This is true with the possible exception of the circuit courts which have found a right to personal choice in hair styles based, in part, upon the ninth amendment. *See* text p. 161 *infra*.

[29] Negrich v. Hohn, 246 F. Supp. 173, 178 (W.D. Pa. 1965), *aff'd*, 379 F.2d 213 (3d Cir. 1967).

[30] 246 F. Supp. at 179.

[31] Stanley v. Illinois, 405 U.S. 645, 651 (1972): "[T]he integrity of the family unit has found protection in . . . the Ninth Amendment." (majority opinion citing Justice Goldberg's *Griswold* concurrence) (dictum); Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 160 (1971), where Justice Stewart for a 5-4 Court ruled that a New York State Bar question asking affiants to applicant's character whether they had visited the applicant's home was a violation of the first, fourth, ninth, and fourteenth amendments: "[I]t borders on the frivolous . . . ." *See* discussion in text at Section III *infra*, where these and other Supreme Court cases since *Griswold* are discussed with reference to individual justices' positions on the ninth amendment.

[32] Freeman v. Flake, 405 U.S. 1032 (1972) (Douglas, J., dissent from denial of certiorari); Olff v. East Side Union H.S. Dist., 404 U.S. 1042 (1972) (Douglas, J., dissent from denial of certiorari).

pended for hair code violations. In both cases, Justice Douglas dissented from the denial of certiorari. In one opinion he reasoned that:

> The word "liberty" is not defined in the Constitution. But as we held in Griswold v. Connecticut . . . it includes at least the fundamental rights "retained by the people" under the Ninth Amendment . . . . 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 . . . .[33]

At the circuit court level, there have been only two decisions where the ninth amendment was used successfully to assert a right of free choice in grooming. In the first case, *Bishop v. Colaw*,[34] the eighth circuit used the ninth, in conjunction with other amendments, to find such a right:

> We hold that Stephen possessed a constitutionally protected right to govern his personal appearance while attending public high school . . . . The source of this right has been found within the Ninth Amendment, the Due Process Clause of the Fourteenth Amendment, and the privacy penumbra of the Bill of Rights . . . . The common theme underlying decisions striking down hairstyle regulations is that the Constitution guarantees rights other than those specifically enumerated, and that the right to govern one's personal appearance is one of those guaranteed rights.[35]

A year before *Bishop* was decided, the seventh circuit, in *Anderson v. Laird*,[36] denied first and ninth amendment claims of a National Guard member seeking to wear his hair as he wished. The court did observe, however, that "[i]f Anderson were completely in civilian status, his position would have legally persuasive stature."[37] Finally recognizing the position foreshadowed in *Anderson*, the seventh circuit permitted a right to free choice in personal grooming in *Arnold v. Carpenter*.[38] Here, as in *Bishop*, the ninth amendment was used with other amendments to guarantee an unenumerated, substantive right.

The circuits denying ninth amendment claims in the long hair cases are:

> —The Third Circuit. "[I]n the absence of further guidance from the Supreme Court, we ought not to expand the Ninth Amendment beyond the notions applied to the right of [marital] privacy as expressed in *Griswold*."[39]

[33] Olff v. East Side Union H.S. Dist., 404 U.S. 1042, 1044 (1972) (Douglas, J., dissent from denial of certiorari).

[34] 450 F.2d 1069 (8th Cir. 1971).

[35] *Id.* at 1075.

[36] 437 F.2d 912 (7th Cir.), *cert. denied*, 404 U.S. 865 (1971).

[37] 437 F.2d at 914.

[38] 459 F.2d 939 (7th Cir. 1972).

[39] Stull v. School Bd., 459 F.2d 339, 347 (3d Cir. 1972).

—The Fifth Circuit. "[A] regulation restricting the length of hair restricts privacy not at all. Hair is, of course, worn for all the world to see. We do not think *Griswold* stands for any general 'right to go public as one pleases.' "[40]

—The Sixth Circuit. "It is further contended that the constitutional right of privacy of the students and their parents has been impaired in violation of the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments. We find the contention to be without merit. . . . In our opinion *Griswold v. Connecticut* has no application here."[41]

—The Tenth Circuit in *Freeman v. Flake*[42] did not answer the student's ninth amendment claim directly but said, in distinguishing *Griswold,* that hair style regulations do not control conduct found in the privacy of the home.

In the ten district court cases where a ninth amendment claim has been raised in support of a student's right to wear his hair as he pleases, and in which the decision was not appealed, the split of authority is even. Three districts have found a ninth amendment right,[43] three have denied such a right,[44] and four districts have not reached the ninth amendment arguments.[45] In all the district court decisions where the right to freedom in personal grooming was successfully asserted, the court cited a number of constitutional provisions. However, two holdings are rather explicit in their use of the ninth amendment. First, the district court for Idaho ruled:

> Certain personal liberties, however, are established for every individual by the reservation of rights contained in the Ninth Amendment and by the Due Process Clause of the Fourteenth Amendment. This court concludes and holds that personal appearance, including hair length, is one of these personal liberties, subject only to reasonable regulation by the state in matters of a legitimate state interest.[46]

Second, the eastern district court for Texas reasoned:

> [T]he fundamental right to be let alone, so often referred to in

[40] Karr v. Schmidt, 460 F.2d 609, 614 (5th Cir. 1972).
[41] Jackson v. Dorrier, 424 F.2d 213, 218 (6th Cir.), *cert. denied,* 400 U.S. 850 (1970).
[42] 448 F.2d 258, 261 (10th Cir. 1971), *cert. denied,* 405 U.S. 1032 (1972).
[43] *See* Berryman v. Hein, 329 F. Supp. 616 (D. Idaho 1971); Parker v. Fry, 323 F. Supp. 728 (E.D. Ark. 1971); Reichenberg v. Nelson, 310 F. Supp. 248 (D. Neb. 1970).
[44] *See* Bouse v. Hipes, 319 F. Supp. 515 (S.D. Ind. 1970); Pritchard v. Spring Branch Ind. School Dist., 308 F. Supp. 570 (S.D. Tex. 1970); Miller v. Gillis, 315 F. Supp. 94 (N.D. Ill. 1969).
[45] *See* Cossey v. Seamans, 344 F. Supp. 1368 (W.D. Okla. 1972); Farmer v. Catmull, 339 F. Supp. 70 (D. Utah 1972); Alberda v. Noell, 322 F. Supp. 1379 (E.D. Mich. 1971); Martin v. Davison, 322 F. Supp. 318 (W.D. Pa. 1971).
[46] Berryman v. Hein, 329 F. Supp. 616, 618 (D. Idaho 1971).

> Fourth Amendment settings, lies within the penumbra of that constitutional guarantee, and should be classified as one of the basic rights retained by the people through the Ninth Amendment.[47]

Given the split in the circuit courts and the indecision at the district court level, one might expect — with Justice Douglas — that the right of public school students to groom as they please should be the major test area for ninth amendment doctrine. Since the Supreme Court persists, however, in its denials of certiorari in these cases, the lower courts are left to deal with *Griswold* and the ninth amendment without meaningful guidance.

2. The Rights of Public School Teachers

Dismissals of public school teachers have produced several ninth amendment claims. In *Fisher v. Snyder*,[48] the District Court for Nebraska had an excellent opportunity to employ the amendment. Here, an unmarried teacher was dismissed by school authorities because men had reportedly spent the night in her home. The court ordered her reinstated after ruling that she possessed a consitutionally protected right of privacy. The decision was based, in part, on *Griswold*, but the teacher's ninth amendment claim was not reached.

In other cases of dismissal, a teacher who taught personal political beliefs in an economics course was not reinstated, the court finding no first, fifth, or ninth amendment "rights of academic freedom."[49] Similarily, a loyality oath for teachers was found not to violate a dismissed teacher's first, fifth, ninth, or fourteenth amendment rights.[50] Ninth amendment pleas went unanswered in a case challenging a dismissal allegedly based on racial discrimination,[51] as well as a case of dismissal for possession of marijuana.[52]

3. Demonstrations and Protests

Most demonstration and protest situations fall more clearly under the ambit of first amendment freedoms than under ninth amendment unenumerated rights. Indeed, where the ninth has been raised to support acts of protest, it has been tied closely to first amendment arguments. Since *Griswold*, there have been eight federal court cases in which the ninth amendment has

[47] Watson v. Thompson, 321 F. Supp. 394, 402 (E.D. Tex. 1971).
[48] 346 F. Supp. 396 (D. Neb. 1972).
[49] Ahren v. Board of Educ., 456 F.2d 399 (8th Cir. 1972).
[50] Knight v. Board of Regents, 269 F. Supp. 339 (S.D.N.Y. 1967), *aff'd*, 390 U.S. 36 (1968).
[51] Caldwell v. Craighead, 423 F.2d 613 (6th Cir. 1970).
[52] Lai v. Board of Trustees, 330 F. Supp. 904 (E.D.N.C. 1971).

been asserted to protect demonstrators.[53] In none of these cases has the ninth been used successfully. In fact, the only case which affirmatively applies a *Griswold*-ninth amendment rationale does so to *suppress* a demonstration. In *People v. Doorley*,[54] the District Court for Rhode Island denied protestors the right to picket in a residential neighborhood on the ground that the pickets invaded the residents' rights of privacy.

Even in those cases where the protestors' convictions were reversed by a federal court, the decisions turned on constitutional provisions other than the ninth amendment, most frequently on the strength of first amendment rationales.[55]

4. Obscenity and Pornography

At the district court level, two ninth amendment challenges to federal laws prohibiting interstate transportation of obscene materials have been successful. In the first of these, *United States v. B & H Distributing Corp.*,[56] the court found that banning interstate transportation of obscene materials where neither unwilling adults nor children would be exposed to them is "unconstitutionally overbroad, in violation of the First and Ninth Amendments."[57] In the second case, *United States v. Orito*,[58] a claimed ninth amendment right to transport obscene materials was not reached, but the court cited *Griswold*, saying: "[w]ith the right to read obscene matters comes the right to transport or to receive such material when done in a fashion that does not pander it or impose it upon unwilling adults or upon minors."[59]

Other cases dealing with transportation or possession of obscene materials have either rejected the ninth amendment claims of petitioners or have decided the issues on first amendment grounds.[60] Where the ninth amendment has been raised

[53] Bright v. Nunn, 448 F.2d 245 (6th Cir. 1971); Tatum v. Laird, 444 F.2d 947 (D.C. Cir. 1971); Williams v. Eaton, 310 F. Supp. 1342 (D. Wyo. 1970), *modified*, 443 F.2d 422 (10th Cir. 1971); Benson v. City of Minneapolis, 286 F. Supp. 614 (D. Minn. 1968); Brooks v. Briley, 274 F. Supp. 538 (M.D. Tenn. 1967), *aff'd*, 391 U.S. 361 (1968); Schumann v. New York, 270 F. Supp. 730 (S.D.N.Y. 1967); Carmichael v. Allen, 267 F. Supp. 985 (N.D. Ga. 1967); United States v. Miller, 249 F. Supp. 59 (S.D.N.Y. 1965), *rehearing denied*, 392 U.S. 917 (1968).

[54] 338 F. Supp. 574 (D.R.I.), *rev'd on other grounds*, 468 F.2d 1143 (1st Cir. 1972).

[55] *See, e.g.*, Tatum v. Laird, 444 F.2d 947 (D.C. Cir. 1971).

[56] 319 F. Supp. 1231 (W.D. Wis. 1970), *vacated*, 403 U.S. 927 (1971) (appeal pending).

[57] 319 F. Supp. at 1237.

[58] 338 F. Supp. 308 (E.D. Wis. 1970), *prob. juris. noted*, 404 U.S. 819 (1971).

[59] 338 F. Supp. at 310.

[60] *See, e.g.*, United States v. Zacher, 332 F. Supp. 883 (E.D. Wis. 1971); Simpson v. Spice, 318 F. Supp. 554 (E.D. Wis. 1970); United States v. Luros, 260 F. Supp. 697 (N.D. Iowa 1966).

in this area it has again been coupled with first amendment freedom of speech arguments.

5. Landlord-Tenant Disputes

Recently, tenants have sought to use the ninth amendment in disputes with their landlords. In each instance thus far, the asserted ninth amendment rights have been raised to no avail. In *Velazquez v. Thompson*,[61] tenants employed the amendment to challenge New York's summary eviction statute and their landlords' use of the statute in cases of nonpayment of rent. The unenumerated right claimed by the tenants was a right to "habitable housing," but the court found their arguments to be without merit. Similarily, courts in two jurisdictions have denied ninth amendment claims where tenants sought to invalidate state statutes permitting landlords to seize and sell the tenant's household effects in distraint for rent.[62]

6. Criminal Procedure Applications

Inroads have been made in the area of substantive ninth amendment rights of persons accused of crimes. In *Hooper v. Gooding*,[63] evidence inadmissable at trial was admitted during a preliminary hearing. The preliminary hearing judge was requested by defense counsel to exercise his discretionary power to close the hearing and thereby protect his client's right of privacy. The judge denied the motion and the district court subsequently reversed the ruling:

> Failure to exercise such discretion under appropriate circumstances might well constitute a violation of a defendant's right to privacy, a violation of the Ninth Amendment to the Constitution of the United States . . . .[64]

In *United States v. Tarlowski*,[65] the court cited the ninth amendment, in dictum, to uphold a general right of "liberty," finding that a defendant was entitled to the presence of wit-

[61] 451 F.2d 202 (2d Cir. 1971).

[62] Sellers v. Contino, 327 F. Supp. 230 (E.D. Pa. 1971); Kerrigan v. Boucher, 326 F. Supp. 647 (D. Conn.), *aff'd*, 450 F.2d 487 (2d Cir. 1971). There are a number of other applications of the ninth amendment which might benefit the poor. In the area of welfare law, see Conner v. Finch, 314 F. Supp. 364 (N.D. Ill. 1970), *aff'd*, 400 U.S. 1003 (1971) (ninth and tenth amendment "right to family life" asserted in challenge of income exclusion provision of Social Security Act). The welfare cases and a variety of miscellaneous cases raise ninth amendment claims, but the courts resolved these controversies on grounds other than constitutional ones. The authors have not classified these cases with other examples where the ninth amendment was not reached because the former group of decisions rejected *all* constitutional arguments. This classification of the cases is supported by several references in case law. *See, e.g.*, Carliner v. Commissioner of the District of Columbia, 412 F.2d 1090 (D.C. Cir.), *cert. denied*, 396 U.S. 987 (1969).

[63] 282 F. Supp. 624 (D. Ariz. 1968).

[64] *Id.* at 627.

[65] 305 F. Supp. 112 (E.D.N.Y. 1969).

nesses at an Internal Revenue Service investigation of possible tax evasion. The adverse ruling was, however, specifically overturned on fifth amendment due process grounds.

In other cases, courts have rejected or ignored ninth amendment claims to be free from prejudicial pretrial publicity,[66] and to be free from prosecutions conducted in bad faith.[67] In unequivocal terms, the court for the northern district of Illinois denied a ninth amendment argument of freedom from giving compelled testimony before a grand jury: "These contentions are so patently frivolous . . . that they do not merit discussion."[68]

7. Prisoner Rights Cases

Prisoner rights claims premised on the ninth amendment have been raised in two circuit court and four district court cases since 1965.[69] The decision most squarely addressing (and rejecting) a ninth amendment claim, *Burns v. Swenson*,[70] denied the prisoner's asserted right to be free from the maximum security facility in the Missouri state penitentiary. The court considered the ninth amendment in these terms:

> [The prisoner] would have us ascribe Constitutional dimensions to penal treatment which is substantially less severe than that barred by the Eighth and Fourteenth Amendments. *Griswold* does not dictate an adjudication that Burns' confinement in the Maximum Security Unit deprived him of a constitutionally protected right. The Ninth Amendment claim has been accorded due consideration. It is devoid of merit and must be rejected.[71]

Similarily, courts have denied ninth amendment claims of prisoners:

—not to be moved to a correctional facility where communication with his counsel would be more difficult;[72]

—to be free from assaults and homosexual attacks in jail;[73]

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[66] Martinez v. Commonwealth of Puerto Rico, 343 F. Supp. 897 (D.P.R. 1972).

[67] Turco v. Allen, 334 F. Supp. 209 (D. Md. 1971).

[68] *In re* Womack, 333 F. Supp. 479, 481 (N.D. Ill. 1971), *aff'd*, 466 F.2d 555 (7th Cir. 1972).

[69] Kish v. County of Milwaukee, 441 F.2d 901 (7th Cir. 1971); Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970), *cert. denied*, 404 U.S. 1062 (1972); Wells v. McGinnis, 344 F. Supp. 594 (S.D.N.Y. 1972); Davis v. Lindsay, 321 F. Supp. 1134 (S.D.N.Y. 1970); Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970); Negrich v. Hohn, 246 F. Supp. 173 (W.D. Pa. 1965), *aff'd*, 379 F.2d 213 (3d Cir. 1967).

[70] 430 F.2d 771 (8th Cir. 1970), *cert. denied*, 404 U.S. 1062 (1972).

[71] 430 F.2d at 778.

[72] Wells v. McGinnis, 344 F. Supp. 594 (S.D.N.Y. 1972).

[73] Kish v. County of Milwaukee, 441 F.2d 901 (7th Cir. 1971).

—to be moved from solitary confinement into the prison population, as a "fundamental right of privacy and freedom from gratuitous humiliation at the hands of the state."[74]

—to be free from the censorship of mail by prison authorities.[75]

In short, no ninth amendment inroads in federal courts have been made by prisoners.

8. Sterilization Cases

In the area of sterilization there have been two attempts to fashion unenumerated rights from the ninth amendment. Both attempts failed. In *Hathaway v. Worcester City Hospital,*[76] the plaintiff sought to compel a city hospital to perform a tubal ligation, on the grounds that the ninth amendment guaranteed the unenumerated "right to choose whether or not to bear children." The court dismissed the action without addressing the ninth amendment. An identical result occurred in the sterilization case of *McCabe v. Nassau County Medical Center.*[77]

9. Sex Education Cases

As in the area of sterilization, there are two federal cases in which the ninth amendment has been raised in disputes concerning sex education. And again, like the sterilization cases, these sex education decisions have ignored the amendment. In *Unitarian Church West v. McConnell,*[78] parents and the church asserted first and ninth amendment rights to teach sex education in Sunday school. Their right to do so was upheld, but on grounds strictly limited to first amendment doctrine.

In *Manfredonia v. Barry,*[79] the first, ninth, and fourteenth amendments were raised in defense of a birth control lecturer arrested for disseminating information in front of a 14-month-old child. Here again, the ninth amendment was not addressed by the court, and the decision, favorable to the lecturer, was based on other grounds.

B. *The Governmental Sphere*

1. Claims of Government Employees

In all cases dealing with the involvement of federal em-

[74] Davis v. Lindsay, 321 F. Supp. 1134, 1137 (S.D.N.Y. 1970).
[75] Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970).
[76] 341 F. Supp. 1385 (D. Mass. 1972).
[77] 453 F.2d 698 (2d Cir. 1971).
[78] 337 F. Supp. 1252 (E.D. Wis. 1971).
[79] 336 F. Supp. 765 (E.D.N.Y. 1971).

ployees (or employees of federally funded agencies) in the political process, claims that the Hatch Act[80] violates ninth amendment rights have not been upheld by the courts.[81] In these cases, the courts have recognized the ongoing right of Congress to regulate the political conduct of federal employees, and constitutional claims (usually a combination of first, fifth, ninth, and tenth amendments) have met resistance.

In two cases, postal employees who had been fired for nonpolitical activities asserted ninth amendment violations of privacy. In *White v. Bloomberg*,[82] the employee was reinstated, but on first, and not ninth amendment grounds. In *Mindel v. United States Civil Service Commission*,[83] however, a postal employee who had been fired because he was living with a woman to whom he was not married was ordered reinstated because his dismissal "violates the right to privacy guaranteed by the Ninth Amendment."[84]

2. Induction into the Armed Services

All circuit and district courts passing on the question have ruled against claimants asserting a ninth amendment right to be free from conscription.[85] Though most courts have dismissed such claims without commenting on the ninth amendment, the first circuit, in *United States v. Diaz*,[86] did expand on the issue somewhat:

> Defendant's final contention is that the Selective Service Act is an unconstitutional interference with his "right to life" guaranteed by the Ninth Amendment. Whatever may be said for the historical and . . . social merit of defendant's contention, we feel compelled to follow existing Court precedent upholding the constitutionality of Congressional conscription.[87]

Indeed, no hint of a ninth amendment inroad appears in this

[80] 5 U.S.C. §§ 7321-27 (1970).

[81] Fishkin v. United States Civil Serv. Comm'n, 309 F. Supp. 40 (N.D. Cal. 1969), *appeal dismissed*, 396 U.S. 278 (1970); Dingess v. Hampton, 305 F. Supp. 169 (D.D.C. 1969); Democratic State Central Comm. v. Andolesk, 249 F. Supp. 1009 (D. Md. 1966).

[82] 345 F. Supp. 133 (D. Md. 1972).

[83] 312 F. Supp. 485 (N.D. Cal. 1970).

[84] *Id.* at 488.

[85] United States v. Murray, 452 F.2d 503 (8th Cir. 1971); 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); United States v. Uhl, 436 F.2d 773 (9th Cir. 1970); United States v. Diaz, 427 F.2d 636 (1st Cir. 1970); United States v. Dorris, 319 F. Supp. 1306 (W.D. Pa. 1970); Orlando v. Laird, 317 F. Supp. 1013 (E.D.N.Y. 1970), *cert. denied*, 404 U.S. 869 (1971); United States v. Cook, 311 F. Supp. 618 (W.D. Pa. 1970); Drifka v. Brainard, 294 F. Supp. 425 (W.D. Wash. 1968); Katz v. United States, 287 F. Supp. 29 (S.D.N.Y. 1966).

[86] 427 F.2d 636 (1st Cir. 1970).

[87] *Id.* at 639.

area. Two other specific claims of ninth amendment freedom from induction have been raised and rejected — the unenumerated right to "life and liberty,"[88] and a "right to one's own life."[89]

3. Rights of Military Personnel

Consistent with the lack of success of ninth amendment claims in the induction cases, attempts by those already in military service to assert unenumerated rights have also failed. A common argument utilizes the amendment to challenge personnel reassignments to combat zones, but such arguments have fallen on deaf ears.[90] In one case, *Gutierrez v. Laird*,[91] a female air force officer asserted a ninth amendment "right to bear children" in contesting a nonpregnancy rule imposed upon women officers. The court distinguished this case from *Griswold*, noting that the government was not prohibiting these women from having children; the rule merely required such officers to choose between a career as an officer or one as a mother.[92]

C. *The Environment*

One of the most interesting developments in the area of ninth amendment doctrine has been the recent assertions of an unenumerated right to a decent environment. However, to date no court has recognized such a right. In *Environmental Defense Fund, Inc. v. Corps of Engineers*,[93] the plaintiffs sought to enjoin the construction of a dam. They pointed to the fifth, ninth, and fourteenth amendments as authority for a right to "enjoy the beauty of God's creation, and to live in an environment that preserves the unquantified amenities of life."[94] In rejecting this claim, the district court for Arkansas summarized its attitude toward the ninth amendment:

> The Ninth Amendment may well be as important in the development of constitutional law during the remainder of this century as the Fourteenth Amendment has been since the beginning of the century. But the Court concludes that the plaintiffs have not stated facts which would under the *present state* of the law constitute a violation of their constitutional rights . . . .[95]

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[88] Katz v. United States, 287 F. Supp. 29 (S.D.N.Y. 1966).
[89] United States v. Dorris, 319 F. Supp. 1306 (W.D. Pa. 1970).
[90] *See, e.g.*, Berk v. Laird, 429 F.2d 302 (2d Cir. 1970).
[91] 346 F. Supp. 289 (D.D.C. 1972).
[92] *Id.* at 293.
[93] 325 F. Supp. 728 (E.D. Ark. 1971).
[94] *Id.* at 739.
[95] *Id.* (emphasis added).

A number of other ninth amendment environmental claims have failed. These include:

— the protection from aircraft noise near Washington National Airport. "Plaintiffs concede that this would be the first court to sustain the contention that the Ninth Amendment . . . protects persons from noise. This circuit has declined the invitation to elevate to constitutional level the concerns for protection of the environment."[96]

— the protection of the historic environment. In *Ely v. Velde*,[97] the court denied an injunction which would have kept the state from constructing a penal facility in an area of historic homes. The ninth was specifically disallowed as a basis for protection of the historic environment.[98]

— a ninth amendment assertion to protect aesthetic, conservational, and recreational interests. The court in *Pennsylvania Environmental Council, Inc. v. Bartlett*[99] expressly denied this claim, as did the court in *Tanner v. Armco Steel Corp.*[100] The latter decision held that "The Ninth Amendment, through its 'penumbra' or otherwise, embodies no legally assertable right to a healthful environment."[101]

III. FEW LIGHTNINGS FROM OLYMPUS

It should be clear from the foregoing survey of federal case law that the promise of *Griswold* has not, as yet, been realized. Except for a handful of lower court decisions, neither the Douglas nor the Goldberg positions has gained wide acceptance. No doubt, some of this reluctance to breathe life into the ninth amendment is a product of the traditional conception of the amendment as a limiter of federal power. The constraints of this traditionalism are, however, greatly overshadowed by another factor — a profound absence of clarification of the meaning and limits of the *Griswold* holding. The "lightnings from Olympus" requested by Judge Dumbauld have simply not been forthcoming.

No Supreme Court decision since *Griswold* has utilized the ninth amendment as a basis for a fundamental constitutional right. *Griswold* stands for the proposition that marital privacy is a constitutional, though unenumerated, right, but beyond *Griswold*, and in cases closely analogous to it factually,

[96] Virginians for Dulles v. Volpe, 344 F. Supp. 573, 579 (E.D. Va. 1972).
[97] 321 F. Supp. 1088 (E.D. Va.), *modified*, 451 F.2d 1130 (4th Cir. 1971).
[98] 321 F. Supp. at 1094.
[99] 315 F. Supp. 238 (M.D. Pa. 1970), *aff'd*, 454 F.2d 613 (3d Cir. 1971).
[100] 340 F. Supp. 532 (S.D. Tex. 1972).
[101] *Id.* at 535.

the Court has refused to discuss the ninth amendment. Eugene Van Loan, in 1968, suggested that "it is perhaps best that the *Griswold* case and its use of the ninth amendment be placed in the 'same class as a restricted railroad ticket, good for this day and train only.' "[102] At least Mr. Douglas among the Justices, is unwilling to view the ninth amendment in so limited a fashion. Although his position in *Griswold* was not entirely clear, Douglas has since refined his theory of the ninth amendment. In *Palmer v. Thompson*,[103] the Court in a 5-4 decision upheld the right of Jackson, Mississippi to close rather than to integrate its public swimming pools. The battle was joined largely on fourteenth amendment equal protection grounds, but Douglas, dissenting separately, chose the ninth amendment to explain his position:

> The "rights" retained by the people within the meaning of the Ninth Amendment may be *related* to those "rights" which are enumerated in the Constitution. . . .
>
> . . . .
>
> [F]reedom from discrimination based on race, creed, or color has become by reason of the Thirteenth, Fourteenth, and Fifteenth Amendments one of the "enumerated rights" under the Ninth Amendment that may not be voted up or voted down.[104]

Like *Griswold*, *Palmer v. Thompson* offers both an asserted fundamental freedom and a group of amendments which are, together, the source of the fundamental freedom. Douglas is arguing that "ninth amendment rights" are somehow related to enumerated rights. The nature of this relation is the key to understanding the refinement of the Douglas position:

> We deal here with *analogies* to rights secured by the Bill of Rights or by the Constitution itself. . . . [The right of races to swim together] is in the *penumbra of the policies* of the Thirteenth, Fourteenth, and Fifteenth Amendments and as a matter of constitutional policy should be in the category of those enumerated rights protected by the Ninth Amendment. If not included, those rights become narrow legalistic concepts which turn on the formalism of laws, not on their spirit.[105]

Read together then, Douglas' *Griswold* and *Palmer* opinions characterize the ninth amendment as an enabling provision which operates via analogies between legally unprecedented and unenumerated rights and those rights already specified in the Bill of Rights. If the asserted right is penumbral or analogous to a specific right or group of rights already recognized

[102] Van Loan, *supra* note 2, at 48, *citing* Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

[103] 403 U.S. 217 (1971).

[104] *Id.* at 233, 237 (Douglas, J., dissenting) (emphasis added).

[105] *Id.* at 238, 239 (Douglas, J., dissenting) (emphasis added).

as constitutional in stature, then Douglas believes the ninth amendment enables, or perhaps requires, the Court to protect the unenumerated right. Although this reasoning will often depend upon an expansive reading of the Bill of Rights to establish the necessary analogies, it is a far more conservative notion than the idea that the ninth itself is a source of substantive rights. With this conservatism rests the true value of the Douglas position, for if an asserted unenumerated right does not reasonably relate to an enumerated right, the ninth amendment does not enable the Court to recognize the new right. It is by this mode of reasoning that the promise of *Griswold* can be realized and yet the recognition of new rights may be doctrinally limited.

In contrast, the Goldberg position in *Griswold* is focused on broad principles of *liberty* — a conceptualization which today might permit Goldberg to use the ninth amendment to discover a "basic freedom" even in the absence of a specific penumbral relationship. In short, there are no clearly ascertainable limits to unenumerated rights in the Goldberg scheme.

Mr. Justice Stewart's position has remained unchanged since his dissent in *Goldberg*: necessarily, if a ninth amendment right is asserted, it must be asserted in combination with the tenth amendment. The "people" of the ninth amendment are — as they were in *Griswold* — embodied by the state legislatures, and thus the ninth may not be used by individuals against the state; instead, it may be used only *by* the state in exercising its legitimate police power. Stewart, reasoning from this posture in *Law Students Civil Rights Research Council, Inc. v. Wadmond*,[106] labeled an individual claim of privacy asserted under the first, fourth, ninth, and fourteenth amendments as one which "borders on the frivolous," since the protection of private personality, like the protection of life itself, is left primarily to the individual states under the ninth and tenth amendments.[107] As was observed earlier,[108] some lower federal courts have followed this traditional view of the ninth amendment, and whatever else may be said about such a view, it is clearly one which needs no limitations regarding the recognition of individual rights.

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[106] 401 U.S. 154 (1971).

[107] *Id.* at 160. In fairness to Justice Stewart, the frivolity he sees may not rest in the individual claim, but rather that the affiants were chosen by the applicant himself.

[108] *See, e.g.*, text p. 169 *supra*.

Of the three original positions articulated in *Griswold*,[109] Stewart's has remained much the same; Goldberg's position, although followed in some of the lower court opinions surveyed earlier,[110] is of questionable vitality because Goldberg is no longer available to develop and defend his position, and because his "liberty theory" cannot be adequately circumscribed. Finally the Douglas position has been gradually refined to a potentially workable approach to the ninth amendment. In more recent decisions, however, Douglas has exceeded these refinements, and in so doing he may have accomplished two results: first, he may have somewhat muddied the waters of his enabling theory and its use of penumbral relationships; and second, he may have partially resurrected the Goldberg position. Analysis of both these developments is critical to future use of the ninth amendment.

In *Osborn v. United States*,[111] Douglas cites *Griswold* and all amendments listed therein except the fourteenth to support a general right of privacy.[112] Additionally, in dissenting from denial of certiorari in *Freeman v. Flake*,[113] Douglas suggests that only one amendment is necessary to bring the ninth into operation as a penumbral relator:

> I can conceive of no more compelling reason to exercise our discretionary jurisdiction than a conflict of such magnitude, on an issue of importance bearing on First Amendment and Ninth Amendment rights.[114]

Both these opinions are consistent with Douglas' enabling theory of the amendment, but in another dissent from certiorari in a student long hair case, *Olff v. East Side Union High School District*,[115] Douglas reasons that "liberty . . . includes at least

[109] Of the rest of the *Griswold* court only Justices Brennan and White remain. Brennan, who joined in the Goldberg concurrence, has remained consistent with his 1965 position. *See* McGautha v. California, 402 U.S. 183, 248 (1971) (Brennan, J., dissenting). Mr. Justice White, who concurred singly in *Griswold* without mentioningthe ninth amendment, has offered one bit of dictum indicating his willingness to entertain the Douglas or Goldberg-Brennan positions. In Stanley v. Illinois, 405 U.S. 645 (1972), where he wrote the majority opinion, White found a violation of the fourteenth amendment where the state failed to provide an unwed father with a hearing to determine his fitness as custodial parent of his children. White cites Goldberg's *Griswold* concurrence favorably: "The integrity of the family unit has found protection in . . . the Ninth Amendment." *Id.* at 651. Of the members of the current court appointed after the *Griswold* decision — Chief Justice Burger and Justices Powell, Rehnquist, Blackmun, and Marshall — none are on record with a post-*Griswold* opinion embracing the ninth amendment.

[110] *See, e.g.*, text pp. 160-61 *supra*.

[111] 385 U.S. 323 (1966).

[112] *Id.* at 341.

[113] 405 U.S. 1032 (1972) (Douglas, J., dissent from denial of certiorari).

[114] *Id.*

[115] 404 U.S. 1042 (1972) (Douglas, J., dissent from denial of certiorari).

the fundamental rights 'retained by the people' under the Ninth Amendment . . . ."[116] The ambiguity here is similar to that in *Griswold*: a largely undefined reference to the ninth amendment. But *Olff*, like *Freeman* is a long hair case, which given Douglas' pronouncements in similar cases, suggests that he would join the first and ninth amendments to protect an unenumerated right of the student. If and when certiorari is granted in such a case, it is to be expected that Douglas will resolve any doubts in the enabling theory occasioned by his *Olff* opinion.

The even more recent Douglas concurrence in the abortion case of *Roe v. Wade*,[117] demonstrates his belief that the ninth amendment is not an independent source of substantive rights, but rather that it is an enabler. The opinion also suggests that Douglas sees more vitality in Goldberg's "liberty theory" than one might expect, particularly as it applies to the due process clause of the fourteenth amendment:

> The Ninth Amendment obviously does not create federally enforceable rights, [he then quotes the ninth in full]. But a catalogue of these rights includes customary, traditional, and time-honored rights, amenities, privileges, and immunities that come within the sweep of "the Blessings of Liberty" mentioned in the preamble to the Constitution. Many of them in my view come within the meaning of the term "liberty" as used in the Fourteenth Amendment.[118]

An alternative interpretation of Douglas' opinion in *Roe* is that he was much more concerned with affecting a conclusive resolution on the subject of abortion, than with furthering any given doctrinal theory.

CONCLUSION

Had *Griswold* stood initially for more than a conglomerate of varied holdings in search of a doctrinal base for the right of marital privacy, many of the differing responses to ninth amendment claims in the lower courts might have been avoided. Patently, *Griswold* still offers no clear signal of its meaning, either in retrospect or through any "line" of cases that follows from it. Though Douglas has since refined and elaborated on the enabling theory he introduced in *Griswold*, further clarification of his position is now needed.

In view of the substantial split among the circuit courts of appeals on the applicability of *Griswold* and the ninth

[116] *Id.* at 1044. Douglas' use of "liberty principles" is reminiscent of the Goldberg concurrence in *Griswold*.

[117] 93 S. Ct. 705, 756 (1973) (Douglas, J., concurring).

[118] *Id.* at 757.

amendment to the student rights long hair cases, and the indecision over these cases at the district court level, the Court might entertain a clarification of *Griswold* in this sphere. Also, since the long hair cases seem to assert penumbral rights that are akin to those protected in *Griswold*, an extension of *Griswold* to these cases would be a cautious and moderate one. Conversely, any holding limiting *Griswold* to its facts would weaken the immediate potential of the ninth amendment.

Ultimately, the Court must decide the nature of those rights retained by the people, but left unenumerated by the Constitution. Implicit in our constitutional design of government is the firm belief that the ultimate source of sovereign power is the people — that they collectively sacrificed many individual freedoms for the benefits of social order. In return, the power they granted government was a power limited by the Constitution, but as evidenced by the specific enumerations of the Bill of Rights, many individual rights were not sacrificed in this process. What the ninth amendment then reaffirms is that there are rights *older than the Constitution itself*, which were retained by the people — rights which may not be "denied" or "disparaged" for their mere lack of enumeration in the Bill of Rights.

Moreover, the ninth amendment may hold a potential similar to that of the equal protection clause of the fourteenth amendment. Under the Warren Court's theory of "new equal protection," the burden rested with the state to establish a compelling and legitimate state interest served by a challenged statutory classification of individuals. Analogously, under the ninth amendment, one who exercises a right he believes was "retained" by the people and whose assertion is in some manner suppressed by the state might conceivably employ the ninth to shift the burden to the state. If the right he exercises is unenumerated and if he makes a prima facie case that it is a right retained by the people, the state may not ignore this claimed right with *any* argument that the right he identifies is not specified in the Constitution. It will then be the state's burden to establish either (1) that the right could not possibly be retained by the people or, (2) if retained, that a compelling state interest militates against the exercise of the right.

It is suggested here that the position of Mr. Justice Douglas, as developed in his opinions subsequent to *Griswold* is the soundest view of the ninth amendment now available to Court. The Douglas approach has appeal to those who wish to find

unenumerated rights of substance in (or through) the ninth amendment; it also contains — as has been discussed herein — a safeguard for moderate constructionists, who, under the Douglas approach, would demand that any novel, unenumerated right be keyed specifically to enumerated rights by penumbra or analogy.

The first bud of a constitutional law development similar to the geometric expansion of equal protection and new equal protection may have been seeded for the ninth amendment in *Griswold*. But until the next needed clarifying step is taken by the Court, this promise of *Griswold* cannot be realized.