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THE NEGLECTED NINTH AMENDMENT: THE "OTHER RIGHTS" RETAINED BY THE PEOPLE

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The year 1787 was the biggest year in the history of the United States, because it was pre-eminently a year of political creation. It was a year for political heroes, for men who could distinguish the possible from the impossible and then convert the boldest of possibilities into the most solid of realities.

The Founding Fathers, the Men of Philadelphia, made the Grand Convention a remarkable arena for creating unity of the delegates, despite sharp differences of opinion on some issues. All the delegates were patriots, Whigs, republicans, and men with Lockean views of property. All but two or three were nationalists who recognized the need for a new departure. The Convention, for all its innate dignity and regard for form, operated as a large committee rather than a small assembly. The objectives of the delegates were closely linked with the public good: an end to disorder, a forestalling of despotism, protection for liberty, security for property, honor for the Republic.

These were the men who had pledged their lives, their fortunes, and their sacred honor to a revolution in the name of republicanism, a form of government that seemed far more radical and experimental at that time than it does today. At the same time, they were not cloistered doctrinaires, but men of practical experience; the majority were planters and large scale farmers and merchants and state officials.

The Constitution, as it finally emerged, was a pleasing balance of reason and practical experience, with a series of compromises between large and small states, between North and South, between liberty and restraints on its abuse. Some issues that were to prove disruptive later —slavery and the right of states to withdraw from the Union—were passed over as impossibly disruptive.

But on balance, the men of Philadelphia built soundly and deserved well of their country. It is of interest to note that another body with the same name, Convention, came into existence during the stormiest period of the French Revolution. Its members indulged in prodigious feats of oratory. It was purged under the pressure of bloodthirsty mobs;

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many of its members perished on the guillotine, and it passed into history without leaving any permanent imprint on French political institutions.

The Convention, however, meeting in the staid atmosphere of Quaker Philadelphia, conducted its discussions in private with no threat of mob violence or military pressure, produced a Charter of government that has been amended—(even though the conditions of amendment were properly made difficult but not impossible)—and sometimes bent and twisted, but it still stands as a subject of cherished respect and affection and unfailingly seems to respond to resolving the ever changing interest of national unity.

It is an historical commentary that, when the completed document of the Constitution was forwarded from Madison to Jefferson, then Ambassador to France, it contained no Bill of Rights. To this Jefferson objected. In the Convention itself, this lack aroused most unfavorable comment. In the several Conventions calling for ratification, the failure to include in the body of the instrument, the immemorial rights and privileges of free men—freedom of speech, of the press, of religion, of assembly, of petition, immunity from unlawful seizure, trial by jury, security of life, person, and property, and the like—had given force to the arguments of men, like George Mason and Patrick Henry, against acceptance. These men, and others, had suggested that another convention be called for correcting this and similar omissions. North Carolina had adopted a resolution virtually declaring its refusal to ratify until this Bill of Rights should be added. There was no hostility in the Philadelphia Convention or outside it to make these historic immunities part of the American system.

Since most of the state constitutions contained a bill of rights, it was, therefore, argued—why load down the organ of the central government with similar declarations. Those who fought for the Bill of Rights to include civil rights believed that the failure to repeat the guaranties in the Constitution masked a deep-laid plot against public liberties. Since the omission of the Bill of Rights gave a handle to the enemies, Madison and other practical statesmen believed that amendments, in accordance with the program set forth in Article V, should be added incorporating all the privileges obtained by Englishmen at Runnymede and wrung from the Crown in succeeding centuries; and within short of two years after the United States Government had been recognized, the first ten Articles of Amendment were added to the Constitution.

The civil rights and liberties specifically protected by the United States Constitution were enumerated in the first eight amendments, the Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments, Article 1: Section 9, Clauses 2 and 3, and Section 10, Clause 1; and Article 4; Sections 2 and 4. The enumerated rights are specified in the

first eight amendments. However, the first nine amendments, which constitute the Bill of Rights, were added in 1791 within two years after ratification by the required number of states as a result of widespread feeling that the Federal Constitution, as drafted in 1787, unlike the majority of state constitutions, insufficiently guaranteed individual liberties. They guarantee (First Amendment) the freedom of worship, of speech, of the press, of assembly, and of petition to the government for redress of grievances; (Second Amendment) the right to bear arms—adopted with reference to state militias; (Third Amendment) freedom from the quartering of soldiers without the consent of the owner of the house; and (Fourth Amendment) freedom from search except with warrant. They further guarantee (Fifth Amendment) that no person shall be held for an infamous crime without indictment, be twice put in "jeopardy of life or limb" for the same offense, be compelled to testify against himself, or "be deprived of life, liberty, or property, without due process of law" and establish that private property may not be taken for public use without just compensation. The Sixth Amendment guarantees the right of a speedy and public trial by an impartial jury in all criminal prosecutions, while the Seventh Amendment guarantees the right of trial by jury in all common-law suits "where the value in controversy shall exceed twenty dollars," and the Eighth Amendment prohibits excessive bail and fines and "cruel and unusual" punishment. By the Tenth Amendment, generally considered with the first nine (they all went into effect in 1791), "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Powers reserved to the States are often termed "residual powers."

The Thirteenth, Fourteenth, and Fifteenth Amendments, adopted after the Civil War, prohibit slavery and involuntary servitude; protect the individual from state abridgement of his privileges and immunities as citizens of the United States and from state deprivations of his life, liberty, or property without "due process of law" or the equal protection of the laws; and protect the right to vote. The Nineteenth Amendment, adopted after World War I, grants the right to vote to women.

In the body of the Constitution, the Congress is prohibited from suspending the Writ of Habeas Corpus except in cases of rebellion or invasion or when the public safety may require it and from enacting Bills of Attainder or *ex post facto* laws by virtue of Article I: Section 9, Clauses 2 and 3. The States are likewise prohibited from enacting a Bill of Attainder** or *ex post facto* law and are prohibited from

** A bill declaring persons attainted and their property confiscated. The chief consequences of attainder were forfeiture of the criminal's property; cor-

passing any law impairing the obligation of contract under Section 10, Clause 1 of Article 1. Article 4, Sections 2 and 4, provides that the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States, and that the United States guarantee each and every State a republican form of government.

In addition to the civil rights and liberties which are embodied in the Constitution, the Ninth Amendment provides:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage other rights retained by the people."

The wording of this amendment apparently indicates that the rights enumerated in the body of the Constitution and the amendments *do not preclude claims of other rights which the individual may assert.*

This article will briefly review the historical background regarding the adoption and application of the Ninth Amendment, analyze its application in *Griswold v. Connecticut,*[1] and consider what are the "other rights" not enumerated which may be claimed by the individual.

I. The Historical Background and Application of the Ninth Amendment

The first Bill of Rights had been adopted by the Commonwealth of Virginia; but the United States Constitution, when adopted at the Philadelphia Convention, did not contain a Bill of Rights. The framers had regarded the Constitution as merely delegating certain limited powers to the Federal Government and that there was no need to encompass a Bill of Rights protecting the individual from governmental action. The occasions in which the Federal Government would act upon the individual was deemed to be rare. But this notion was contradicted by the inclusion of provisions for the Writ of Habeas Corpus and the prohibition of Bills of Attainder and *ex post facto* laws. Strong opposition was encountered in ratifying the Constitution by the States. The critics of the Constitution argued that it contained no provisions protecting the individual from possible infringements by Federal authority.

To obtain necessary support for the ratification of the Constitution, Madison promised that, upon ratification, the first business of the new Congress would be to submit a Bill of Rights for ratification. However, an argument made by Hamilton in opposition to the inclusion of a Bill of Rights was that the enumeration of the protection of certain rights would preclude protection of other rights. Madison was concerned that the formulation of the protection of specific rights would

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ruption of his blood, so that no title could be traced through him; and incapacity to sue. This extinction of rights which resulted from a sentence of death or outlawing for treason or felony was abolished in 1870.

[1] 381 U.S. 479 (1965).

be too limited. He was particularly concerned about the extent to which freedom of conscience would be protected. To meet these problems, the Ninth Amendment was adopted.[2]

As originally formulated, the Ninth Amendment was coupled in one article with the Tenth Amendment which asserted that "the powers not delegated to the United States by the Constitution nor prohibited by it to the people, are reserved to the States respectively, or to the people." Subsequently, the two amendments were separated. However, this legislative history may indicate that it was the intent of the framers to make the Ninth Amendment applicable to the States as well as to the Federal Government.[3]

The framers, in adopting the Constitution and the Bill of Rights, were influenced by the philosophy of John Locke. His notion of inherent human rights (not excluding Jean Jacques Rousseau and others) influenced the writing of the Declaration of Independence. Government comprised a "social contract" deriving its source from the governed. The source of individual rights did not emanate from the government but from the people. The Bill of Rights did not confer rights upon the people but reaffirmed pre-existing rights.[4] This notion is reflected in the phrasing of the Ninth Amendment which refers to "rights . . . retained by the people." This was a reflection of the natural law notions of the Enlightenment. The Ninth Amendment has been interpreted to constitute a basic statement of individualism, recognizing the inherent right of the individual.[5]

The Ninth Amendment and the Bill of Rights are also reflections of the notions of the Encyclopediaists' opposition to the arbitrary rule of feudalism and the subsequent monarchical absolutism. The custom of the Enlightenment, which has been carried over to the present day, was the formulation of individual rights. But simultaneously, there was a reaction against the particularism and narrow formulation of legal rules.[6] *The Ninth Amendment was intended to assert that the constitutional formulations were not to be narrowly interpreted.* As Mr. Justice Storey stated:

> 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 per-

[2] The history of the adoption of the ninth amendment is discussed in PATTERSON, THE FORGOTTEN AMENDMENT (Bobbs-Merrill, 1951); Note, *The Uncertain Renaissance of the Ninth Amendment,* 33 U. CHI. L. REV. 814 (1966).
[3] Redlich, *Are There Certain Rights . . . Retained by the People?,* 37 N.Y.U.L. REV. 787 (1962).
[4] Patterson, *supra.*
[5] Franklin, *The Relation of the Fifth, Ninth and Fourteenth Amendments to the Third Constitution,* 4 How. L. J. 170 (1958).
[6] *Ibid.*

> fectly sound and safe; but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies.[7]

Madison, in framing the Bill of Rights and the Ninth Amendment, did not intend to limit the powers of the Federal Government. The "necessary and proper" clause conferred authority on the Congress to exercise its powers in any way it may deem proper and necessary. But the Congress could not exercise its powers in a manner which would infringe upon individual rights. The Congress has the power to lay and collect taxes, but it cannot use the "necessary and proper" clause to issue general warrants for tax collecting.[8] Similarly, the Ninth Amendment, in recognizing that there are inherent rights retained by the people, does not limit the power of the Federal Government but asserts that the Government may not exercise its powers in a manner which will deprive the individual of his inherent rights.

This principle was not, however, recognized by Mr. Justice Reed in *United Public Workers v. Mitchell*[9] where the Ninth Amendment was asserted to challenge the constitutionality of the Hatch Act which declared unlawful certain specified political activities of federal employees. Justice Reed based his decision on the power of the Federal Government to regulate the activities of its employees, though recognizing the existence of an inherent right.

Prior to *Griswold*, the Supreme Court has had little occasion to apply the Ninth Amendment. In *Tennessee Electric Power Co. v. Tennessee Valley Authority*,[10] the contention that the sale of electricity by the Tennessee Valley Authority violated the Ninth Amendment by putting Federal authority in competition with privately owned interests and by depriving the people of the States of the rights to acquire property and to employ it in a lawful business was overruled. The Court had previously denied a contention that this amendment prohibited Congress from disposing of electric power as property of the United States.[11] But aside from these cases and the *Mitchell* opinion, the Court had not construed the Ninth Amendment.

Actually, the Court had been invoking what may be regarded as the *unenumerated* rights by reference to the "contract" clause in the early years of the Republic[12] and, following the Civil War, by reference to

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[7] STOREY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 651 (5th ed., 1891), quoted by Mr. Justice Goldberg in Griswold v. Connecticut, 381 U.S. 479, 490, and contra by Mr. Justice Black, *id.*, 520 footnote 15. Similar comments were made by MADISON, 1 ANNALS OF CONGRESS 440 (Gales and Seaton, 3d., 1884).

[8] Note, *The Uncertain Renaissance of the Ninth Amendment*, supra.

[9] 330 U.S. 75 (1947).

[10] 306 U.S. 118 (1939).

[11] Ashwander v. T.V.A., 297 U.S. 288 (1936).

[12] Fletcher v. Peck, 10 U.S. (6 Cranch.) 87 (1810); Terrett v. Taylor, 13 U.S., (9 Cranch.) 43 (1815).

the "due process" and "equal protection" clauses of the Fourteenth Amendment.[13]

Chief Justice Marshall, in *Barron v. Baltimore*,[14] had held that the Bill of Rights did not apply to the States. Mr. Justice Miller, in *Eillenbecker v. The District Court of Plymouth County, Iowa*,[15] held that only the first eight amendments had reference to the powers exercised by the Government of the United States and not to those of the States, a principle which was later reiterated by Mr. Justice Cardozo in *Palko v. Connecticut*.[16] These cases indicate that a distinction was made by the Court between the *enumerated* rights of the first eight amendments and the Ninth. The Court was not bound to any construction of the Ninth Amendment which would limit its application to the Federal Government alone.

After 1937, the Court began to limit the application of the Fourteenth Amendment's "due process" and "equal protection" clauses. The judiciary no longer inquired as to the rational basis for substantive economic regulation deferring to the discretion of the legislature.[17] The tendency developed to limit the "due process" clause to the application of enumerated rights. The trend has developed to use the Fourteenth Amendment to incorporate or absorb the rights enumerated in the first eight amendments into the "due process" clause of the Fourteenth to be applied to the States.[18] The "due process" clause of the Fifth Amendment had rarely been invoked and was limited in scope.[19] A new interest then developed in the use of the Ninth Amendment, as exemplified by the appearance of a monograph, *The Forgotten Ninth Amendment*, by Bennett B. Patterson of the Texas Bar.[20]

A judicial attitude to the Ninth Amendment was expressed by Mr. Justice Jackson in referring to Patterson's book:

> I could not remember that in my long experience in government litigation I had ever had an argument based on the Ninth Amendment or that I had ever been obliged to meet one based thereon, and I could not recall ever having heard that Amendment mentioned by any Justice of the Court in Conference or

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[13] Lochner v. New York, 198 U.S. 45 (1905); Adair v. United States, 208 U.S. 161 (1908); Coppage v. Kansas, 236 U.S. 1 (1915); Adams v. Tanner, 244 U.S. 590 (1917). These cases are discussed generally in Corwin, LIBERTY AGAINST GOVERNMENT (1948).

[14] 32 U.S. (7 Pet.) 243 (1833).

[15] 134 U.S. 31 (1890)).

[16] 302 U.S. 319 (1937).

[17] Nebbia v. New York, 291 U.S. 502 (1934); Olson v. Nebraska, 313 U.S. (1941); Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); Railway Express Agency v. New York, 336 U.S. 106 (1949).

[18] Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); Malloy v. Hogan, 378 U.S. 1 (1964); Griffin v. California, 380 U.S. 609 (1965); Pointer v. Texas, 380 U.S. 400 (1965).

[19] Redlich, *supra*.

[20] Note 2, *supra*.

> by any lawyer in any argument before it. So I turned to the work of my friends Hart and Wechsler, "The Federal Courts and the Federal System," and found that they omitted the Ninth Amendment entirely from their printing of the important excerpts from the Constitution. Going to the full text, however, I found that it reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." What are these other rights retained by the people? To what law shall we look for their source and definition? My lawyer friend kindly furnished me all the legislative history he had been able to find on the subject and called my attention to the only written commentary on it. But the Ninth Amendment rights which are not to be disturbed by the Federal Government are still a mystery to me.[21]

II. *Griswold v. Connecticut*

The Court for the first time construed the Ninth Amendment in *Griswold v. Connecticut*,[22] which involved a challenge to the constitutionality of a Connecticut statute prohibiting the use of contraceptive drugs or devices by married couples and the prescribing of such drugs or devices. A director and attending physician of a birth control clinic were convicted and fined. After their convictions were upheld by the higher courts of Connecticut, the defendants petitioned for *certiorari* to the Supreme Court of the United States. Mr. Justice Douglas, in writing the Opinion of the Court, deduced a constitutionally protected right of privacy as implicit within the "penumbra" of the enumerated rights.

> [S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that give them life and substance. . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one. . . . The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its self-incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."[23]

Douglas is unclear as to the relevance of the Ninth Amendment. But in his dissent in *Osborn v. United States* he refers to his opinion in *Griswold* and quotes from a law review student note:

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[21] JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT, 74-75 (Harper Torch Books, 1963).
[22] *Supra*, Note 1.
[23] 381 U.S. at 484.

> The ninth amendment should be permitted to occupy its rightful place in the Constitution as a reminder at the end of the Bill of Rights that there exist rights other than those set out in the first eight amendments. It was intended to preserve the underlying theory of the Constitutional Convention that individual rights exist independently of government and to negate the Federalist argument that the enumeration of certain rights would imply the forfeiture of all others. The ninth is simply a rule of construction, applicable to the entire constitution.[24]

Apparently Douglas construes the Ninth Amendment to permit the application of a rule of construction which would enable the judge to derive *unenumerated* rights as based upon values implicit within the context of the specified rights. He regards it as a rule of construction.

Mr. Justice Goldberg, in his concurring opinion in *Griswold*,[25] also applied the Ninth Amendment as a rule of construction. He asserted that the Constitution does not permit the infringement of the right of privacy in marriage merely because the right is not specifically guaranteed in the first eight amendments. He does not construe the Ninth Amendment as constituting an independent source for 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 exhausted."[26] Though this amendment and the entire Bill of Rights originally concerned restrictions upon Federal power, the subsequently enacted Fourteenth Amendment prohibits States as well as the Federal Government from abridging fundamental personal freedoms. The Ninth Amendment is used with the "due process" clauses of the Fifth and Fourteenth Amendments. "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 Government or the States is not restricted to rights specifically mentioned in the first eight amendments."[27] Judges 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.' "[28] Goldberg then determined that the right of privacy is a fundamental personal right emanating from the totality of the constitutional scheme and cited prior judicial decisions invoking the Fourteenth Amendment as instances of judicial recognition of the privacy of the home and of family life.

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[24] Osborn v. United States, 385 U.S. 323, 352-3 (1966), footnote 15, quoting from Note, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814, 835 (1966).
[25] 381 U.S. at 487.
[26] *Id.* at 492.
[27] *Id.* at 493.
[28] *Id.*

Clearly, Goldberg holds that by virtue of the Ninth Amendment the Court is not limited by the first eight amendments in upholding fundamental personal rights both in regard to limitations upon Federal and—through the Fourteenth Amendment—State authority. The Court determines what rights are fundamental by referring to the constitutional scheme and the collective conscience of the people.

One such fundamental personal right is the right of privacy in marriage, which is encroached upon by the Connecticut statute. The ban on the use of contraceptives by married persons cannot be justified as serving any subordinate state interest which is compelling or necessary. This holding does not broaden the powers of the Court, Goldberg reasons, because it had previously upheld rights not specified by the wording of the Constitution, including the privacy of family relationships; and the Ninth Amendment confirms the use of the Fifth and Fourteenth Amendments' "due process" clauses in this manner. Though the States are free to engage in economic and social experimentation, they may not encroach upon fundamental personal rights.

One commentator has characterized Goldberg's approach as a natural law conception of the Ninth Amendment similar to the Volksgeist German Historical School of Savigny. While Douglas offers legal method "which is opposed to arbitrariness because it is grounded in analogy justified by the texts of the first eight amendments of the . . . Constitution," Goldberg "offers legal method which is arbitrary because the sources of determination may be entirely arbitrary and secretive."[29] The allegation is made that "Justice Goldberg offers legal method which is arbitrary because the sources of determination may be entirely subjective and secretive."[30] The methodology "strengthens the position not of democratic social forces, but that of American monopolistic possessive market society, which similarly once exploited the due process clause of the fourteenth amendment."[31] In contrast, Douglas' approach is characterized as that of using the Ninth Amendment to fill gaps or lacunae in the first eight amendments by analogy as is done in the Roman law tradition.

However, even the phrasing of the first eight amendments is so broad as to be construed only by subjective judgment. The use of analogy also depends on the judge's personal predilections. Moreover, the concept of a right of privacy is of such breadth as to encompass a great number of personal infringements depending upon the judge's subjective notions. Privacy may, to a large extent, be viewed as a cultural norm which has been introduced into a variety of legal issues

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[29] Franklin, *The Ninth Amendment as Civil Law Method and Its Implications for Republican Form of Government: Griswold v. Connecticut; South Carolina v. Katzenbach*, 40 TULANE L. REV. 487 (1966).
[30] *Id.* at 489.
[31] *Ibid.*

and providing a rallying point for those concerned about the encroachments of mass society on the individual. Its utility is much like that of "due process" or "equal protection."[32]

Mr. Justice Harlan wrote a concurring opinion deriving a right of privacy in the family relationship from the "due process" clause of the Fourteenth Amendment standing "on its own bottom"[33] and based on notions of ordered liberty. Mr. Justice White argued that though the Court will not intervene in matters involving economic regulation, more judicial concern will be manifested where regulation affects certain sensitive areas, including the family relationship. These justices, not having limited the Fourteenth Amendment's "due process" clause to the absorption or incorporation of the first eight amendments, found it unnecessary to invoke the Ninth Amendment.

Justices Stewart and Black dissented. Mr. Justice Stewart regarded Goldberg's reliance on the Ninth Amendment as "turn[ing] sommersaults with history."[34] To Stewart the Ninth Amendment, like the Tenth, which the Court has characterized as stating "but a truism that all is retained which has not been surrendered," was adopted 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."[35]

Dean Roscoe Pound would apparently support this interpretation:

> Where rights are defined and secured expressly by the Constitution, there is simply a question of interpretation. But where rights not declared in terms are "reserved" there is a question as to where is the power of defining them, and where is the power of securing them when defined. The Tenth Amendment seems to preclude definition and enforcement by the federal government except as committed to that government by the Constitution. It would seem, therefore, that these reserved rights may be defined and enforcement of them may be provided by the states, except as may be precluded by the Fourteenth Amendment, or may be defined and acquired secured enforcement by the people of the United States by constitutional amendment.
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> Assuming that the Ninth Amendment is a general recognition of inherent or natural rights, it does not purport to secure them. . . . It declares that there are natural rights but makes no attempt to define those not expressly provided for in the Bill of Rights nor to provide for securing them. But the states have the attributes and powers of sovereignty so far as inherent rights are not committed to the federal government, defining and securing

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[32] Havighurst, *Foreward*, 31 LAW AND CONTEMP. PROBS. 252 (1966).
[33] 381 U.S. 479, 499 (1965).
[34] *Id.* at 1706.
[35] *Id.*

> them is left to the states or to be taken over by the people of the United States by constitutional amendment. . . .[36]

However, though the Ninth Amendment was at one time coupled with the Tenth, the two were separated. The wording and history of the Ninth Amendment suggested that the intention was to express a principle of construction, that because certain rights are not enumerated in the Constitution this does not preclude their protection. With the establishment of the principle of judicial review, the Supreme Court should not be precluded from protecting a right—such as, the right of privacy in regard to the marital relationship—merely because it is not specified in the Constitution. The framers, in drafting the Ninth Amendment, sought to avoid the argument of Stewart that, because there is no specific constitutional provision protecting the rights involved in *Griswold,* these rights could not be protected.

Mr. Justice Black, like Stewart, is unable to hold the Connecticut statute unconstitutional because no specific Constitutional right is infringed. He is particularly critical of Goldberg's use of the Ninth Amendment which, like Harlan's and White's use of the Fourteenth Amendment's "due process" clause, constitutes an extension of judicial authority. The Court should not substitute its own judgment for that of the legislature. In using the Ninth Amendment the Court, contrary to Goldberg's contention, will not be able to avoid basing decisions on their personal and private notions. There is no means for determining the "traditional and collective conscience of our people." He contends that the Ninth Amendment was intended only to limit the Federal Government to the powers granted expressly or by necessary implication. For the Court to invoke the Ninth Amendment "would make of this Court's members a day to day constitutional convention."[37]

Black charges that his concurring brethren are returning to the old line of substantive natural law due process cases. He quotes at length from his dissent in *Adamson v. California,*[38] where he had argued that the Fourteenth Amendment "due process" clause incorporates the Bill of Rights by reasoning that, in construing the Bill of Rights and other specific Constitutional provisions, the courts "proceed within clearly marked constitutional boundaries seek to execute policies written into the Constitution,"[39] while in relying on natural law notions of due process "they roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people."[40]

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[36] Pound, "Foreward" to Patterson, *supra,* vi.
[37] 381 U.S. 479, 522 (1965).
[38] 332 U.S. 46 (1947).
[39] 381 U.S. 479, 525 (1965).
[40] *Id.*

Black's contention, however, that the Ninth Amendment is merely a limitation on the Federal Government is contradicted by his claim that the Fourteenth Amendment's "due process" clause had made the Bill of Rights applicable to the states. In *Adamson v. California*,[41] he refers to the "First Ten Amendments" as binding on the states, thus including the Ninth, and urged extending to all the people the complete protection of the Bill of Rights. In *Griswold*, he fails to present any convincing historical reasons as to why the Ninth Amendment should be construed differently from any other constitutional provision.

Black's approach is based on an antipathy to subjective judicial interpretation. But the specific provisions are also dependent on subjective interpretation. Though he bases his "absolutist" interpretation of the First Amendment on what he regards as its plain meaning, while admitting that this coincides with his policy beliefs, analysis indicates uncertainty as to the meaning of "speech" and "abridge,"[42] nor is it apparent that his interpretation necessarily coincides with the interpretation of the framers.[43] The Eighth Amendment provision as to "cruel and unusual punishment" has been subject to broad interpretation based on the judge's personal predilections.[44] The text of the Constitution "can serve only as the putative starting point of constitutional review, not as both its certain beginning and its unequivocal end."[45] Because problems arise which the framers had not anticipated and because their intent cannot be conclusively determined, subjective judicial determination is unavoidable. The Constitution does not provide specific answers.

Regardless of whether the judicial formula proposed by Douglas, Goldberg, or Black is adopted, decisions will be based on the judge's bias. This is particularly true regarding the formulae for applying the Ninth Amendment. To attempt to establish objective guidelines for determining the enumerated rights is illusory.[46] But to fear the return to judicial intervention in economic and social regulation is groundless. The role of the State in controlling economic and social life is generally accepted.

The Eisenhower Republican administration did not lead to the appointment of justices who sought to return in any manner to the pre-1937 doctrines; and the overwhelming defeat of the Republican candidate in 1964, who called for the appointment of judges with a different philosophy, meant the final repudiation of these notions. The use of

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[41] 332 U.S. 46 (1947).
[42] Cahn, *Mr. Justice Black and the First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. Rev. 549 (1962).
[43] Levy, Legacy of Suppression (Harper, 1962).
[44] Robinson v. California, 370 U.S. 660 (1962).
[45] Bickel, The Least Dangerous Branch, 141 (1963).
[46] Branden, *The Search for Objectivity in Constitutional Law*, 57 Yale L. J. 57 (1948).

the Ninth Amendment should not lead to fears of extension of judicial power. Universally unpopular decisions will not be enforced, and the Congress has the power to limit the scope of judicial review.[47] Moreover, the justices are subject to criticism regarding the rationale of their decisions by their peers as expressed in scholarly journals. Even a Supreme Court justice is limited by the disciplines of the legal tradition.

Though the Court has continued to refrain from invoking the due process and equal protection clauses to determine the rationality of economic and social legislation, it has not refrained from determining the purpose of legislation where fundamental human rights are involved. The Court has been particularly concerned about legislation infringing upon the free speech provisions of the First Amendment. Where the question is whether legislation is "necessary and proper" to the accomplishment of a constitutionally permitted legislative purpose, or whether a particular enactment is "appropriate legislation," the so-called rational basis test is properly invoked to give the legislature—federal or state—maximum freedom to promote the public welfare in the face of a claimed violation of due process. But the rational basis test is particularly inappropriate where First Amendment rights are involved.[48]

The basis for this distinction is that political rights are involved, the right of political participation.[49] The same justification applies with regard to the application of the equal protection clause of the Fourteenth Amendment in eliminating racial segregation and legislative malapportionment. However, the Court has interfered with economic regulation where the effect is taking of property.[50] The approach of the Court is that of protecting the individual where hard core individual rights are involved.[51] Such rights are essential for the functioning of a free, democratic society. The Ninth Amendment could be employed where such fundamental rights are not enumerated.

III. *The "Other" Rights Retained by the People*

The Ninth Amendment may be regarded as a rule of construction applicable to the entire Constitution. As a guide placed at the end of the Bill of Rights, it enables the Court to recognize the existence of rights not specified or enumerated. The Ninth Amendment is not a

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[47] Ex Parte McCardle, 7 Wall. 508 (1869).
[48] Note, *The Julian Bond Case,* 52 VA. L. REV., 1309, 1331 (1966).
[49] Hyman and Newhouse, *Standards for Preferred Freedoms beyond the First,* 60 N.U.L. R. 1 (1965).
[50] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (opinion by Mr. Justice Holmes); Miller v. Schone, 276 U.S. 272 (1928); United States v. Causby, 328 U.S. 256 (1946); Griggs v. Allegheny County, 369 U.S. 84 (1962); Lockhart, Kamisar and Chopter, CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS, 613 ff. (West, 1964).
[51] Hyman and Newhouse, *supra.*

source of these unenumerated rights but points to other parts of the Constitution, particularly the "due process" clauses of the Fifth and Fourteenth Amendments as the context within which enumerated rights are to be determined and the means by which they are to be protected.[52] However, in construing the Ninth Amendment, the Court will base its rationale within the context of present day thinking as derived from precedents in other cases. As the Court is not bound to notions of equality as set forth in a particular political era,[53] it is similarly not bound in regard to other constitutional provisions. Mr. Justice Holmes observed:

> [W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.[54]

Within this context it is necessary to determine what are the rights retained by the people under the Ninth Amendment. *Griswold* recognizes the right of privacy. This right includes the family or marital relations encompassing the right to bear and rear children and to engage in sexual relations.[55] The State may not interfere with the parental right to teach a child a foreign language,[56] to compel attendance only at a public school,[57] or to make saluting the flag compulsory.[58]

However, this right of privacy is not absolute, as the State may compel vaccination and forbid child labor.[59] The approach the Court will choose to take will depend upon the nature of the public interest to be protected, the nature and extent to which individual rights are infringed upon, and the availability of alternative approaches to achieving the purpose of the legislation.[60]

Family privacy is peculiarly subject to infringement in the dispensing and administration of public assistance. Case workers, by threatening to deprive parents of the custody of their children or by

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[52] Note, *supra*, Note 8.
[53] Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
[54] Missouri v. Holland, 252 U.S. 416, 433 (1920). A similar view is held by Mr. Justice Fortas in his dissenting opinion on Fortson v. Morris, 385 U.S. 231, 241 (1967).
[55] Griswold v. Connecticut, *supra*; Skinner v. Oklahoma, 316 U.S. 535 (1942).
[56] Meyer v. Nebraska, 262 U.S. 390 (1923).
[57] Pierce v. Society of Sisters, 268 U.S. 510 (1925).
[58] Board of Education v. Barnette, 319 U.S. 624 (1943).
[59] Prince v. Massachusetts, 321 U.S. 158 (1944); Jacobson v. Massachusetts, 197 U.S. 11 (1905).
[60] Wormath and Mirkin, *Doctrine of Reasonable Alternative*, 9 UTAH L. REV. 254 (1964).

denial of welfare payments, direct the private lives of their clients. The practice of mass night and pre-dawn searches to determine the presence of a man in the house is a flagrant intrusion of family privacy.[61] However, also involved in this area are policy considerations as to the efficiency of dispensing grants, the means test, and the need for rehabilitation to make the families self-sufficient.[62] But protection must be given from arbitrary infringement with individual rights as characterized by mass searches. Similar considerations are involved with regard to the treatment of juvenile delinquents.[63]

Another area of family privacy involves the miscegnation statutes prohibiting the marriage or cohabitation of couples who are members of different races. Though such statutes may be held to be unconstitutional as a denial of the equal protection clause of the Fourteenth Amendment,[64] an alternative basis could be the right to family privacy.

The right of privacy recognized in *Griswold,* as premised in the ninth amendment, should embody the doctor-patient relationship.[65] Though the State may regulate the qualifications of those who are to be licensed to practice medicine, the State may not unduly restrict the type of treatment he may prescribe for his patient. Laws which forbid the prescribing of contraceptives to unmarried women by the physician may constitute an infringement of the doctor-patient relationship. Where governmental authorities interfere with the physician's right to prescribe such nontoxic, harmless drugs as Krebiozen for the treatment of terminal cancer, a similar infringement may be deemed to have occurred.

Griswold is significant in that for the first time the Court upheld the right of privacy without the presence of a physical intrusion. Previously, the Court has refused to apply the search and seizure provisions of the Fourth Amendment in cases involving wiretapping or eavesdropping absent an actual breaking or entering of the premises.[66] But the recognition of an independent right of privacy may mean that the

[61] Reich, *Individual Rights and Social Welfare,* 74 YALE L. J. 1245 (1965).
[62] Handler and Rosenheim, *Privacy in Welfare: Public Assistance and Juvenile Justice,* 31 LAW AND CONTEMP. PROBS. 377 (1966).
[63] *Ibid.*
[64] Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective,* 52 VA. L. REV. 1189 (1966). The argument that the Fourteenth Amendment is inapplicable is presented by Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent,* id. at 1224. The Supreme Court, in Loving v. Commonwealth of Virginia, 87 Sup. Ct. 1817 (1967) held unconstitutional a Virginia statute banning interracial marriages as violative of the equal protection and due process clauses of the fourteenth amendment.
[65] Note, *What Does Griswold Do for Doctors?,* 6 JOURN. OF FAMILY LAW, 371 (1966).
[66] Olmstead v. United States, 277 U.S. 438 (1928); Goldman v. United States, 316 U.S. 129 (1942); On Lee v. United States, 343 U.S. 747 (1952); Lopez v. United States, 373 U.S. 427 (1963); Silverman v. United States, 365 U.S. 505 (1961); Clinton v. Virginia, 377 U.S. 158 (1964) reversing Clinton v. Commonwealth, 204 Va. 275 (1963).

Court will now exclude evidence obtained through such means regardless of whether there has been a physical intrusion. The right of privacy may also prevent searches in pursuance of administrative regulations, heretofore exempted from the Fourth Amendment.[67] However, the Court has failed to hold that the Ninth Amendment right of privacy may be invoked to curtail the use of informers.[68]

The right of privacy based upon the Ninth Amendment may be applied to curtail the activities of certain governmental agencies as recently exposed by Congressional investigations,[69] from engaging in such activities as mail covers which infringe on individual privacy. The use of psychological testing and the conducting of surveys which inquire into the intimate details of the individual's life and thoughts may, where extending beyond considerations of competency and efficiency, be regarded as a deprivation of the right of privacy.[70]

Another aspect of the right of privacy is the right to travel. To the extent an individual is denied the right to move about where he may please, his privacy is infringed. The Court has recently failed to uphold the right to travel in affirming the denial of passports by the State Department for travel to Cuba and other designated areas.[71] But this case was decided under the due process clause of the fifth amendment and the speech provisions of the First Amendment. Another basis for deciding these cases would be the right of privacy. The Universal Declaration of Human Rights recognizes the right to travel as a fundamental personal right. Article 13 provides:

> 1. Everyone has the right to freedom of movement and residence within the borders of each State.
> 2. Everyone has the right to leave any country, including his own, and to return to his country.

Clearly, the right of privacy, as premised upon the Ninth Amendment, is an all encompassing constitutional right. This right, recognized

[67] Frank v. Maryland, 359 U.S. 360 (1959); Eaton v. Price, 364 U.S. 263 (1960).
[68] Hoffa v. United States, 385 U.S. 293 (1966); Lewis v. United States, 385 U.S. 206 (1966); Osborn v. United States, 385 U.S. 323 (1966).
[69] Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, Invasions of Privacy, 89th Cong., 1st Sess. (1965); Hearings before a Subcommittee of the House Committee on Government Operations, Special Inquiry on Invasions of Privacy, 89th Cong. 1st Sess. (1965); Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, Psychological Tests and Constitutional Rights, 89th Cong. 1st Sess. (1965); Hearings before a Subcommittee of the House Committee on Government Operations, Use of Polygraphs as "Lie Detectors" by the Federal Government, 88th Cong. 2d Sess. 1964; Hearings before a Subcommittee of the House Committee on Government Operations, The Computer and Invasion of Privacy, 89th Cong. 2d Sess. 1966. The problems regarding invasion of privacy is well summarized in Mr. Justice Douglas' dissenting opinion in Osborn v. United States, 385 U.S. 323 (1966).
[70] Creech, *The Privacy of Government Employees*, 31 LAW AND CONTEMP. PROBS. 413 (1966); Mirel, *The Limits of Governmental Inquiry into the Lives of Government Employees*, 46 BOST. U. L. REV. 1 (1966).
[71] Zemel v. Rusk, 381 U.S. 1 (1965).

in Talmudic and Roman Law, is essential for the existence of a free society. It provides the "breathing space" for the operation of the enumerated rights.[72] The right of privacy, as expressed by the Court in *Griswold,* accords significantly with Article 12 of the Universal Declaration of Human Rights:

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.[73]

Another right retained by the people is the right to political participation when the Ninth Amendment is read within the context of the speech provisions of the First Amendment, the voting provisions of the Fifteenth Amendment, the decisions involving legislative apportionment in relation to the equal protection clause of the Fourteenth Amendment, and the provision in Article 4, Section 4, that the Congress guarantee each State a republican form of government.[74] The contention could be made that a State may not substitute another means for the selection of a governor or legislator. The State may not impose unreasonable qualifications for denying a candidate or political party the right to appear on an election balloting or in striking a candidate from the ballot. The right to political participation includes the right of members of the public to have standing to be heard in matters of administrative agency determination. Such a statutory right has been recognized in regard to the renewal of a television station license by the Federal Communications Commission and in the granting of a right to erect a reservoir and power transmission lines by the Federal Power Commission.[75]

The right to political participation could be asserted to protect and conserve natural resources. Mr. Justice Douglas has asserted that people have a right to an environment that will not be offensive, harmful, or even destructive of life and a right to have lakes and wilderness areas protected from destruction.[76] Such a right can be protected through political participation by the general public who should have

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[72] Konvitz, *Privacy and the Law: A Philosophical Prelude,* 31 LAW AND CONTEMP. PROBS. 272, 277 (1966). The phrase, "breathing space," was used by Mr. Justice Brennan in NAACP v. Button, 371 U.S. 415, 433 (1963).

[73] A/C.3/SR 119, p. 9, discussed in ROBINSON, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, 11 (1958).

[74] Relevant precedents include Baker v. Carr, 369 U.S. 186 (1962); Gray v. Sanders, 372 U.S. 368 (1963); Wesberry v. Sanders, 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

[75] Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d. Cir. 1965) cert. Den. 384 U.S. 941 (1966); Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966). Bond v. Floyd, 385 U.S. 116 (1966).

[76] DOUGLAS, "THE BILL OF RIGHTS IS NOT ENOUGH" *in Cahn,* ed. THE GREAT RIGHTS (Macmillan, 1963).

standing to bring suit to enjoin public or private incursions upon natural resources.

Article 21 of the Universal Declaration of Human Rights embodies the right of political participation:

> 1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
>
> 2. Everyone has the right of equal access to public service in his country.
>
> 3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.[77]

Involved with the right to political participation is the right to have access to information. Clearly the right to political participation, as well as the exercise of free speech, cannot be effectively exercised without knowledge of the facts involved with regard to a particular issue. If an effective protest is to be made as to an administrative action, there must be adequate notice. The individual has a right to notice of pending government action and to the facts surrounding the given situation which should be made easily accessible to him. Information may be withheld where security or other policy considerations are overriding.

Related to this right to information is the right to know as encompassed in academic and cultural freedom. A college professor or school teacher has the right to pursue knowledge. The Court has recognized that a professor need not be made answerable for his academic pursuits to a governmental authority.[78] Where a teacher is dismissed or disciplined because of his exercise of academic freedom, he should have a judicial remedy to protect his constitutional rights. Academic freedom also includes the right of a student or faculty group to invite any speaker they may choose to speak on a college campus provided he does not incite violence.

Another right retained by the people, to be derived from the Ninth Amendment and the due process and equal protection clauses, is the right to engage in a business or profession. The Court has abstained from ruling on economic regulation under the equal protection and due process clauses. But where regulations are imposed which have the effect of depriving an individual from entering or engaging in a particular business or profession, a fundamental civil right is denied. The legislature may adopt such regulations as the forbidding of women to

[77] A/C.3/SR 130 p. 8. Discussed in Robinson, *supra* 131.
[78] Sweezy v. New Hampshire, 354 U.S. 234 (1957).

engage in bartending[79] through pressures of particular interest groups.[80]

Another right retained by the people in the context of modern industrial society is social and economic. Where once the right to property was the basis of freedom, the right to social well being has become basic. The Ninth Amendment may be read together with the due process clause to establish a vested right to a pension. The right to social well being, when coupled with the right to know—an aspect of the right to political participation and the school segregation cases decided under the equal protection clause of the Fourtenth Amendment—establishes a constitutional right to an education as an aspect of the right to social well being.[81] Where education facilities in one area are inadequate or unavailable, a child has the right to schooling in an adjacent area with superior facilities.

To a great extent, the right to social well being can be implemented by governmental agencies other than the judiciary. The Court cannot improve the quality of schools, eradicate poverty, provide jobs, grant better housing, or adequate medical care, or assure a minimum income. Within this context, the Ninth Amendment is declaratory of a right which can be secured by the legislative and executive branches of government. But after the legislature has secured this right by providing the services, the Court may assure that the services are equitably distributed. To the Court, the right to social well being means that social services may not be distributed in a manner which infringes upon fundamental human rights.

The right to social well being requires social planning by administrative agencies guided by policies laid down by the executive and the legislature. The right of political participation will help in assuring that planning and the allocations of resources will be made more democratic, pluralistic, and egalitarian. But planning based on public interest as determined by egalitarian majority decision making does not assure protection for the individual. The law must draw a line beyond which planning may not go, the starting point of which must be the Bill of Rights. But these safeguards can be effective barriers only if given a functional interpretation, and such a functional approach can be found in the concept of privacy. As living becomes more crowded, and government regulation becomes more pervasive, privacy is increasingly threatened and requires the protection of law. The objective is to keep the amount of privacy constant through changing circumstances and times. As Professor Reich asserts:

> Planning must be halted at the line where belief, artistic expression, domestic affairs, education, and creativity begin.

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[79] Goesaert v. Cleary, 335 U.S. 464 (1948).

[80] McClosky, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUPREME COURT REV. 34.

[81] Griffin v. County School Board, 377 U.S. 218 (1964).

> It is in meeting the need for an expanding Bill of Rights that the most crucial function of the courts and of judicial review is to be found. Courts cannot say what good planning is; at most they can insist that procedures be followed, parties heard, values mentioned and jurisdictional limits observed. But when planning confronts the Bill of Rights the job of the courts is to see to it that each right is equal to its task. In this sense, the courts may expect an ever higher role and responsibility in the planned society.[82]

It is in the protection of human rights, the area beyond planning, that the distinctive quality of America lies in contrast to planning in Soviet society.

Another right retained by the people is the right to treatment for mental illness. In coupling the Ninth Amendment with the due process clause the contention can be made that where an individual is confined or committed to a hospital and is subjected only to custodial care without receiving any treatment, he is, in effect, being restrained without due process of law. By writ of habeas corpus, the Court should be permitted to order that the patient be given treatment or released.

The rights enumerated in the Constitution apply to governmental or state action. The concept of rights retained by the people as expressed in the Ninth Amendment could be construed to apply the Bill of Rights to private action. Modern industrial society is characterized by the emergence of pluralistic institutions—particularly, the labor union and the corporation—which undertake important social functions.[83] These private institutions dispense social welfare and play a vital role in providing services and regulating the life of the individual. Where such institutions infringe upon fundamental rights, the individual should have the protection of the Bill of Rights. An individual should not be discharged from his employment or union membership summarily or be subjected to psychological testing or interrogations infringing upon his privacy. Private institutions should not be permitted to discriminate in the housing or employment of individuals because of their race or religion nor deprive individuals of their right to exercise speech or religion.[84]

Since private institutions play a vital role in determining public policy, the right to political participation should be extended to permit members of the public to assert the public interest. If, for example, a strike or lock-out occurs which adversely affects the public interest, the members of the public should have standing to bring suit to protect

[82] Reich, *The Law of the Planned Society*, 75 YALE L. J. 1227, 1268 (1966).
[83] BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION (Harcourt Brace, 1954); HUTCHINS, THE TWO FACES OF FEDERALISM (Fund of Republic, 1961).
[84] Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952); Affeldt, *The Labor Bill of Rights—Its Impact upon Personal Rights*, 37 DET. L. J. 500 (1960).

its rights. Similarly, where oligopolistic industries, such as steel, raise prices arbitrarily, the public should have a right to compel a public hearing.

In some instances, such as in providing for the equal rights of all citizens, the rights retained by the people may be secured by the state or federal government through such legislation as providing for open occupancy or fair employment. In upholding the constitutionality of the Colorado fair housing statute, the Colorado Supreme Court stated:

> We have no hesitancy in stating that there are fundamental and inherent rights with which all humans are endowed even though no specific mention is made of them in either the national or state constitution. . . . Are not the Ninth and Tenth Amendments authority for state legislation to define and secure inherent reasonable expectations in life, in civilized society as it is today and is not the Ninth Amendment a challenge to the state to undertake that work as the condition of American life today may demand it.[85]

Conclusion

With the decision in *Griswold v. Connecticut,* the Ninth Amendment has emerged as rule of construction to interpret the rights specified in the Constitution within the context of present day needs and values. The unenumerated "other" rights which are retained by the people serve to make the Bill of Rights more functional. The right of privacy and the right of political participation are essential for the functioning of a free and open society. These concepts enable the encompassing of those rights which are embodied in the Universal Declaration of Human Rights and serve the function of assuring individual freedom in a planned society.

The notion of rights retained by the people can be applied to assure protection from infringement of fundamental human rights by the private sector of our economy. The Ninth Amendment not only provides a guide for judicial action but is also an injunction upon the legislative and the executive at both the Federal and State levels to secure the rights of the individual by positive action.

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[85] Colorado Anti-Discrimination Commission v. Case, 151 Colo. 235, 380 p. 2d 34 (1962).