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THE NINTH AMENDMENT IN THE FEDERAL COURTS, 1965-1980: FROM DESUETUDE TO FUNDAMENTALISM?

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INTRODUCTION

Long ignored by the courts as well as by legal and political scholars, the ninth amendment to the United States Constitution has recently attracted considerable attention in the federal courts. The source of this new focus on the ninth amendment is found in Justice Douglas' majority and Justice Goldberg's concurring opinions in *Griswold v. Connecticut*.[1] The new prominence of the ninth amendment is illustrated by examining Shepard's Citations. Prior to *Griswold*, the number of federal court citations to the ninth amendment was less than 100. In the fifteen years after *Griswold*, the number of citations to the ninth amendment exceeded 400. Despite the phenomenal increase in reliance on the ninth amendment in litigation, the legal and political literature does not demonstrate any serious interest in exploring the nature, outcome, or consequences of such reliance.

Only two law review articles offer insight into this concern. In 1972, A.F. Ringold reviewed the *Griswold* ninth amendment legacy in federal court cases.[2] He concluded that the "current success ratio for asserted ninth amendment rights has been so phenomenally large that an attorney would almost be derelict if [s]he did not at least include" the ninth amendment in her or his claim.[3] Lyman Rhoades and Rodney Patula, who examined federal court cases decided during roughly the same period, were less enthusiastic.[4] They concluded that the federal courts exhibited a "reluctance" to use the ninth amendment.[5] Neither article contains a comprehensive analysis of the federal courts' application of the ninth amendment. Each article offers

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1. 381 U.S. 479 (1965). *Griswold* involved a criminal prosecution for advising married persons on the use of contraceptives. The Supreme Court reversed the convictions. Justice Douglas' majority opinion was based on the existence of a zone of privacy for married couples in matters of contraception and marital privacy. This was formed by emanations from the first, third, fourth, fifth, ninth and fourteenth amendments. Justice Douglas did not expound on the future implications of the ninth amendment in litigation. However, Justice Goldberg's concurrence advances the proposition that the ninth amendment is a source of unenumerated rights not located in the fifth and fourteenth amendments, so long as the ninth amendment claim is grounded in a liberty interest.

2. Ringold, *The History of the Enactment of the Ninth Amendment and its Recent Development*, 8 TULSA L.J. 1 (1972).

3. *Id.* at 36.

4. Rhoades and Patula, *The Ninth Amendment: A Survey of Theory and Practice in the Federal Courts Since* Griswold v. Connecticut, 50 DEN. L.J. 153 (1973).

5. *Id.* at 163-67.

only a glimpse of the disposition of a group of ninth amendment claims, some of which the courts resolved on grounds other than the merits of the ninth amendment. Rhoades and Patula reviewed claims made under the ninth amendment for the right to teach sex education,[6] the right to demonstrate,[7] and for the rights of prisoners. In each instance, however, the ninth amendment claim was not considered by the courts, as Rhoades and Patula note. For example, questions regarding sex education and public demonstration were decided on first amendment grounds, while the prisoner rights case was decided on the failure to show a violation under the eighth and fourteenth amendment. The court summarily dismissed or failed to address the ninth amendment claim in each instance.[8]

In the years since Ringold's, and Rhoades and Patula's articles, no examination of ninth amendment cases has been published in either the legal or the political science literature. Some effort is necessary to: 1) reexamine the cases covered by Ringold, and Rhoades and Patula, 2) to examine the period through 1979, and 3) to discuss the relevant Supreme Court cases decided after *Griswold*.[9] The central focus of this article is directed at determining what rights are accorded constitutional protection via the ninth amendment in the federal courts.

I. A SURVEY OF NINTH AMENDMENT DECISIONS

A. *The Ninth Amendment in the Supreme Court*

After *Griswold*, only seven majority opinions in the cases decided refer to the ninth amendment.[10] Not one of these uses the ninth amendment as a constitutional source for protecting unenumerated rights. In each the Court

6. Manfredonia v. Barry, 336 F. Supp. 765 (E.D.N.Y. 1971).

7. People v. Doorley, 338 F. Supp. 574 (D.R.I.), *rev'd on other grounds*, 468 F. 2d 1143 (1st Cir. 1972).

8. 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. 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).

9. Only majority opinions of the United States Supreme Court, the Courts of Appeals, and the District Courts are included in the analysis of this inquiry. Shepard's Citations and LEXIS were used to identify those cases in which the ninth amendment is cited. Only those cases decided during the period commencing with June 7, 1965, through December 31, 1979, were considered for relevancy, as defined below. Approximately 560 federal court citations were generated through the two legal indexes. Court opinions in which the ninth amendment is cited, but which are not included in this inquiry, include those in which the court disposed of the case for one of the following reasons: 1) on the basis of statutory construction, without reaching the constitutional claims, and 2) on procedural questions, e.g., standing, jurisdiction, abstention. In addition, this inquiry does not include those cases in which the issue of the ninth amendment, as opposed to the case as a whole, was disposed of by one of the following reasons: 1) the court states that the claim asserted under the ninth amendment is a question arising under some other constitutional provision and will, therefore, be treated as such, 2) the court notes that there is no need to consider the ninth amendment claim because its decision concerning other constitutional claims effectively disposes of the case, and 3) the court notes that the merits of the ninth amendment claim are not considered because plaintiff, or appellant, emphasized some other constitutional provision and failed to address the ninth amendment claim.

10. Selection of Supreme Court opinions differed from the selection process for the Courts of Appeals and the District Courts. All majority opinions which could conceivably be interpreted as bearing on the Court's predilections towards the ninth amendment have been included for consideration. Those majority opinions in which the ninth amendment is cited solely

declined the opportunity to explicitly accept or to reject the ninth amendment as a source of authority for identifying unenumerated rights. Justice Douglas' and Justice Goldberg's ninth amendment contributions in *Griswold*, however, have not been modified, limited or overruled. Since subsequent discussions of the ninth amendment have been extremely terse, efforts to identify acceptance of their views on ninth amendment protection for unenumerated rights would involve a speculative process of surmise. A review of these decisions shows the cursory manner in which the Supreme Court has dealt with ninth amendment questions.

Law Students Research Council v. Wadmond[11] involved objections to certain questions on the New York State Bar application. Justice Stewart, writing for the Court, identified and then summarily dismissed the appellant's ninth amendment claims.[12] In response to a privacy claim, Justice Stewart stated: "We think it borders on the frivolous to say that such an inquiry offends the applicant's right to privacy by the First, Fourth, Fifth, Ninth and Fourteenth Amendments."[13] Thereafter, Justice Stewart addressed the substance of appellant's claims and ignored the constitutional source of the right to privacy.

Justice White gave a ninth amendment claim similar treatment in the majority opinion in *Civil Service Commission v. Letter Carriers*.[14] Without specifically addressing the relevance of the ninth amendment, Justice White implicitly rejected any ninth amendment bar to Hatch Act[15] restrictions on political activities of civil service employees: "Our judgment is that neither the First Amendment *nor any other* provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees."[16]

The Supreme Court denied ninth amendment privacy claims in two abortion cases, *Roe v. Wade*[17] and *Planned Parenthood of Missouri v. Danforth*.[18] Justice Blackmun wrote for the majority in *Roe* that:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[19]

Yet, Blackmun's silences are more interesting than his affirmative state-

to identify the constitutional claims are not included, nor are concurring or dissenting opinions in which the ninth amendment is discussed or cited.

11. 401 U.S. 154 (1971).

12. The Law Students Research Council argued that certain questions included in the "third-party affidavits attesting to an applicant's good moral character" violated the applicant's right to privacy. One question objected to was whether the affiant visited the applicant's home. *Id.* at 160.

13. *Id.*

14. 413 U.S. 548 (1973).

15. 5 U.S.C. § 7324(a)(2) (1970).

16. 413 U.S. at 556 (emphasis added). The National Association of Letter Carriers sought to have the Hatch Act's "prohibition against active participation in political management or political campaigns with respect to certain defined activity" declared unconstitutional. For a description of the prohibited activities in which the Union sought to partake, see *id.* at 551 n.3.

17. 410 U.S. 113 (1973).

18. 428 U.S. 52 (1976).

19. 410 U.S. at 153 (cited with approval in 428 U.S. at 60).

ments. Blackmun neither avers nor denies that the ninth amendment is an adequate source of constitutional restraint. Moreover, Blackmun does not suggest that the lower court erred by relying on the ninth amendment. Perhaps Blackmun's silence was in deference to the discretion of the lower court. Or possibly he intimated that it was inconsequential whether either the ninth amendment, or the liberty guarantee of the fourteenth amendment, was relied on, or even whether both were relied on, in a case. Thus, Blackmun might have unintentionally advanced the use of the ninth amendment as constitutional authority to protect an unenumerated, fundamental right. However, in *Whalen v. Roe*[20] Justice Stevens dispelled any speculation that Blackmun's statement constituted an implicit acceptance of the ninth amendment as the source of the right to privacy. Writing for a unanimous Court, Stevens noted that the decision in *Roe v. Wade* rested on the personal liberty concept of the fourteenth amendment, and not on the ninth amendment.[21]

The ninth amendment was treated more graciously in *Stanley v. Illinois*,[22] and *Moore v. City of East Cleveland*.[23] In both cases the Court used the liberty guarantee of the fourteenth amendment to strike down the challenged laws. Justice White in *Stanley* and Justice Powell in *Moore*, however, look to seize upon Justice Goldberg's concurrence in *Griswold*, for authority to infuse the claims in these cases with constitutionl protection.[24]

In short, the later Supreme Court opinions reflect tolerance; certainly there is no hearty embrace of the ninth amendment as a constitutional source for the right of privacy which *Griswold* generated. Although the Court has approved of Douglas' and Goldberg's general theories, there has been no disposition to rely on the ninth amendment as interpreted in *Griswold*.[25]

B. *The Ninth Amendment in the Courts of Appeal*

A group of twenty-seven representative Court of Appeals opinions[26]

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20. 429 U.S. 589 (1977).

21. *Id.* at 598 n.23. *Whalen* involved a privacy challenge against a New York record keeping system. The law required that the names and addresses of all persons who obtained, pursuant to a doctor's prescription, certain drugs, be stored in a centralized computer file. Although the plaintiff relied, in part, on the ninth amendment, Justice Stevens did not address that claim at length, his opinion emphasized that the right of privacy was protected by the liberty concept of the fourteenth amendment.

22. 405 U.S. 645 (1972). *Stanley* involved a challenge to an Illinois state law which provided for taking an illegitimate child from the father at the time of the mother's death without a hearing as to the father's fitness. Justice White notes that the right at issue is the "private interest . . . of a man in the children he has sired and raised." *Id.* at 651.

23. 431 U.S. 494 (1977). *Moore* involved an attack on a city ordinance limiting the occupancy of dwelling units to a single family. The ordinance defined "family" in such a manner as to prohibit appellant from housing two of her grandsons, who were first cousins, in her home.

24. *See* Stanley v. Illinois, 405 U.S. at 651, and Moore v. City of East Cleveland 431 U.S. at 503 n.12, respectively.

25. The Supreme Court's most recent abortion decision, City of Akron v. Akron Center for Reproductive Health, Inc. 51 U.S.L.W. 4767 (U.S. June 15, 1983), reinforces the Court's pattern of express reliance on the fourteenth amendment for constitutional protection for freedom of choice in marital and familial matters. *Id.* at 4770.

26. For an explanation of the method used to develop the sample of cases, see note 9 *supra*.

were considered in this inquiry. Only four of these cases, however, suggest that the courts accepted constitutional claims based at least in part on the ninth amendment. The rights upheld in these cases include the right of public school students to control their personal appearance in spite of high school grooming codes,[27] the right of a woman to choose an abortion during the first trimester of pregnancy without the imposition of state restrictions,[28] and the right of parents to rear their children without the state unreasonably taking the youngster's life.[29] An additional seven opinions exhibit acquiescence in the notion that the ninth amendment does protect unenumerated rights. In these cases, however, the courts refused to extend protection to the rights asserted. Generally, this refusal was based on a finding that the claimed right was not within the original notion of privacy enunciated in *Griswold*.

Three separate challenges to public grooming regulations were rejected on the basis that the right to publicly wear one's hair in the style of one's choosing was not a right protected by the *Griswold* marital-familial right of privacy.[30] A request to extend ninth amendment protection to an inmate incarcerated in a penal institution was declined by the Court of Appeals for the Eighth Circuit in *Burns v. Siverson*.[31] Other rights which were asserted

27. Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied* 398 U.S. 937 (1970). Note that Judge Myron Bright, in his opinion for the court in *Bishop*, cited the opinion in Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970) for reliance on the ninth and fourteenth amendments to uphold a claim to a similar right. 450 F.2d at 1071. While the court's opinion in *Crews* contains no mention of the ninth amendment, *Crews* states one's choice in hair style is an element of personal freedom protected by the Constitution. See *Breen*, 419 F.2d at 1036, for authority that the ninth amendment is a possible source for such protection. *Crews*, 432 F.2d at 1203, cites *Griswold* without mentioning the ninth amendment for certain "additional fundamental rights" existing alongside those enumerated in the first eight amendments.

28. Mahoning Women's Center v. Hunter, 610 F.2d 456 (6th Cir. 1979), *vacated*, 447 U.S. 918 (1980) (no discussion of ninth amendment). Examples of requirements set by the regulation include: that anesthesia be administered by an anesthesiologist; that nursing personnel must be supervised and directed by a registered nurse who has post-graduate education or experience in obstetric or gynecological nursing. The clinic was also required to have various "expensive and elaborate equipment." *Id.* at 458.

29. Mattis v. Schnarr, 502 F.2d 588 (8th Cir. 1974), *vacated*, 431 U.S. 171 (1977) (no discussion of ninth amendment). Mattis's eighteen year old son, Michael, and a friend had broken into a golf course office to steal money. When the police arrived, the youths attempted to flee. One of the police officers gave chase after Michael. When the officer realized that he could not keep up, he ordered Michael to halt, which Michael refused to do. The officer then fired what he thought was "well above" Michael, but struck Michael in the head. The court of appeals held that the father had a constitutional right to "raise his son," and could, therefore, challenge the validity of the shooting for the purpose of seeking declaratory relief. *Id.* at 595.

30. Karr v. Schmidt, 460 F.2d 609 (5th Cir. 1972) (en banc), *cert. denied*, 409 U.S. 989 (1972); Freeman v. Falke, 448 F.2d 258 (10th Cir. 1971), *cert. denied*, 405 U.S. 1032 (1972) (Douglas, J., dissenting); Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970), *cert. denied*, 400 U.S. 850 (1970). Not included in this inquiry, but of some interest, are two court of appeals opinions in which the judges relied on *Karr* or *Jackson*, but did not mention the ninth amendment. In Sherling v. Townley, 464 F.2d 587 (5th Cir. 1972), decided shortly after *Karr*, the court stated it felt bound by the holding in *Karr*. (But note Judge Tuttle's concurring opinion, in which he expresses agreement with the dissenting judges in *Karr*). In Gfell v. Rickelman, 441 F.2d 444, 446 (6th Cir. 1971), the court reaffirmed the "principles of" *Jackson*.

31. 430 F.2d 771 (8th Cir. 1970), *cert. denied*, 404 U.S. 1062 (1972). The exact nature of the ninth amendment claim is not clear from a reading of the court's opinion. The court of appeals reversed the district court's holding that the isolated detention in maximum security to which the inmate was committed violated the prisoner's due process rights. On appeal Burns argued

but found to be without ninth amendment protection include the asserted right of a husband to stay with his wife in a public hospital's delivery room,[32] an individual's right to possess an unregistered submachine gun,[33] a postal patron's right to be free from mail covers by the United States Bureau of Customs,[34] and Florida state legislators' right to be free from compelled disclosure of certain personal financial information.[35]

In the remaining sixteen cases, the Courts of Appeals disposed of claims, based in part on the ninth amendment, by concluding that the government possessed the constitutional authority to engage in the challenged activity. In these cases the courts did not explicitly reject the proposition that the ninth amendment may be invoked for asserting an unenumerated right. The courts ruled against challenges to induction orders,[36] the "equal time" provision of the "Fairness Doctrine" for broadcasters,[37] the manner of congressional representation in the District of Columbia,[38] a deportation order issued by the Immigration and Naturalization Service,[39] subpoenas issued

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that, *inter alia*, the district court's order to expunge his record of the detention was supported by the ninth amendment. *Id.* at 778.

32. Fitzgerald v. Porter Memorial Hospital, 523 F.2d 716, 721 (7th Cir. 1975), *cert. denied*, 425 U.S. 916 (1976).

33. United States v. Warin, 530 F.2d 103, 108 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976).

34. United States v. Choate, 576 F.2d 165, 181 (9th Cir.), *cert. denied*, 439 U.S. 953 (1978). The Bureau of Customs had arranged with the United States Postal Inspector to obtain addresses from the face of the envelopes addressed to Choate for the purpose of locating a source of narcotics in South America.

35. Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979). The disclosure was mandated by an amendment to the Florida Constitution, which required elected and other public officials and employees to file a public statement detailing their assets and liabilities over $1,000.

36. United States v. Murray, 452 F.2d 503 (8th Cir. 1971), *cert. denied*, 405 U.S. 935 (1972); United States v. Sowul, 447 F.2d 1103 (9th Cir. 1971), *cert. denied*, 404 U.S. 1023 (1972); United States v. Zaugh, 445 F.2d 300 (9th Cir. 1971); United States v. Farrell, 443 F.2d 355 (9th Cir.), *cert. denied*, 404 U.S. 853 (1971); United States v. Uhl, 436 F.2d 773 (9th Cir. 1970); United States v. Diaz, 427 F.2d 636 (1st Cir. 1970). Appellants challenged their induction orders on such grounds as: the induction unconstitutionally interfered with the "right to life" (*Diaz*, 427 F.2d at 639), that the Selective Service law was unconstitutional during a period in which there was no "dire emergency" (*Uhl*, 436 F.2d at 774), or that one is exempt from military service because of one's "religious scruples under the First and Ninth Amendments" (*Murray*, 452 F.2d at 504). The courts rejected these challenges on the ground that the Congress has the power to conscript individuals into the armed forces.

37. Red Lion Broadcasting Co. v. FCC, 381 F.2d 908 (D.C. Cir. 1967), *aff'd*, 395 U.S. 367 (1969) (no discussion of ninth amendment). Red Lion Broadcasting argued that the "equal time" provision of the FCC mandated by the "fairness in broadcasting" doctrine constituted a prior restraint and, therefore, deprived them of their political rights retained by the ninth amendment. *Id.* at 925.

38. Breakefield v. District of Columbia, 442 F.2d 1227, 1228-29, 1228 n.4 (D.C. Cir. 1970), *cert. denied*, 401 U.S. 909 (1971); Carliner v. Commissioner, 412 F.2d 1090 (D.C. Cir. 1968) *cert. denied*, 396 U.S. 987 (1969).

39. Cervantes v. Immigration and Naturalization Service, 510 F.2d 89 (10th Cir. 1975). Mr. and Mrs. Cervantes were in the United States illegally. The husband had exceeded the six month temporary stay originally granted by the Department of Immigration and Naturalization Service. In addition, he moved to Kansas for employment without informing the Department of his move. His fiancee entered the country illegally from Mexico, and joined him in New York where they were married and continued to live. During this period, they had a child. The couple filed suit in the court of appeals arguing that their son, an American minor, had a ninth amendment right "to continue to have the love and affection of his parents in the United States." *Id.* at 91.

by federal grand juries,[40] and an army reservist grooming code.[41] Other failed challenges include an effort to avoid an Internal Revenue summons,[42] and a claim by a school board that a "freedom of choice" school placement policy was justified by the ninth amendment.[43] Finally, in *Mapco Inc. v. Carter*,[44] an Emergency Court of Appeals rejected an oil company's contention that it had a ninth amendment right "to trust the federal government and rely on the integrity of its pronouncements."[45]

In general, the Courts of Appeals have restricted ninth amendment protection to the right of privacy in *Griswold*. When the claim asserted under the ninth amendment was too broad, several courts expressed the view that only those rights specified in *Griswold*, such as the right to privacy of the home, the general rights of family and procreation, and the right to marital privacy, were protected through the ninth amendment. However, some cases did begin to expand the limits. A broader conceptual framework was offered in *Plante v. Gonzalez*,[46] which limited the right to privacy to those situations involving personal autonomy and confidentiality. In *Breen v. Kahl*,[47] the court of appeals upheld the right to choose one's hair style, because the issue was one of personal freedom; the judgment in *Mattis v. Schnarr*[48] found that a father had a right to rear his son based on the right to raise a family, a right implicitly recognized in *Griswold*; and, the court's judgment in *Mahoning Women's Center v. Hunter*[49] rested upon the determination that a woman's right to have an abortion during the first trimester of pregnancy involved the constitutionally protected area of a woman's autonomy.

The unwillingness to extend the *Griswold* concept of the ninth amend-

40. *In re* January 1976 Grand Jury, 534 F.2d 719, 730 (7th Cir. 1976).

41. Anderson v. Laird, 437 F.2d 912 (7th Cir.), *cert. denied*, 404 U.S. 865 (1971). While in the Army Reserves, Anderson had a number of unexcused absences from obligatory meetings. Although he attended the meetings, he was recorded as absent because his hair length violated army grooming codes. As a result, Anderson was ordered to active duty. His attempt to reverse the induction order by challenging the army's grooming code was rebuffed by Judge Wilbur Pell, Jr. Judge Pell reasoned that if Anderson "were completely in civilian status, his position would have legally persuasive stature." But, Judge Pell concluded, the rights of individuals in the armed forces are balanced against compelling governmental interests, and that "it is not for civil courts to judge whether the military has properly determined the balance between military needs and personal rights." *Id.* at 914.

42. United States v. Silkman, 543 F.2d 1218, 1220 (8th Cir. 1976), *cert. denied*, 431 U.S. 919 (1977).

43. United States v. School Board of Franklin City, 428 F.2d 373 (4th Cir. 1970). *School Board of Franklin City* consists of three cases consolidated into one. The ninth amendment claim was made in Covington v. United States, *id.*

44. 573 F.2d 1268 (Temp. Emer. Ct. App.), *cert. denied*, 437 U.S. 904 (1978).

45. *Id.* at 1273. Mapco sought to enjoin implementation of a "rollback" of prices of "upper-tier" domestic crude oil, arguing that the establishment of the two-tier pricing system was devised and pronounced by the federal government for the purpose of providing oil companies with incentive to increase domestic drilling and development. Consequently, Mapco maintained, it had a ninth amendment right to the "expectation that the maximum prices of upper-tier oil would never be regulated or reduced by the federal government." *Id.* at 1280.

46. 575 F.2d 1119 (5th Cir. 1978). *See supra* note 35 and accompanying text.

47. 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970). *See supra* note 27 and accompanying text.

48. 502 F.2d 588 (8th Cir. 1974), *vacated*, 431 U.S. 171 (1977) (no discussion of the ninth amendment). *See supra* note 29 and accompanying text.

49. 610 F.2d 456 (6th Cir. 1979), *vacated*, 447 U.S. 918 (1980) (no discussion of the ninth amendment). *See supra* note 28 and accompanying text.

ment is also evident in those decisions where the court determined that the right asserted was foreclosed because the government had constitutionally derived power to control that area. None of the cases that were disposed of on this basis involve a right similar, either in nature or in circumstance, to those specified earlier by the courts as appropriate for ninth amendment protection.

Of the cases outlined, the only real conflict pits the Fifth and Sixth Circuits against the Seventh and Eighth Circuits. While the former hold that an individual's choice of hair style is not a fundamental right under the ninth amendment, the latter two circuits conclude otherwise.[50]

C. *The Ninth Amendment in the District Courts*

A representative group of fifty-seven district court decisions were gathered for this discussion. Twenty-seven decisions of these relevant cases held that the rights asserted were protected, at least in part, by the ninth amendment. Of these, eighteen involved matters of personal decisions; it was claimed in most cases that the consequences of these decisions were confined to the individual making the decision. This category includes suits brought by military reservists who wanted to wear wigs during training,[51] challenges by public high school students to school grooming codes,[52] an individual's claimed right to obtain obscene material,[53] challenges to state abortion regulations,[54] and the asserted individual right to use "a nontoxic substance [in

50. Note that the United States Supreme Court has yet to rule on the question of the constitutionality of a public school's grooming code. The Court, however, examined a police department's grooming code in Kelley v. Johnson, 425 U.S. 238 (1976). Justice Rehnquist wrote that the regulations involved in *Kelley* did not violate any substantive rights guaranteed by the fourteenth amendment. Rehnquist argued that for that case's purpose, it was "assume[d]" that "the citizenry at large has some sort of 'liberty' interest within the Fourteenth Amendment in matters of personal appearance. . . ." *Id.* at 244. However, the "claim of a member of a civilian service based on the 'liberty' interest protected by the Fourteenth Amendment must [not] necessarily be treated for constitutional purposes the same as a similar claim by a member of the general public." *Id.* at 249.

51. Etheridge v. Schlesinger, 362 F. Supp. 198 (E.D. Va. 1973); Brown v. Schlesinger, 365 F. Supp. 1204 (E.D. Va. 1973).

52. Copeland v. Hawkins, 352 F. Supp. 1022 (E.D. Ill. 1973); Watson v. Thompson, 321 F. Supp. 394 (E.D. Tex. 1971), *vacated*, 458 F.2d 1361 (5th Cir. 1972); Berryman v. Hein 329 F. Supp. 616 (D. Idaho 1971); Dunham v. Pulsifer, 312 F. Supp. 411 (D. Vt. 1970); Black v. Cothren, 316 F. Supp. 468 (D. Neb. 1970); Reichenberg v. Nelson, 310 F. Supp. 248 (D. Neb. 1970); Crossen v. Fatsi, 309 F. Supp. 114 (D. Conn. 1970).

53. United States v. Orito, 338 F. Supp. 308 (E.D. Wis. 1970), *vacated*, 413 U.S. 139 (1973); United States v. B & H Distrib. Corp., 319 F. Supp. 1231 (W.D. Wis. 1970), *vacated*, 403 U.S. 927 (1971), *aff'd on other grounds*, 347 F. Supp. 905 (W.D. Wis. 1972), *vacated*, 413 U.S. 909 (1973), *acq.* 375 F. Supp. 136 (W.D. Wis. 1974). The original opinions in *Orito* and *B & H* rely principally on Stanley v. Georgia, 394 U.S. 566 (1968), for the proposition that the first amendment protects the right to read obscene material in the privacy of one's home. While the judges in *Orito* and *B & H* argued that the right to obtain such material was also protected, the Supreme Court rejected this, citing U.S. v. Reidel, 402 U.S. 351 (1971); and United States v. Thirty Seven (37) Photographs, 402 U.S. 363 (1971).

54. Doe v. Mundy, 378 F. Supp. 731 (E.D. Wis. 1974), *aff'd*, 514 F.2d 1179 (7th Cir. 1975); Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973), *vacated* 410 U.S. 950 (1972); YWCA v. Kugler, 342 F. Supp. 1048 (D. N.J. 1972) *aff'd mem.*, 493 F.2d 1402 (3d Cir. 1974); Abele v. Markle, 342 F. Supp. 800 (D. Conn. 1972), *vacated*, 410 U.S. 951 (1973); Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970), *modified on other grounds*, 410 U.S. 113 (1973); Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis.), *appeal dismissed*, 400 U.S. 1 (1970).

this case the drug Laetrile] in connection with one's personal health care."[55] Five cases concern claims involving interpersonal relationships of a formal familial or informal associational nature. The issues in these cases include a challenge to a Merchant Marine Academy's regulation prohibiting its cadets from marrying,[56] the claimed rights of a parent and minor child to attend a lecture on contraception,[57] and the asserted right of a parent to protect her child from state distribution of contraceptive information.[58] Other actions objected to on this basis include the dismissal of an unmarried teacher[59] and an unmarried civil servant[60] for sleeping or living with a member of the opposite sex. The other opinions in this category upheld a residential anti-picketing ordinance on the ground that the right to privacy includes tranquility, protected in part by the ninth amendment;[61] a racially discriminatory membership policy of a private country club, because associational rights are protected privacy interests;[62] upheld an indictment of a private individual for conspiring to electronically intercept business communications because the ninth amendment protects a bundle of unexpressed privacy interests.[63] Finally, on grounds that prison overcrowding constituted severe confinement conditions, offensive to the ninth amendment, the court ordered a change in the prison conditions.[64]

A second major category of district court cases are those in which the courts acknowledged the ninth amendment as a source of constitutional protection for the right to privacy, but concluded that the case presented circumstances which did not involve privacy interests protected by the *Griswold* decision. Thus, the courts upheld two state statutes requiring unwed mothers to furnish the name of the child's putative father,[65] rejected a plaintiff's claim to an environment free from tobacco smoke,[66] upheld a public

55. Rutherford v. United States, 438 F. Supp. 1287 (W.D. Okla. 1977), *rev'd*, 616 F.2d 455 (10th Cir.), *cert. denied*, 439 U.S. 1128 (1980).

56. O'Neil v. Dent, 364 F. Supp. 565 (E.D. N.Y. 1973).

57. Manfredonia v. Barry, 401 F. Supp. 762 (E.D. N.Y. 1975). Ms. Manfredonia was arrested for bringing her fourteen month old daughter to a lecture, given by William Baird, on the subject of contraceptives. She was charged under N.Y. PENAL LAW § 260.10 (McKinney 1974) which makes it a misdemeanor for anyone to endanger the welfare of a child.

58. Doe v. Irwin, 428 F. Supp. 1198 (W.D. Mich.), *vacated mem.*, 559 F.2d 1219 (6th Cir. 1977), *aff'g* 441 F. Supp. 1247 (6th Cir. 1977), *dismissed*, 615 F.2d 1162 (6th Cir.), *cert. denied*, 449 U.S. 1829 (1980).

59. Fisher v. Snyder, 346 F. Supp. 396 (D. Neb. 1972), *aff'd*, 476 F.2d 375 (8th Cir. 1973).

60. Mindel v. United States Civil Service Comm'n, 312 F. Supp. 485 (N.D. Cal. 1970).

61. People v. Doorley, 338 F. Supp. 574 (D. R.I.), *rev'd*, 468 F.2d 1143 (1st Cir. 1972).

62. Wright v. Salisbury Club, Ltd., 479 F. Supp. 378 (E.D. Va. 1979), *rev'd*, 632 F.2d 309 (4th Cir. 1980) (since the "private" club involved was not a truly private social organization, the court dismissed the ninth amendment argument).

63. United States v. Perkins, 383 F. Supp. 922 (N.D. Ohio 1974).

64. Mitchell v. Untreiner, 421 F. Supp. 886 (N.D. Fla. 1976). Although the court specifically found a violation of the ninth amendment, the opinion is unclear as to the nature of the ninth amendment right that was involved.

65. Burdick v. Miech, 385 F. Supp. 927 (E.D. Wis. 1974); Doe v. Norton, 365 F. Supp. 65 (D. Conn. 1973), *vacated per curiam*, 422 U.S. 391 (1975), *modified sub nom.* Doe v. Maher, 414 F. Supp. 1368 (D. Conn. 1976), *vacated per curiam*, 432 U.S. 526 (1977).

66. Gasper v. Louisiana Stadium and Exposition Dist., 418 F. Supp. 716 (E.D. La. 1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978), *cert. denied*, 493 U.S. 1073 (1979).

high school's grooming code,[67] and held that the Mann Act's prohibition on the interstate transportation of women for prostitution purposes did not violate a ninth amendment guarantee to privacy.[68] Other district court's have rejected a claim that the right to privacy protected one from unwarranted publicity,[69] upheld a city ordinance prohibiting the use of the word "Saloon" for any premise on which alcohol was sold,[70] and held that a New York statutory eviction procedure did not infringe upon any " 'right to housing' within the ambit of the ninth amendment."[71]

In a number of environmental cases, the courts held that the right to a clean environment was not protected by the ninth amendment.[72] The courts made no effort in these cases to identify when the environment might conceivably be protected by the ninth amendment. The opinions, however, do not dispute that the ninth amendment is a source of constitutional protection for other unidentified rights.

In eight cases, the courts rejected challenges to the government imposing restrictions or obligations, on the basis that the sovereign possessed the requisite constitutional authority to impose such restrictions or obligations. In two instances, the courts upheld the dismissal of civil servants for participating in political activities in violation of the Hatch Act.[73] A Seventh Day Adventist's refusal to pay union dues was rejected on the ground that Congress, under its power to regulate interstate commerce, could provide for collective bargaining under which the "employer and the federally-employed representative of employees . . . [could] make a collective bargain requiring union membership."[74] A serviceman's challenge to transfer orders which would have sent him to Vietnam,[75] and a civilian's challenge to an induc-

67. Davis v. Firment, 269 F. Supp. 524 (E.D. La. 1967), *aff'd*, 408 F.2d 1085 (5th Cir. 1969).

68. United States v. Ceasar, 368 F. Supp. 328 (E.D. Wis. 1973), *aff'd mem. sub nom.*, United States v. Harden, 519 F.2d 1405 (7th Cir. 1975).

69. Reilly v. Leonard, 459 F. Supp. 291 (D. Conn. 1978). Reilly filed a suit alleging that his right to privacy had been violated when the police published an investigative report which concluded that he was the murderer of his mother. The report was published after the Attorney General rejected it and an information against Reilly was dismissed with prejudice.

70. Boscia v. Warren, 359 F. Supp. 900 (E.D. Wis. 1973).

71. Velazquez v. Thompson, 321 F. Supp. 34 (S.D. N.Y. 1970), *aff'd* 451 F.2d 202 (2d Cir. 1971).

72. *In re* "Agent Orange" Product Liability Litigation, 475 F. Supp. 928 (E.D. N.Y. 1979); Township of Long Beach v. City of New York, 445 F. Supp. 1203 (D. N.J. 1978); Upper West Fork River Watershed Ass'n v. Corps of Engineers, 414 F. Supp. 908 (N.D. W. Va. 1976), *aff'd mem.*, 556 F.2d 576 (4th Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978); River v. Richmond Metropolitan Auth., 359 F. Supp. 611 (E.D. Va. 1973), *aff'd per curiam* 481 F.2d 1280 (4th Cir. 1973); Hagedorn v. Union Carbide Corp. 363 F. Supp. 1061 (N.D. W. Va. 1973); Virginians for Dulles v. Volpe, 344 F. Supp. 573 (E.D. Va. 1972), *aff'd in part, rev'd in part*, 541 F.2d 442 (4th Cir. 1976); Tanner v. Armco Steel Corp., 340 F. Supp. 532 (S.D. Tex. 1972); Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 728 (E.D. Ark. 1970), *aff'd*, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973).

73. Hatch Political Activities Act, Ch. 640, 54 Stat. 767 (1940) codified as amended at 5 U.S.C. § 1501-1505 (1976). Democratic Cent. Comm. for Montgomery County v. Andolsek, 249 F. Supp. 1009 (D. Md. 1966); Fishkin v. United States Civ. Serv. Comm'n, 309 F. Supp. 40 (N.D. Cal. 1969), *dismissed*, 396 U.S. 278 (1970).

74. Linscott v. Millers Falls Co., 316 F. Supp. 1369, 1372 (D. Mass. 1970), *aff'd*, 440 F.2d 14 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971).

75. Orlando v. Laird, 317 F. Supp. 1013 (E.D. N.Y. 1970), *aff'd*, 443 F.2d 1039, *cert. denied*, 404 U.S. 869 (1971). Orlando sought to void the orders by arguing that his rights as a citizen

tion notice,[76] were rejected, as was the challenge of a military reservist to a requirement that he participate in a Veteran's Foreign War parade.[77] Environmentalists seeking to prevent mining operations in the Challis National Forest, located in Idaho, were rebuffed; the court found that Congress, and not the citizenry, has the constitutional power to dispose of minerals in land owned by the United States.[78] A challenge to an indictment under the Hobbs Act[79] was also rejected by the court.[80]

In three of the remaining cases, the district courts held that the asserted rights were indeed fundamental but, under the circumstances, the state had a more compelling interest. Consequently, the courts upheld grooming codes for inmates,[81] and for police officers,[82] and upheld the discharge of a teacher for expressing, in her economics class, her opinions concerning the issue of students' rights and corporal punishment.[83] The final two cases, involving a challenge to a high school grooming code,[84] and a claim to a protected environment,[85] are the only ones which state that the ninth

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were violated because the conduct of the war in Vietnam was not authorized by Congress and the Executive had no constitutional authority to continue it.

76. United States v. Cook, 311 F. Supp. 618 (W.D. Pa. 1970).

77. Jones v. United States Secretary of Defense, 346 F. Supp. 97 (D. Minn. 1972). Jones maintained that because the parade coincided with a speech that was to be delivered by then Vice President Spiro Agnew, the parade indirectly promoted the Vice President's political candidacy for reelection. Jones supported the Democrats and the presidential candidacy of Senator George McGovern.

78. Honchok v. Hardin, 326 F. Supp. 988 (D. Md. 1971).

79. Hobbs Anti-Racketeering Act, ch. 645, 62 Stat. 793 (1948) codified as amended at 18 U.S.C. § 1951-1955 (1976).

80. United States v. Howe, 353 F. Supp. 419 (W.D. Mo. 1973). Howe was indicted for compelling a tavern owner to provide space for various coin operated machines.

81. Howard v. Warden, Petersburg Reformatory, 348 F. Supp. 1204 (E.D. Va. 1972), *dismissed mem.*, 474 F.2d 1341 (4th Cir. 1973).

82. Stradley v. Andersen, 349 F. Supp. 1120 (D. Neb. 1972), *aff'd*, 478 F.2d 188 (8th Cir. 1973).

83. Ahern v. Board of Education, 327 F. Supp. 1391 (D. Neb. 1971), *aff'd*, 456 F.2d 399 (8th Cir. 1972). Ms. Ahern was suspended when, during class time, she criticized the action of a substitute teacher who slapped a student. In addition, during the discussion Ms. Ahern raised issues pertaining to students' rights. Judge Urbom argued that although Ms. Ahern had a right to express her opinions, there is no right to express them during class in violation of a superior's admonition not to do so when the subject of her opinion is directly related to student and teacher discipline. *Id.* at 1397.

84. Pritchard v. Spring Branch Independent School District, 308 F. Supp. 570 (S.D. Tex. 1970). Judge Allen Hannay dismissed the relevance of the ninth amendment in the following words:

> The Ninth Amendment . . . has traditionally been construed to pertain to the proper allocation of governmental power between the federal and state sovereigns. . . . It would be the opposite of this to ascribe to the stately 18th century rhetoric of the Ninth Amendment an intent to enlarge at the expense of the several states the federal judicial power created by Article III of the Federal Constitution—a judicial power amply extended by the Fourteenth Amendment and its authoritative interpretation across the years.

Id. at 577.

85. Sequoyah v. Tennessee Valley Authority, 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980). Judge Robert Taylor rejected any contention that the ninth amendment could be invoked as a source of constitutional protection for the area to be flooded, by pointedly stating that "the Ninth Amendment grants no substantive rights." Thereafter, Judge Taylor also stated: "The Ninth Amendment simply provides that the specification of certain rights in the Constitution shall not be construed to deny or disparage other rights retained by the people." *Id.* at 611. Note also that Judge Taylor cited the opinion in *Tanner* to support his assertion that the ninth amendment grants no substantive

amendment affords no protection to unenumerated rights.

To summarize, in every case where the judges addressed rights which they considered to be protected by the ninth amendment, the judges restricted the protection to the general right of privacy. In most cases, the judges only addressed the question whether the right that a plaintiff asserted was included in the definition. The courts did this without attempting to criticize or limit the right to privacy itself. Only Chief Judge Clarie, in *Reilly v. Leonard*,[86] tried to define the scope of the right to privacy. According to Judge Clarie, the right to privacy protects one "from substantive regulation by the government"[87] only in those areas involving "private conduct in 'matters relating to marriage, procreation, contraception, family relationships, and child rearing and education'."[88] With few exceptions, the other judges who sought to characterize an aspect of the right to privacy and whether it is protected by the ninth amendment, restricted their identifications to aspects of privacy equivalent to or similar to those identified by Judge Clarie. While those opinions extending ninth amendment privacy protection to the choice of hair style or the receipt of obscene material may not fit exactly within Judge Clarie's conception of the constitutional right to privacy, nevertheless, according to other judges, such conduct also finds shelter under the wings of ninth amendment privacy.

II. DISCUSSION

As this review illustrates, the federal courts have, with few exceptions, restricted the scope of ninth amendment protection to the marital-familial aspect of the right to privacy. Where efforts to define the scope of this right have been made, they have generally been limited to protecting the autonomy of the individual, matters concerning the family and procreation, (including marriage and contraception), and such aspects of family relationships as child rearing and education. Other rights which are easily distinguished from the marital-familial axis were held by the courts to be unprotected by the ninth amendment. For example, the courts consistently rejected contentions that the ninth amendment includes protection for a clean environment.[89] The courts were unwilling to extend ninth amendment protection to the naming of one's tavern as one pleased,[90] or to the discussion of corporal punishment in a classroom.[91] Moreover, the decisions reviewed demonstrate that ninth amendment rights are not absolute; they may be balanced against legitimate governmental interests. In addition, courts rejected ninth amendment claims which infringed on the exercise of other legitimate constitutional powers.

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rights. In so doing, Judge Taylor interpreted the treatment of the ninth amendment claim in *Tanner* expansively and erroneously. Judge Noel's ruling in *Tanner* concerning the ninth amendment is limited to the question of environmental concerns, and not to the ninth amendment proper.

86. 459 F. Supp. 291 (D. Conn. 1978).

87. *Id.* at 299.

88. *Id.* at 300, *quoting*, Paul v. Davis, 424 U.S. 693, 713 (1976).

89. *See supra* note 70.

90. *See supra* note 68.

91. *See supra* note 81.

Beyond these obvious conclusions lie some intriguing undercurrents which provide portents of the future significance of the ninth amendment to the protection of unenumerated rights. Ostensibly, Ringold's, and Rhoades and Patula's views of the status of the ninth amendment are correct. It appears that, as Ringold has written, the "success ratio for asserted ninth amendment rights has been so phenomenally large that an attorney would almost be derelict if (s)he did not at least include" the ninth amendment in her or his claim.[92] This is most probably the result of the marked growth in ninth amendment claims made since *Griswold*, and success of even a small number of those actions. This also accommodates Rhoades and Patula's assessment that the courts have exhibited a "reluctance" to use the ninth amendment.[93] The matter is obviously one of perspective. Significantly, however, both articles ignore altogether the rationales underlying the ultimate decisions of the courts. The rationale for the result in these cases indicate, however, the scope of the ninth amendment's status, and its future in the judiciary.

An overwhelming number of the cases examined do not directly address whether, under the circumstances of each case, the ninth amendment was properly invoked. *Griswold* is the only case in which the Supreme Court found a right, the right to privacy, and rested it squarely upon the ninth amendment. Yet in subsequent cases involving privacy questions the Court deliberately avoided connecting that right to the ninth amendment, holding instead that the right was encompassed within the liberty concept of the fourteenth amendment. Moreover, in every instance after *Griswold*, the Court avoided the question of the relationship of the ninth amendment to the constitutional scheme of fundamental rights. In effect, immediately after the Court gave life to the right of privacy on ninth amendment grounds, the new child privacy was placed under the aegis of the more structured and familiar guardian "liberty," to be nurtured and cultivated. Thus, while the right to privacy has become firmly entrenched in the American scheme of constitutional rights, the ninth amendment basis for this right has become relegated to limbo; it is neither repudiated nor immuted as a constitutional source of protection. This effect is evident in many lower federal court decisions. Rather than moving toward an acceptance or rejection of the ninth amendment, the lower courts have focused on the more general question of whether the particular right asserted was encompassed by the broader concept of the right to privacy.[94] This approach is illustrated by Judge Myron Bright's opinion in *Bishop v. Colaw*.[95] Judge Bright cited a number of cases for the point that while courts found protection in the ninth amendment right to privacy for the right to choice in governing personal appearance,

92. *See* Ringold, *supra* note 2, at 36.

93. *See* Rhoades and Patula, *supra* note 4, at 163-67.

94. This may also account for another tactic used by a number of judges in addressing a claim of privacy based, in part, upon the ninth amendment. In these cases (not included in this inquiry), the judges cite the ninth amendment, among others, upon which the petitioners based their privacy claim. The judges then direct their attention to the substantive questions respecting the nature of the right to privacy, and the particular claim presented, without any consideration of the specific constitutional provisions from whence the right to privacy derives.

95. 450 F.2d 1069 (7th Cir. 1970).

others found the same protection in the due process clause of the fourteenth amendment, and still others found it in the privacy penumbra of the Bill of Rights. Rather than indicating a preference, Judge Bright dismissed the need to make a choice:

> A close reading of these cases reveals, however, that the differences are more semantic than real. The common theme underlying decisions striking down hair style 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.
>
> The existence of rights other than those specifically enumerated in the Constitution was recognized by the Supreme Court in *Griswold*. . . . Much of the present divergence of opinions as to the source of the right asserted here can be traced to the different approaches adopted by the Justices in *Griswold*. We see no point in rehashing these different approaches, since under any of them, the conclusion follows that certain additional rights exist.[96]

The current ninth amendment dilemma may be traced to the lack of clarity in Justices Douglas' and Goldberg's opinions in *Griswold* concerning the proper interpretation of the ninth amendment.[97] These questions arise: how is the ninth amendment to be applied, and what is its relation to the rest of the Constitution?[98] Although both Justices Douglas and Goldberg use the ninth amendment, courts and commentators disagree as to the application and impact of that invocation.[99] Moreover, Justice Harlan and Justice White each wrote a concurrence in *Griswold*, in which they relied exclusively upon the liberty guarantee of the fourteenth amendment. With

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96. *Id.* at 1075. This is not to suggest, however, that every judge exhibited such equivocation. Writing for the Court of Appeals in *Mahoning*, Judge Merritt is representative of a few judges who expressed at least partial reliance on the ninth amendment:

> In addition to formulating specific limitations on government in the first eight amendments of the Constitution, the founding fathers in a more general way carved out a slice of human affairs of a private nature which should be 'retained by the people' without legislative interference. The ninth amendment provides that '[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'

456 F.2d at 459.

97. A number of legal commentators differ as to the proper interpretation of Goldberg's and Douglas' opinions; this is some indication of possible ambiguities in these opinions.

98. Although this is a matter of considerable constitutional importance, satisfactory discussion here is beyond the scope of this inquiry. A brief descriptive statement of each of the four theories is set forth to provide some guidance, however: 1) the "Independent Source" theory: the ninth amendment operates as a shield to protect unspecified, fundamental rights, just as each of the first eight amendments directly protects the rights specified in text, 2) the "Operationalize Due Process" theory: the ninth amendment directs the courts to interpret broadly the due process guarantees of the fifth and fourteenth amendments, 3) the "Enabling Analogous Rights" theory: the ninth amendment may be invoked for the sole purpose of expanding or protecting those rights enumerated throughout the Constitution, most particularly rights identified in the first eight amendments and, 4) the "Rule of Construction" theory: the ninth amendment adds nothing in the way of substantive rights, its sole purpose being to guard against a misconstruction of any enumerated or interpreted constitutional guarantee.

99. *See, e.g.*, Beaney, *The* Griswold *Case and the Expanding Right to Privacy*, 1966 WIS. L. REV. 979, 982; Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The* Griswold *Case*, 64 MICH. L. REV. 235, 243 (1965-66); and Katin, Griswold v. Connecticut: *The Justices and Connecticut's "Uncommonly Silly Law,"* 42 NOTRE DAME LAW. 680, 686 (1966-67).

this panoply of viewpoints before them, it is no wonder that the lower federal courts generally remain silent on the details of ninth amendment jurisprudence.[100] The absence of an established form for ninth amendment adjudication has, however, proven to be less a barrier than might be expected in justifying the final judgment of the courts. Where there was a case factually similar to the one under consideration, which recognized a similar substantive right, the examining court would follow the earlier case and recognize the asserted right. On the other hand, where precedent was unavailable, the courts were not inclined to extend constitutional protection. This pattern was reflected by comments in those cases which intimated the court could not recognize the asserted ninth amendment right because of the absence of guiding precedent.

CONCLUSION

The courts have been willing to recognize that constitutional claims may be based on the ninth amendment. The courts are more willing to give ninth amendment protection, however, to matters that fall within the marital-familial aspects of privacy. Because of this hesitancy to push *Griswold* beyond the family, a complete view of the breadth and depth of the ninth amendment in the federal courts has yet to develop. The overwhelming number of lower federal court cases examined lend themselves to the following general assessment: A ninth amendment claim is more likely to receive favorable judicial recognition when it is used in asserting the marital-familial form of the right to privacy. The further the ninth amendment claim is from the marital-familial axis, the less acceptance it will receive.

If the ninth amendment is to be expanded, or explained, the responsibility for doing so resides with the Supreme Court. Should the Supreme Court choose to invoke the ninth amendment for the purpose of protecting a particular right, lower courts will follow suit. The absence of Supreme Court guidance has discouraged an expansive interpretation of the ninth amendment rights by the lower federal courts.[101] Judge Garnett Eisele's

100. Judge Cummings' opinion in *United States v. Choate*, is the exception. His opinion is worth quoting at length.

> The specific sources for zones of privacy in the Constitution seem only to include the First, Third, Fourth, Fifth, and Ninth Amendments. *Griswold v. Connecticut*, 381 U.S. 479, 484, ... If a zone of privacy cannot be grounded on neutral principles rooted in one of these constitutional sources, it simply does not enjoy constitutional protection. . . .
>
> Requiring that a constitutional right be locatable in the Constitution most emphatically does not, of course, suggest a strict circumscription of the various specific constitutional guarantees in the Bill of Rights. Each guarantee still has its *Griswold* penumbras and emanations. But if it is demonstrated *seriatim* that none of the specific guarantees creates a zone of privacy in a given case, then there simply is not a constitutional 'right of privacy' in that case. Nor is there any question of synergistic coupling between the several Bill of Rights guarantees to create by the operation of all of them together a constitutional right not locatable in any one of them.

576 F.2d at 173-74. *See also supra* notes 84 and 85.

101. Two possible additional factors inhibiting efforts by the lower courts to undertake such an endeavor include 1) the failure on the part of the litigants to provide the courts with sufficient elaboration concerning the relevance of the ninth amendment (a concern specifically noted by some judges); and 2) the apparent lack of awareness, on the part of the judges and justices, of the ninth amendment literature.

opinion in *Environmental Defense Fund v. Corps of Engineers of United States Army* expresses the hesitancy of the lower federal courts to formulate new jurisprudence independent of Supreme Court guidance:

> [S]uch claims, even under our present Constitution are not fanciful and may, indeed, someday, in one way or another, obtain judicial recognition. But, as stated by Judge Learned Hand in *Spector Motor Serv., Inc. v. Walsh*, 139 F.2d 809 (2d Cir. 1944):
>
> > Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant.
>
> 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 plaintiffs have not stated facts which would under the present state of the law constitute a violation of their constitutional rights as alleged . . . in their complaint.[102]

This opinion intimates that lower courts are justifiably unwilling to bring the ninth amendment from the "womb" to the courtroom without some strong assistance from the Supreme Court. This reluctance remains in spite of the ninth amendment's promising future. Of course, this bodes poorly for the incorporation, at least in the near future, of novel unenumerated rights through the mechanism of the ninth amendment. The federal courts remain firm in their resolve to look to the Supreme Court for guidance. The Supreme Court, however, has been reluctant to invoke the ninth amendment when a more specific constitutional provision guarantees the constitutional right at issue.

Insofar as substantive unenumerated rights are concerned, the development of the ninth amendment has been limited. Nevertheless, the treatment given to the ninth amendment to this date may have greater significance in the future. So far, some federal courts have recognized that the ninth amendment provides sustenance for unenumerated fundamental rights.

While *Griswold* may have sown the ninth amendment seed, it did so without regard for the fertility or receptivity of the judicial furrows in which it was sown. Nevertheless, the courts of appeal and the district courts have nurtured that seed to the point where it has developed its own root system, anchoring it into the field where fundamental rights are found.

An expansion of the ninth amendment might occur one day provided the Supreme Court becomes convinced that such an expansion is necessary. Ultimately, the ninth amendment's potential may not begin to be seriously explored until such time as the Justices of the Supreme Court are confronted with a political or judicial climate which compels them to seek out reliance on unchartered constitutional guarantees.[103]

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102. 325 F. Supp. at 739.

103. A recent case which gives some sense of the direction in which the Court is headed with the ninth amendment is the opinion in Richmond Newspaper Inc. v. Virginia, 448 U.S. 555 (1980). Only Justices White and Stevens joined in Chief Justice Burger's opinion. Justice William Rehnquist registered the only dissent, while others wrote concurring opinions. Writing for the Court, Chief Justice Burger found that the right of the public and the press to attend crimi-

nal trials is guaranteed under the first and fourteenth amendments and could be restricted only upon a showing of an "overriding interest." The first amendment, Burger argued, "can be read as protecting the right of everyone to attend trials so as to give meaning to . . . [the] explicit guarantees [such as freedom of speech and press]." To support this contention, Justice Burger invokes the ninth amendment, reviewing briefly the Federalists' and Anti-Federalists' debate over the formulation of the Bill of Rights. Justice Burger concluded, in a footnote, that James Madison's efforts to end the debate "culminate[d] in the Ninth Amendment, [and] served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others." *Id.* at 579, n.15. *See also supra* note 25.