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Constitutional Law—Abortions: Abortion as a Ninth Amendment Right.—Babbitz v. McCann, 310 F.Supp. 293 (E.D.Wis. 1970), appeal dismissed per curiam, 91 S. Ct. 12 (1970)

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CONSTITUTIONAL LAW—ABORTIONS: ABORTION AS A NINTH AMENDMENT RIGHT.— *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970), *appeal dismissed per curiam*, 91 S. Ct. 12 (1970).

Plaintiff, a physician, allegedly performed a “nontherapeutic” abortion upon a woman carrying an unquickened fetus and was subsequently prosecuted under the Wisconsin abortion statute.¹ He brought suit in federal district court to enjoin enforcement of the statute and to obtain a declaratory judgment that the statute was unconstitutional. The injunction was denied, but the declaratory judgment was granted.² *Held*: The state may not deprive a woman of her ninth amendment right to decide whether to carry or reject an unquickened child. *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970), *appeal dismissed per curiam*,³ 91 S. Ct. 12 (1970).

The *Babbitz* decision is a departure from traditional constitutional law. Prior to *Babbitz* few courts had relied upon the ninth amendment to protect an unenumerated right⁴ and no court had invalidated an

1. WIS. STAT. ANN. § 940.04 (1958) provides as follows:

(1) Any person, other than the mother, who intentionally destroys the life of an unborn child may be fined not more than \$5,000 or imprisoned not more than 3 years or both.

(5) This section does not apply to a therapeutic abortion which:

(a) Is performed by a physician; and

(b) Is necessary, or is advised by 2 other physicians as necessary, to save the life of the mother; and

(c) Unless an emergency prevents, is performed in a licensed maternity hospital.

(6) In this section “unborn child” means a human being from the time of conception until it is born alive.

2. The injunction was denied, as the court did not believe the circumstances in the case warranted an exception to the anti-injunction policy set out in 28 U.S.C. § 2283 (1964) and case precedent. *Douglas v. City of Jeanette*, 319 U.S. 157, 163 (1943); *Cameron v. Johnson*, 390 U.S. 611 (1968). The court was free to grant a declaratory judgment since the Supreme Court has ruled that a district court may decide “. . . the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction.” *Zwickler v. Koota*, 389 U.S. 241, 254 (1967).

3. Defendant appealed directly to the Supreme Court under 28 U.S.C. § 1253 (1964). The appeal was dismissed on the authority of *Mitchell v. Donovan*, 398 U.S. 427 (1970) and *Gunn v. University Committee to End the War*, 399 U.S. 383 (1970). These cases hold that the Supreme Court lacks jurisdiction under 28 U.S.C. § 1253 to review the granting of a declaratory judgment by a district court.

4. The ninth amendment states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

The Supreme Court has seldom dealt directly with the ninth amendment and has never protected a right on purely ninth amendment grounds. Although the Supreme Court’s decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965), was partially based on the ninth amendment, the Court has not found it subsequently necessary to rely upon the ninth amendment. Between the *Griswold* and *Babbitz* decisions federal courts

abortion statute on ninth amendment grounds.⁵ This infrequent use of the ninth amendment would seem contrary to both the language and history of the amendment.⁶ The amendment was specifically included within the Bill of Rights in order to safeguard rights not spelled out in the Constitution. The rights reserved⁷

were to be of a nature comparable with the rights enumerated. They were 'retained . . . by the people' not because they were different from the rights specifically mentioned in the Constitution, but because words were considered inadequate to define all of the rights which man should possess in a free society.

Because the Supreme Court has not used the ninth amendment as envisioned, it has needed to employ other tools to protect unenumerated rights. The Court has often broadened the scope of enumerated rights to include unenumerated ones⁸ and has used the "due process" clauses of the fourteenth⁹ and the fifth¹⁰ amendments to strike down

relied upon the ninth amendment but three times. *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969) (the right to wear one's hair at any desired length is protected by the first or ninth amendment); *accord*, *Reichenberg v. Nelson*, 310 F. Supp. 248 (D. Neb. 1970); *Crossen v. Fatsi*, 309 F. Supp. 114 (D. Conn. 1970) (the liberty to dress as one desires is protected by the ninth amendment). At least two federal courts have subsequently utilized the ninth amendment. *Dunham v. Pulsifer*, 312 F. Supp. 411, 418 (D. Ver. 1970) (the right to choose one's hair style is protected by the "first, ninth or fourteenth amendments, or any combination of the above"); *Mindel v. United States Civil Service Comm.*, 312 F. Supp. 485 (N.D. Cal. 1970) (post office termination of clerk's job, because of his private sexual life, held violative of "due process" and the ninth amendment).

See Kent, *Under the Ninth Amendment What Rights are the "Others Retained by the People?"*, 29 FED. B.J. 219, 222-24 (1970) for a summary of court decisions in which ninth amendment claims have been rejected.

5. Prior to *Babbittz* two courts had invalidated abortion statutes on vagueness grounds. *People v. Belous*, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970); *United States v. Vuitch*, 305 F. Supp. 1032 (D.D.C. 1969), *rev'd*, 39 U.S.L.W. 4453 (U.S. April 21, 1971). The Supreme Court held that the statute involved in *Vuitch* was not unconstitutionally vague.

6. The history of the adoption of the ninth amendment is discussed in B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* (1955) [hereinafter cited as PATTERSON]; Comment, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814, 815-25 (1966).

7. Redlich, *Are There "Certain Rights . . . Retained by the People?"*, 37 N.Y.U.L. REV. 787, 810, 811 (1962) [hereinafter cited as Redlich].

8. *E.g.*, *Schneider v. Smith*, 390 U.S. 17, 25 (1968) (first amendment protects freedom of association); *accord*, *NAACP v. Button*, 371 U.S. 415, 437 (1963); *Louisiana v. NAACP*, 366 U.S. 293, 296 (1961).

9. *E.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967) ("due process" protects the liberty to marry an individual of another race); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) ("due process" protects the freedom of parents to direct the education and upbringing of children under their control); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("due process" protects the liberty to establish a home and bring up children).

10. *E.g.*, *Bolling v. Sharpe*, 347 U.S. 497 (1954) ("due process" protects the liberty to attend a non-segregated school).

legislation that deprives individuals of "liberty"—particularly liberty in private family matters.¹¹

*Griswold v. Connecticut*¹² is the only decision in which the Supreme Court has utilized the ninth amendment to protect an unenumerated right. In *Griswold* the Court found a Connecticut statutory ban on the use of contraceptives violative of the right of marital privacy. Justice Douglas, in his opinion for the Court, demonstrated that the first, third, fourth and fifth amendments protect various aspects of individual privacy,¹³ and apparently derived the right of marital privacy from these guarantees by using the ninth amendment as a rule of construction.¹⁴ Justice Goldberg, in a concurring opinion, used the ninth amendment as a rule of construction¹⁵ to discover the right of marital privacy within the "liberty" protected by the fourteenth amendment.¹⁶

Both Justices Douglas and Goldberg indicated that while the state could regulate marital behavior, the birth control statute unneces-

11. *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965). In *Griswold*, although some justices relied on the ninth amendment, the only ground generally agreed upon by the Court was the "due process" clause of the fourteenth amendment. Justices White and Harlan based their decisions on the fourteenth amendment alone. *Id.* at 499-507.

12. 381 U.S. 479 (1965).

13. *Id.* at 482-84.

14. Because Justice Douglas used the ninth amendment broadly to construe specific Bill of Rights provisions, rather than seeing the amendment alone as protective of marital privacy, he evidently believes that the ninth amendment is a rule of construction and not a source of fundamental rights. The conclusion that Justice Douglas views the ninth amendment in this light is supported by his concurring opinion in *Osborn v. United States*, 385 U.S. 323 (1966), where he quoted with approval a law review note which had treated the ninth amendment as a rule of construction. 385 U.S. at 352-53, n.15.

Those who view the ninth amendment as a rule of construction perceive it as a guidepost, pointing to other parts of the Constitution as the contexts within which unenumerated rights are to be discovered. Former Justice Goldberg is of this school; he explicitly denied that the ninth amendment is a source of fundamental rights. *Griswold*, 381 U.S. at 492. He instead used the ninth amendment to justify construing the "liberty" protected by the fourteenth amendment to include the right of marital privacy. *Id.* at 486.

Commentators disagree about the correct interpretation of the ninth amendment. For articles treating the ninth amendment as a rule of construction, see Kutner, *The Neglected Ninth Amendment: The "Other Rights" Retained by the People*, 51 MARQ. L. REV. 121 (1967); Franklin, *The Ninth Amendment as Civil Law Method and Its Implications for Republican Form of Government: Griswold v. Connecticut; South Carolina v. Katzenbach*, 40 TUL. L. REV. 487 (1966); Comment, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814 (1966).

For articles treating the ninth amendment as an independent source of rights, see Ratner, *The Function of the Due Process Clause*, 116 U. PENN. L. REV. 1048, 1068-69 (1968); Redlich, *supra* note 7; and PATTERSON, *supra* note 6.

15. See note 14, *supra*.

16. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV (emphasis added).

sarily invaded the right of marital privacy. The Justices set out a strict test for permissible state invasion of rights discovered through the ninth amendment,¹⁷ implicitly rejecting the holding of *United Public Workers v. Mitchell*¹⁸ that the government can infringe upon ninth amendment rights whenever it has the power to legislate in a particular area.

Griswold was the Supreme Court's most complete discussion of the ninth amendment at the time that Dr. Babbitz challenged the Wisconsin abortion statute. In determining the constitutionality of the statute, the *Babbitz* court first rejected vagueness¹⁹ and equal protection²⁰ arguments. The court responded to plaintiff's argument that the statute abridged a mother's right of privacy²¹ by asserting that the law infringed upon a specific private right protected by the ninth amendment—the right to decide whether or not to bear an unquickened child.²² The court supported its determination of this right by dis-

17. Both Justice Douglas and Justice Goldberg stressed that the state could not infringe upon the right of marital privacy through a statute that was "unnecessarily broad." *Griswold*, 381 U.S. at 485, 498. In addition, Justice Goldberg maintained that a state could not encroach upon this fundamental right unless it demonstrated a "compelling interest." *Id.* at 497-98.

18. 330 U.S. 75 (1947). In *United Public Workers*, a case challenging the constitutionality of the Hatch Act's prohibition on political activity, the Court recognized a right to engage in political activity. The Court refused to protect this right, however, because Congress had the power to regulate the activities of government employees. The Court noted: "If granted power is found, necessarily the objection of invasion of these rights, reserved by the Ninth and Tenth Amendments, must fail." *Id.* at 96.

19. 310 F. Supp. at 297-98. The challenged words in the Wisconsin statute, "necessary, to save the life of the mother," are similar to those in a repealed California statute ("necessary to preserve her life"). Ch. 99, § 45 [1850] Cal. Sess. Laws 233, as amended by ch. 528, § 1 [1935] Cal. Sess. Laws 1605. This later statute was declared unconstitutionally vague by the California Supreme Court. *People v. Belous*, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), cert. denied, 397 U.S. 915 (1970). The *Babbitz* court, commenting on the *Belous* opinion, stated: "[W]e do not share the view of the majority in *Belous* that such language is so vague that one must guess at its meaning." 310 F. Supp. at 298. See note 5, *supra*.

20. 310 F. Supp. at 298. Plaintiff contended that the statute denied him equal protection because medical facilities were not constant throughout Wisconsin. Consequently, doctors in rural and urban areas might not always find it "necessary" to perform abortions in the same type of case. In addition, plaintiff urged that the statute denied poor women equal protection, since they, unlike wealthy women, could not afford to obtain safe and legal abortions by journeying to other locales. Although the *Babbitz* court found "more cogency" in this latter argument, they rejected it. They stated: "We are reluctant to equate these types of inequality with a denial of a protected right under the fourteenth amendment." *Id.*

21. *Id.* at 295.

22. *Id.* at 299, 302. It is unclear from the court's opinion whether plaintiff argued that the right to privacy is a ninth amendment right or whether the court raised the point on its own motion.

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cussing prior Supreme Court opinions,²³ including *Griswold*, and by alluding to federal district court²⁴ and state supreme court²⁵ opinions on abortion.

After "establishing" the ninth amendment right to an abortion, the *Babbitz* court prescribed a test for determining the validity of state regulation of this ninth amendment right: a state can only infringe upon a fundamental right if it has a "compelling interest," and then only through a narrowly drawn statute.²⁶ The court derived this test both from the *Griswold* opinion²⁷ and from the statement in *Bates v. City of Little Rock*²⁸ that, "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."

The tribunal in *Babbitz* concluded that the abortion statute could not survive this test.²⁹ The state could not justify the statute as a health measure, since abortions are now relatively safe. Nor could the statute be justified as a means of discouraging non-marital sexual intercourse, since the broad abortion statute did not make any distinction between married and unmarried women. Finally, the state was unable to justify the statute by asserting an interest in the continued existence of the fetus, because the court arbitrarily stated that the mother's interest was superior to that of an unquicken child, thereby deftly avoiding all philosophical arguments on the relative interests of mother and unborn child.

23. See cases cited note 9, *supra*. The court would appear correct in concluding that these prior Supreme Court decisions are suggestive of a right to abortion. It can be argued, however, that Supreme Court pronouncements do not compel a conclusion that the right to abortion is a *ninth amendment* right. Except in *Griswold*, the Supreme Court has never utilized the 9th amendment to protect familial privacy. Since *Griswold*, the Supreme Court has not relied upon the ninth amendment in any opinion.

24. *United States v. Vuitch*, 305 F. Supp. 1032, 1035 (D.D.C. 1969), *rev'd*, 39 U.S.L.W. 4453 (U.S. April 21, 1971). The district court speculated that a woman's right of privacy might include the right to remove an unwanted child in early stages of pregnancy. The Supreme Court did not deal with this issue. See note 5, *supra*.

25. *People v. Belous*, 71 Cal. 2d 954, 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1969), *cert. denied*, 397 U.S. 915 (1970). The *Belous* court noted: "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex."

26. 310 F. Supp. at 301.

27. In *Griswold* the Court stated: "A governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." 381 U.S. at 485.

28. 361 U.S. 516, 524 (1960).

29. 310 F. Supp. at 301.

The decision to treat abortion as a fundamental right can be attacked on at least two grounds: 1) the court may have expanded the concept of "fundamental rights" to an undue extent by including abortion,³⁰ and 2) the court failed to provide any reasoned support for its conclusion "that the mother's right transcends that of such an embryo."³¹ The purpose of this Note, however, is not to criticize the court but rather to ascertain what conclusions the court has drawn about the purpose and use of the ninth amendment and to describe, where appropriate, alternative approaches to those taken by the court.

Examination indicates that the court has implicitly drawn five conclusions about the ninth amendment. First, the court has concluded that the ninth amendment is a source of fundamental rights rather than a rule of construction.³² This conclusion is evidenced by reliance on the ninth amendment alone to protect the right of abortion. Had the court believed that the ninth amendment was a rule of construction, it would have used the amendment as in *Griswold*, to interpret liberally other constitutional provisions, and would then have concluded that the ninth amendment, coupled with these other constitutional guarantees, protects the right to an abortion.

The court's conclusion that the ninth amendment is a source of fundamental rights is supported by both the wording and history of the amendment. The ninth amendment was adopted in order to insure that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."³³ This language is certainly not typical of a rule of construction.³⁴ Nor has the United States Supreme Court ever asserted that the ninth amendment is *not* a source of fundamental rights.³⁵

30. See notes 44-51 and accompanying text, *infra*.

31. 310 F. Supp. at 301.

32. See note 14, *supra*.

33. U.S. CONST. amend. IX.

34. One commentator argues:

Nor does the language of the ninth amendment or the context of its enactment indicate that it was designed simply as a canon of liberal constitutional construction, a kind of necessary and proper clause saying, in effect: The provisions of the foregoing amendments shall be liberally construed to extend to those rights implied therein though not expressly set forth. Madison would not likely have used the oblique language of the amendment and of his congressional explanation to express that conventional legal idea.

Ratner, *The Function of the Due Process Clause*, 116 U. PENN. L. REV. 1048, 1069 (1969).

35. In *United Public Workers v. Mitchell*, 330 U.S. 75 (1947) the Supreme Court

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Only in *Griswold*, where the Court used the ninth amendment together with other constitutional provisions to vindicate the right of marital privacy, did the Supreme Court give any indication that the ninth amendment may only be a rule of construction. Yet, even in *Griswold*, the majority did not aver that the ninth amendment cannot be used by itself to protect unenumerated rights.³⁶

A second implicit conclusion of the *Babbitz* court was that the ninth amendment is a direct restriction on state activity. This conclusion is evidenced by the court's reliance on the ninth amendment alone rather than on the ninth and fourteenth amendments as the basis of its decision.³⁷ Most commentators, in contrast to the *Babbitz* court, would apply the ninth amendment to the states through the fourteenth amendment.³⁸

A third conclusion drawn by the *Babbitz* court about the ninth amendment was that a state can infringe upon a ninth amendment right only if it demonstrates a "compelling interest" and then only through a narrowly drawn statute.³⁹ The court therefore utilized the

implicitly acknowledged that the ninth amendment is a source of fundamental rights. The Court stated: "We accept appellants' contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments are involved. The right claimed as inviolate may be stated as the right of a citizen to act as a party official or worker" *Id.* at 94.

36. See note 14 and accompanying text, *supra*.

37. However, even if the court had concluded that the ninth amendment is only directly restrictive of federal activity, it could still have protected the right to an abortion by holding that the "due process" clause of the fourteenth amendment incorporates or absorbs ninth amendment guarantees. Most of the enumerated Bill of Rights protections have been applied to the states through the fourteenth amendment. *E.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (sixth amendment right to jury trial); *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963) (sixth amendment right to counsel); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (first amendment freedom of speech and press). Justices Black and Douglas believe that the fourteenth amendment safeguards all of the Bill of Rights liberties from state infringement. *E.g.*, *Duncan v. Louisiana*, 391 U.S. at 163 (concurring opinion); *Gideon v. Wainwright*, 372 U.S. at 346 (concurring opinion). Many other Supreme Court justices, however, have concluded that the fourteenth amendment does not absorb or incorporate all of the Bill of Rights protections. *E.g.*, *Duncan v. Louisiana*, 391 U.S. at 172 (dissenting opinion); *Malloy v. Hogan*, 378 U.S. 1, 4 (1964).

To hold that the ninth amendment operates directly on state activity and not through the fourteenth amendment may suggest that it also directly restricts private interferences with ninth amendment rights. See notes 54-55 and accompanying text, *infra*.

38. *E.g.*, Redlich, *supra* note 7, at 805-06; Comment, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814, 831 (1966). But see PATTERSON, *supra* note 6, at 36-43. In *Breen*, 419 F.2d at 1034, *Reichenberg*, 310 F. Supp. at 248, and *Crossen*, 309 F. Supp. at 114, the ninth amendment is applied to the states through the due process clause of the fourteenth amendment. See note 4, *supra*.

39. See text accompanying notes 26-28, *supra*. By adopting this standard the *Babbitz* court rejected the conclusion of *United Public Workers*, 330 U.S. at 75. See note 18, *supra*.

same standard of protection for a ninth amendment right that the Supreme Court has adopted to protect first amendment rights⁴⁰ and the unenumerated rights of travel⁴¹ and marital privacy.⁴² It was appropriate for the district court to develop a stringent test for encroachment of ninth amendment rights, since these protections were originally designed to be as rigorous as the more specific Bill of Rights guarantees.⁴³

A fourth conclusion implicit in *Babbitz* was that the method of stare decisis should be used to identify ninth amendment rights. This conclusion may be inferred from the court's methodology, *i.e.* an examination of prior court decisions and the rights protected therein.⁴⁴

The method of stare decisis, used alone, does not appear to be an adequate methodology through which to identify ninth amendment rights. There is no assurance that courts will identify as ninth amendment rights only those interests that are of an importance comparable to enumerated rights. The right to an abortion, for instance, is arguably not of the same significance as freedom of the press or speech. The unenumerated rights of privacy and self determination,⁴⁵ however, do seem to be of this stature. Moreover, the method of stare decisis will not preclude courts from identifying an abundance of special interests as ninth amendment rights. If courts begin to label all special interests as "rights," the word "right" will cease to have special meaning and status.

The following criteria would seem useful in determining what rights are protected by the ninth amendment.⁴⁶

1. The right should meet the test of historic justification. Historical evidence must show that the right is not a new creation.

40. *E.g.*, *Elfbrandt v. Russel*, 384 U.S. 11, 18 (1966); *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Talley v. California*, 362 U.S. 60, 66 (1960).

41. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (invalidation of a statute abridging the right to travel because the state did not demonstrate a "compelling interest").

42. *Griswold*, 381 U.S. at 485.

43. See note 7 and accompanying text, *supra*.

44. See notes 23-25 and accompanying text, *supra*.

45. If courts were to recognize the right of self determination, as a ninth amendment right, abortion could be considered one form of behavior protected by this guarantee. Similarly, freedom of the press now protects various forms of activity, including the distribution of handbills. *Talley v. California*, 362 U.S. 60 (1960).

46. Comment, *Ninth Amendment Vindication of Unenumerated Rights*, 42 *TEMPLE L.Q.* 46, 54, 55 (1968).

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2. The right should be pervasive. It must be a right that most citizens exercise or could exercise frequently.
3. The right should encroach minimally on the exercise of fundamental rights by others.

Had the instant court tested the right to an abortion on the above scale, it might have concluded that this right fails to meet two, or perhaps all three, criteria.⁴⁷ Freedom of speech and the right to privacy, in contrast, pass all of the forenamed tests.

The *Babbitz* tribunal could also have employed a process of "analogy to constitutional text"⁴⁸ to determine whether the right to an abortion is a ninth amendment right. To use this method courts should first study the specific rights and governmental patterns protected by our Constitution, in order to discern the ideals reflected. Then, after perceiving these underlying values, they can better deduce which interests are ninth amendment rights. Justice Douglas used this analogic technique in *Griswold* to discover the right of marital privacy. By thorough study of the interests protected by the first, third, fourth, and fifth amendments, he was able to conclude that our constitutional system protects the privacy of the individual.⁴⁹ Had the *Babbitz* tribunal employed this procedure it might not have concluded that the right not to bear a child is a ninth amendment right.⁵⁰

The method of "analogy to constitutional text" would seem to be a valuable aid in the search for ninth amendment rights. Since this technique requires intensive study of the Constitution, it should at least partially ensure that only basic and pervasive interests will be identified as ninth amendment rights. The method of "analogy,"

47. Abortion has not been long basic to our way of life or the abortion issue would not be presented in the way it is today. Nor is the right to abortion pervasive. Neither men, nor women after the menopause can ever expect to exercise it. Finally, many individuals believe that abortions encroach upon the rights of an unquickened child.

48. A number of scholars believe that the method of "analogy" should be used to fill in the content of the ninth amendment. E.g., Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 37-45 (1970); Franklin, *The Ninth Amendment as Civil Law Method and Its Implications for Republican Form of Government: Griswold v. Connecticut; South Carolina v. Katzenbach*, 40 TUL. L. REV. 487 (1966).

49. 381 U.S. at 482-485.

50. It can be argued that the Constitution does not protect any rights analogous to the "right" to an abortion. The nineteenth amendment is the only amendment to secure for women a specific right, the right to vote. The guarantee of suffrage, however, differs from the "right" to an abortion in that it involves freedom of choice in political rather than personal matters.

however, should not be used alone, since the Constitutional text may not contain the basis of all man's rights. Instead, to determine ninth amendment rights courts should initially use both the methods of "analogy" and stare decisis. Then, any possible "rights" discovered through this process should be evaluated in light of the three point scale set out above.⁵¹

The fifth conclusion implicit in the *Babbitz* decision is that the ninth amendment is a viable tool for the protection of unenumerated rights. The court declined to rest its decision on the "due process" clause of the fourteenth amendment and therefore bypassed an opportunity to state that the "liberty" protected by the fourteenth amendment includes the liberty to obtain an abortion. This expanded view of the due process clause is suggested by prior Supreme Court opinions.⁵²

The *Babbitz* court did not indicate why it chose to utilize the ninth rather than the fourteenth amendment as the basis for its decision. Perhaps the *Babbitz* judges shared the general judicial distaste for fourteenth amendment substantive "due process."⁵³ Alternatively, the tribunal may have believed that a new constitutional tool would better serve the needs of present society. Today, because of the advances in science and the individualism of youth, a host of new rights press for recognition, e.g. the right to sexual freedom, the right to work, the right to an abortion, and the right to wear long hair. Courts may prefer to deal with those new interests through an amendment that is not laden with precedent.

An additional possibility is that the *Babbitz* court chose to utilize the ninth amendment because it recognized that the amendment may

51. See note 46 and accompanying text, *supra*.

52. See notes 9 and 23, *supra*.

53. The "due process" clause of the fourteenth amendment was used extensively during the first third of the 20th century to invalidate state social and economic legislation which was perceived as infringing upon unenumerated rights. See, e.g., *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Lochner v. State of New York*, 198 U.S. 45 (1905). Later, many of these earlier opinions were reversed. The Supreme Court recognized that it had often substituted its own judgment for that of the legislature and refused to do so any longer. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952); *West Coast Hotel Co. v. Parish*, 300 U.S. 379 (1937). Courts are now reluctant to invalidate social legislation on fourteenth amendment substantive grounds, as they are mindful of past abuse.

It should be noted, however, that the ninth amendment concept of "unenumerated rights" when viewed as a source of fundamental rights could be used every bit as broadly and as subjectively as "substantive" due process.

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be a restriction on both private and governmental activity. Two ninth amendment scholars have previously suggested this novel proposition,⁵⁴ and the suggestion seems plausible, because the words of the ninth amendment, unlike those of the fourteenth amendment, do not indicate that the provision is only a restriction on state activity.⁵⁵ If the ninth amendment is a limitation on private action, the amendment could be used as an effective tool to protect individuals from the arbitrary acts of unions, professional associations, or corporations.

It is unclear whether the present Supreme Court will follow the lead of the *Babbitz* tribunal in using the ninth amendment to protect unenumerated liberties. After the great changes in constitutional law during the Warren era, the present Court may prefer to stay within established constitutional tradition. *Babbitz*, however, will serve as a reminder to the legal profession that the ninth amendment is a feasible and open tool by which to protect "the other rights retained by the people."⁵⁶

54. PATTERSON, *supra* note 6, at 4; Kutner, *The Neglected Ninth Amendment: The "Other Rights" Retained by the People*, 51 MARQ. L. REV. 121, 141 (1967).

55. Although it is arguable that the ninth amendment was specifically adopted to limit governmental activity, this argument can be countered by pointing out that the Framers believed that man has certain inherent natural rights, which *no one* should be able to encroach upon. See PATTERSON, *supra* note 6, at 4, 19-21. Had the drafters of the ninth amendment recognized that the unions and corporations of the 20th century would become as great a threat to liberty as the governments of the 18th century, they might well have provided expressly that the ninth amendment restrict non-governmental power.

56. For a discussion of rights which could be protected by the ninth amendment, see Kent, *Under the Ninth Amendment What Rights Are the "Others Retained by the People?"*, 29 FED. B.J. 219, 226-37 (1970); Kutner, *The Neglected Ninth Amendment: The "Other Rights" Retained by the People*, 51 MARQ. L. REV. 121, 134-42 (1967).