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ABSTRACT. Concern about individual rights and the desire to protect them has been part of our nation since its founding, and continues to be so today. The Ninth Amendment was created to assuage the Framers' concerns that enumerating some rights in the Bill of Rights would leave unenumerated rights unrecognized and unprotected, affirming that those rights are not disparaged or denied by their lack of textual support. The Ninth Amendment has appeared infrequently in our jurisprudence, and Courts initially construed it rather narrowly. But starting in the 1960s, the Ninth Amendment emerged as a powerful tool not just for recognizing unanticipated rights, but for protecting or expanding even enumerated rights. The right to privacy—encompassing the right to contraception and abortion—the right to preserve the integrity of your family, the right to vote, the right to own a firearm as an individual—all these rights have been asserted under and found to be supported by the Ninth Amendment. In its *Dobbs v. Jackson Women's Health* decision overturning *Roe*, the Supreme Court found that there is no right to abortion because it is not in the Constitution. But the potential of the Ninth Amendment is such that reproductive choice need not be mentioned in the Constitution to be protected. Reproductive choice may rightfully be considered as part of a right to privacy, an unenumerated right that nevertheless has abundant precedent behind it. The Ninth Amendment, and its counterparts found in many state constitutions, has the power to protect not just reproductive choice, but all of our fundamental rights.

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I. INTRODUCTION

The Ninth Amendment is a sparse bit of text, and compared to some of the other amendments, a relatively lesser-explored piece of the Bill of Rights. It is filled with potential for protecting rights that were unrecognized and unanticipated at our nation's founding. This paper examines the history of the Ninth Amendment as a means to assess its potential. In its entirety, the Ninth Amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." [2]

The Ninth Amendment is a tacit admission that neither the Constitution nor the Bill of Rights could anticipate and protect the full spectrum of inalienable human rights.[3] Some argue that the Ninth Amendment is not meant to guarantee protection for unnamed rights, but rather to delineate boundaries for the federal government.[4] However, seen in the context of its creation as a method for protecting individual liberties, it is reasonable and recommended that we recognize it as such, and thereby grant full protection to rights that were unanticipated at the founding of the nation, but are no less fundamental for their lack of enumeration.

The Ninth Amendment has tremendous rhetorical utility and has been appealed to as a source of rights at various times throughout American jurisprudence, sometimes successfully and sometimes unsuccessfully. Courts have found support for property rights,[5] voting rights,[6] and the right to contract[7] under its protection, but the Ninth Amendment has never been the sole foundation for a Supreme Court ruling.

For the purposes of finding protection for reproductive choice under the Ninth Amendment, there is a clear jurisprudential point of reference: the 1965 Supreme Court case of *Griswold v. Connecticut*.[8] *Griswold*, which recognized the right of married couples to buy and use contraception, is the case that first established a right to privacy under the Ninth Amendment, using the concept of "penumbral" rights;[9] those rights that are "held to be guaranteed by implication" rather than specified in the text of the law.[10] This

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[2] U.S. Const. amend. IX.
[3] Michael Levy, *Ninth Amendment, ENCYC. BRITANNICA (May 13, 2020).* https://www.britannica.com/topic/Ninth-Amendment.
[4] The Ninth Amendment has not as yet been incorporated as applying to the individual states, but its protections still have bite, even when applied only to the federal government; see also Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV., Jan. 2011, at 498.
[5] Magill v. Brown, 16 F.Cas. 408 (1833) (right of charitable organizations to own property).
[6] State ex rel. Mullen v. Howell, 107 Wash. 167 (1919) (right of citizens to vote on a referendum).
[7] Adkins v. Children's Hosp., 261 U.S. 525 (1923) (right to contract for wages, discussed further in section I).
[8] Griswold v. Connecticut, 381 U.S. 479 (1965).
[9] *Id.* at 485.
[10] *Penumbra*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/penumbra (last visited Oct. 3, 2023).

"penumbra" concept is behind the Supreme Court's substantive due process jurisprudence; that the inherent fundamental nature of certain personal and relational rights requires that they be protected.[11] The *Dobbs* decision was explicit that it is not overturning *Griswold*, but Justice Thomas's concurrence casts doubt on that assertion, as well as questioning the entire structure of substantive due process. But the Ninth Amendment need not be interpreted so narrowly as to be dependent on substantive due process to protect reproductive choice.

In this paper I will explore (II) the pre-*Griswold* application of the Ninth Amendment in American jurisprudence; and (III) the recognition of a Ninth Amendment right to privacy in the *Griswold* holding and Justice Douglas's concurrence to the holding, as well as the creation of the penumbra doctrine in relation to it. In (IV), I will briefly discuss the recognition of other rights under the Ninth Amendment; and in (V), I will examine post-*Griswold* Ninth Amendment right-to-privacy jurisprudence. In (VI), I will consider the limitations of the Ninth Amendment, and finally, I will conclude in (VII) that the Ninth Amendment, on its own as well as through the penumbra doctrine, implicitly contemplates and encompasses the fundamental human right of privacy regarding control over one's reproductive choices.

II. PRE-GRISWOLD NINTH AMENDMENT JURISPRUDENCE

The Bill of Rights—the first ten amendments to the Constitution—was conceived, created, and ratified to address a concern that had loomed large in the raging debate during the Constitutional Convention. The delegates to the Convention disagreed about the best way to protect individual rights, with the Federalist faction concerned that enumerated rights would leave other, unenumerated rights unprotected, and the Anti-Federalist faction concerned that leaving individual rights unenumerated in a Bill of Rights would give too much power to the Federal Government.[12] Ultimately, all but three of the Convention delegates signed and ratified the Constitution *sans* Bill of Rights,[13] with a promise secured by the Anti-Federalists that a Bill of Rights would be added.[14]

The Federalists and Anti-Federalists may have disagreed about the proper approach to take, but both factions recognized that individual rights needed to be protected. The Ninth Amendment provided a resolution. It was specifically constructed by James Madison[15] to protect individual liberties, recognizing that certain rights had been enumerated, but asserting that the enumerated rights were not an exhaustive list, and that other, unenumerated rights were retained by the people.[16] In short, the Ninth Amendment

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[11] *Substantive Due Process*, CORNELL LAW SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/substantive_due_process (last visited Oct. 3, 2023).
[12] Levy, *supra* note 2.
[13] *The Bill of Rights: How Did it Happen?*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/bill-of-rights/how-did-it-happen (last visited Oct. 3, 2023).
[14] *Id.*
[15] Levy, *supra* note 2.
[16] *Id.*

was intended to ensure that the Bill of Rights was not interpreted to only grant the rights which were explicitly named in the amendments.[17]

Ninth Amendment jurisprudence has typically been in one of two camps: expansive or limited. Some courts have taken the approach that unenumerated rights are unprotected—the exact misconception that the Federalist camp feared during the Constitutional Convention—and have been reluctant to establish rights under the Ninth Amendment. Other courts have been much more willing to find new rights under the auspices of the Ninth Amendment.

To research the historical and modern use of the Ninth Amendment, I conducted a Lexis search for "Ninth Amendment OR 9th Amendment" within Supreme Court cases and sorted them chronologically from oldest to newest. Since *Griswold v. Connecticut* is the first mention of the right of privacy under the Ninth Amendment, and since the right to privacy is the pertinent right being discussed in this paper, I searched for "privacy" within the post-*Griswold* results. Finally, I searched for "ninth amendment AND right" within Supreme Court cases to determine if privacy was the only right that had been recognized by the Court to be under the protection of the Ninth Amendment.

Prior to *Griswold*, only three cases that came before the Supreme Court made any mention of the Ninth Amendment, and the mentions are fleeting and restrained. These cases show a Court with a limited interpretation of the Ninth Amendment. Whether this restraint was born of purposeful intent to not recognize new rights, or of a genuine conviction that there were no new rights being asserted that could be recognized under the auspices of the Ninth Amendment, these cases display the Court's hesitancy to exercise the Ninth Amendment's potential jurisprudential power.

A. Adkins v. Children's Hospital

The first time the Ninth Amendment was mentioned in a Supreme Court case was *Adkins v. Children's Hosp.*[18] In 1918, the District of Columbia passed the Act of September 19, 1918, which established a minimum wage for women and children.[19] The Children's Hospital of the District of Columbia (Hospital) employed a large number of women, with whom it had negotiated "wages and compensation satisfactory to such employees" (according to the Hospital), but which did not meet the standards of the Act.[20] The Hospital brought a suit against the Minimum Wage Board of the District of Columbia to prevent them from enforcing the terms of the Act against the Hospital.[21] The Hospital's counsel argued that requiring a minimum wage without a corresponding required minimum of work

[17] *Ninth Amendment*, CORNELL LAW SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/constitution/ninth_amendment (last visited Oct. 3, 2023).
[18] Adkins v. Children's Hosp., 261 U.S. 525 (1923).
[19] *Id.* at 539.
[20] *Id.* at 542.
[21] *Id.*

quality and quantity was an unlawful taking for private purpose, "contrary to the Fifth Amendment and the Ninth Amendment."[22]

The *Adkins* Court did find a right to contract within the due process guarantees of the Fifth Amendment but did not engage with the assertion of a Ninth Amendment protection against unlawful takings in its holding.[23] In 1937, *Adkins* was overturned by *West Coast Hotel Co. v. Parish*,[24] in which the Court did not mention the Ninth Amendment in its holding. The Court found that although there was a right to contract under the Fifth Amendment, that right was not absolute. The state had a valid concern in the wages paid to women because their care "casts a direct burden for their support upon the community" if they are not paid adequately.[25] Again, there was no mention of a Ninth Amendment protection against takings.

So, the Ninth Amendment's first appearance before the Supreme Court was fleeting and not very impactful. The *Adkins* Court clearly did not see the Ninth Amendment as a powerful tool for the recognition and protection of rights.

B. Ashwander v. TVA

In *Ashwander*, the plaintiffs were stockholders of a power company.[26] The plaintiffs challenged the constitutionality of a contract between the power company and the Tennessee Valley Authority (TVA), which permitted the TVA to purchase transmission lines from the power company, and for the TVA to distribute surplus power from a government-owned dam to the power company.[27] The plaintiffs sought review of a Court of Appeals decision that found the dam had been constructed under Congress's war and commerce powers, and that the surplus energy was the property of the U.S. government, which the TVA had the authority to dispose of as it saw fit.[28] The Court held that the Ninth Amendment "in insuring maintenance of the rights retained by the people does not withdraw the rights which are expressly granted to the Federal Government."[29] Congress had built the dam under its constitutionally-delegated war and commerce powers, the power that was generated was property belonging to the government,[30] and Congress has the power to dispose of its property the way it wishes.[31]

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[22] *Id.* at 538.
[23] *Id.*
[24] West Coast Hotel Co. v. Parish, 300 U.S. 379 (1937).
[25] *Id.* at 399.
[26] Ashwander v. TVA, 297 U.S. 288 (1936).
[27] *Id.* at 315.
[28] *Id.* at 330.
[29] *Id.*
[30] *Id.* at 333.
[31] *Id.* at 330.

Here again, we see a Court with a reserved approach to the Ninth Amendment, unwilling to recognize a new individual right.

C. Tennessee Electric Power Co. v. Tennessee Valley Authority

The Tennessee Valley Authority Act, passed in 1933, authorized the Tennessee Valley Authority (TVA) to construct a series of dams and to sell the electric power generated by the dams.[32] A group of power companies brought suit against the TVA, claiming the Act violated the Ninth Amendment, because the contract would deprive the electric companies of their "guaranteed liberty to earn a livelihood and to acquire and use property subject only to state regulation."[33] The Court found that the TVA had the authority to generate and sell power and was not in violation of the Ninth Amendment.[34] (*Tennessee* was overruled in 2011 by *Bond v. United States*, on the issue of standing, unrelated to this discussion.[35])

These three cases show the inauspicious beginnings of Ninth Amendment jurisprudence, with barely a mention in the only cases to come before the Supreme Court that even mentioned it. No previously-undiscussed rights were established under it; in fact, the Ninth Amendment was only used to disclaim the rights that were asserted. Either there was no desire to establish new rights under it, or there was no perceived need to. This would all change in 1965.

III. GRISWOLD AND THE INSTANTIATION OF NINTH AMENDMENT PRIVACY RIGHTS

The 1960s marked a drastic change in how the Ninth Amendment was understood and used. As opposed to the 150-plus year span in which only three cases mentioned the Ninth Amendment, and then only to deny the establishment of a right under its protection, the post-*Griswold* era has seen 27 cases cite the Ninth Amendment. *Griswold* has been the most influential case in Ninth Amendment jurisprudence, opening the door to an expansive interpretation of the Ninth Amendment's ability to protect fundamental human rights that have been historically denied.

A. Griswold v. Connecticut

In 1965, the case of *Griswold v. Connecticut* came before the Supreme Court.[36] Estelle Griswold was the executive director of the Planned Parenthood League of Connecticut and had opened a medical clinic in New Haven, Connecticut with a gynecologist from the Yale School of Medicine named C. Lee Buxton.[37] Griswold and

[32] Tenn. Elec. Power Co. v. Tenn. Valley Auth., 306 U.S. 118 (1939).
[33] *Id.* at 136.
[34] *Id.*
[35] Bond v. U.S., 564 U.S. 211 (2011).
[36] Griswold v. Connecticut, 381 U.S. 479 (1965).
[37] *An Arrest in New Haven, Contraception and the Right to Privacy*, YALE MED. MAG., https://medicine.yale.edu/news/yale-medicine-magazine/article/an-arrest-in-new-haven-contraception-and-the/ (last visited Oct. 4, 2023).

Buxton were part of a deliberate movement to openly challenge Connecticut's 1879 Comstock Laws by providing contraception.[38] The Comstock Act had been passed in 1873, championed by an anti-vice crusader named Anthony Comstock.[39] The Comstock Act made it a federal offense to "disseminate birth control through the mail or across state lines."[40] 24 states had passed their own Comstock laws to prohibit contraception at the state level, and Connecticut's were by far the most restrictive because they did not just regulate the sale and advertisement of contraceptives; they banned the use of contraceptives altogether.[41] Connecticut's version of the Comstock Laws was championed by none other than P.T. Barnum, the founder of the Barnum and Bailey Circus, who was a state senator during the era of the Comstock Laws. Barnum was responsible for the language that banned the *use* of any contraceptive, and made it a crime to act as an *accessory* to the use of contraception.[42] The statute, § 53-32 of the General Statutes of Connecticut (1958 rev.) (sometimes called the Barnum Act), prohibited the use of "any drug, medicinal article or instrument" in preventing conception. Additionally, § 54-196 stated that "any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted as if he were the principal offender."[43]

Planned Parenthood and other pro-family planning advocates had been advocating repeal of the Barnum Act for decades, but without success.[44] Then the Supreme Court dismissed the case of *Poe v. Ullman* as nonjusticiable,[45] and Justice Harlan's dissent called Connecticut's Barnum law that *Poe* was challenging "an intolerable and unjustifiable invasion of privacy" that violated the Fourteenth Amendment.[46] This signaled that there might finally be enough justices to strike down the Barnum Act.[47]

Planned Parenthood decided to open a medical clinic in New Haven, and Griswold and Buxton gave "information, instruction, and medical advice to married persons as to the means of preventing conception."[48] Within a week of its opening, police arrived and arrested Estelle Griswold and Dr. Buxton and charged them with violating §§ 53-32 and 54-196.[49]

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[38] *Id.*
[39] *Anthony Comstock's "Chastity" Laws*, PBS, https://www.pbs.org/wgbh/americanexperience/features/pill-anthony-comstocks-chastity-laws/ (last visited Oct. 4, 2023).
[40] *Id.*
[41] *Connecticut and the Comstock Law*, CONNECTICUTHISTORY.COM, https://connecticuthistory.org/connecticut-and-the-comstock-law/ (last visited Oct. 4, 2023).
[42] J James I. Glasser & Benjamin M. Daniels, *P.T. Barnum, Justice Harlan, and Connecticut's Role in the Development of the Right to Privacy*, FED. BAR COUNCIL QUARTERLY, https://federalbarcouncilquarterly.org/?p=396 (last visited Nov. 19, 2022).
[43] Griswold v. Connecticut, 381 U.S. 479, 480 (1965).
[44] Glasser & Daniels, *supra* note 42.
[45] Poe v. Ullman, 367 U.S. 497 (1961) (regarding married couples' right to use contraceptives).
[46] *Id.* at 539.
[47] Glasser & Daniels, *supra* note 42.
[48] *Griswold*, 381 U.S. at 480.
[49] *Id.*

This was the moment that Planned Parenthood had been waiting for—Estelle Griswold is reported as having been "overjoyed" to see the police arrive at their clinic.[50] Griswold and Buxton were convicted by the Supreme Court of Errors of Connecticut of violating the Barnum Law, and they appealed to the U.S. Supreme Court.[51] In a 7-2 decision, the Court found ample support to find the Barnum Law unconstitutional, finding a right to privacy in the "penumbras" emanating from the guarantees in the Bill of Rights, including the Ninth Amendment.[52] The Court cited a number of cases involving rights that were found to be protected under various Bill of Rights Amendments.[53] The *Griswold* Court called attention to the fact that rarely in those cases was there specific language protecting, e.g., the right to educate your children, the freedom of association, the freedom of inquiry, and the freedom of thought, but that "without those peripheral rights, the specific rights would be less secure."[54] The Court said, "the foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy."[55] Thus is born the penumbra doctrine as it relates to the Ninth Amendment—the concept that for the enumerated rights to carry any weight in the protection of fundamental human rights, there must be recognition of peripheral rights within the penumbra, or shadow, of the specific rights. Privacy is one such penumbral right.[56] The Court asked, "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship," and said that marriage was "intimate to the degree of being sacred."[57]

Justice Goldberg's compelling concurrence declared that "the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights" and that "it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution."[58] The concurrence argued that this conclusion is supported not only by numerous Court decisions, but also by "the language and history of the Ninth Amendment."[59] It referred to the Court's "penumbra" language finding the right to privacy in the Ninth Amendment, saying, "I add these words to emphasize the relevance of that Amendment to the Court's holding."[60]

Justice Goldberg devoted the major part of his concurrence to exploring the Ninth Amendment's protection of privacy and its origins. He said, "The Framers did not intend

[50] Glasser & Daniels, *supra* note 42.
[51] *Griswold*, 381 U.S. at 480.
[52] *Id.* at 484.
[53] *Id.* at 481-3.
[54] *Id.* at 483.
[55] *Id.* at 484.
[56] *Id.* at 486.
[57] *Id.* at 485-6.
[58] *Id.* at 486.
[59] *Id.* at 487.
[60] *Id.*

that the first eight amendments be construed to exhaust the basic and fundamental rights,"[61] and that the Fourteenth Amendment prohibits not just the Federal Government, but "the States as well from abridging fundamental personal liberties."[62] The existence and text of the Ninth Amendment itself is an indication that there *are* other rights that must be protected, whether or not they are known. As Justice Goldberg said, "to hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever."[63]

Interestingly, though Justice Goldberg stated in his concurrence that "the Court's holding today […] in no way interferes with a State's proper regulation of sexual promiscuity or misconduct," and used State criminalization of homosexuality as an example of this "proper regulation,"[64] *Griswold* is cited heavily in both *Lawrence v. Texas*, which decriminalized homosexual relationships,[65] and *Obergefell v. Hodges*, which legalized same-sex marriage.[66] It is inevitable that once a right is recognized, groups that have been previously denied the exercise of that right will seek to be included under its new sphere of protection. Precedent is a building block for the evolution of rights recognition.

IV. OTHER RIGHTS FOUND UNDER THE NINTH AMENDMENT

After *Griswold,* the Court heard cases asserting a variety of rights in addition to privacy under the protection of the Ninth Amendment. In *Palmer v. Thompson,* a case about a city that closed its municipal pools rather than desegregate them, the Court stated "the right to education or to work or to recreation by swimming […] like the right to pure air and pure water, may well be rights 'retained by the people' under the Ninth Amendment."[67] Though the Court stopped short of explicitly establishing the rights of education, work, and recreation as part of their *Palmer* holding, they did recognize that these rights arguably could be established under the Ninth Amendment. Importantly, the *Palmer* decision also treated privacy as an established right, saying, "the right of privacy, which we honored in *Griswold*, may not be overturned by a majority vote at the polls, short of a constitutional amendment."[68] Clearly, the Court in *Palmer* felt that not only was privacy a constitutional right, but that other rights might be as well.

In *Stanley v. Ill.* a father was seeking custody of his children—their mother had died, and because the mother and father had not been married, the children were declared

[61] *Id.* at 490.
[62] *Id.* at 493.
[63] *Id.* at 491.
[64] *Id.* at 498.
[65] Lawrence v. Texas, 539 U.S. 558 (2003).
[66] Obergefell v. Hodges, 576 U.S. 644 (2015).
[67] Palmer v. Thompson, 403 U.S. 217, 233-4 (1971).
[68] *Id.*at 235.

wards of the state.[69] The Court found that Mr. Stanley was entitled to due process in determining his parental fitness before losing custody of his children, and, citing *Griswold*, reiterated that "the integrity of the family" is a right found under the Ninth Amendment.[70]

In *Hodgson v. Minn.* the Court once again held that "the integrity of the family unit" is a right protected by the Ninth Amendment.[71] In 1981, Minnesota passed a two-parent notification law for minors, which required a physician or the minor's agent to notify the minor's parents at least 48 hours before the minor could receive an abortion, with a judicial bypass option if "the proper authorities" have been notified that the woman[72] is a victim of parental abuse or neglect.[73] The plaintiffs, which included two OB/GYN doctors, four clinics which provided abortion and contraceptive services, six pregnant minors, and the mother of a pregnant minor, brought suit against the state of Minnesota, arguing that the statute violated the Due Process ad Equal Protection Clauses of the Fourteenth Amendment, as well as various provisions of the Minnesota Constitution.[74] The District Court found the parental notification requirement unconstitutional, and the Eighth Circuit Court of Appeals and the Supreme Court affirmed the District Court's findings.[75] The Supreme Court referred to the privacy rights of both the minor[76] and the family, and quoted the Eighth Circuit's language saying that "the family has a privacy interest […] which is protected by the Constitution against undue state interference.[77]

The right to vote in state elections has been asserted in several decisions, for example, in *Wesberry v. Sanders*, with the Court saying, "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[78] However, the asserted right to vote in state elections was not given textual Constitutional support, until the footnotes of *Lubin v. Panish*, where the Court stated that "the right to vote in state elections is one of the rights historically 'retained by the people' by virtue of the Ninth Amendment."[79] The fact remains that the right to vote in state elections is not enumerated, guaranteed by, or even discussed in the text of the Constitution, and it strains credulity to think that this right therefore does not exist. This is a strong indication of the Ninth Amendment doing exactly what it was intended to do—recognize unenumerated rights that are equally fundamental and vital to democracy as the enumerated rights.

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[69] Stanley v. Ill., 405 U.S. 645, 646-7 (1972).
[70] *Id.* at 651.
[71] Hodgson v. Minn., 497 U.S. 417, 447 (1990).
[72] The opinion repeatedly refers to the pregnant minor as a "woman".
[73] *Id.* at 422.
[74] *Id.* at 429.
[75] *Id.* at 423.
[76] *Id.* at 453.
[77] *Id.* at 446.
[78] Wesberry v. Sanders, 376 U.S. 1, 17 (1964).
[79] Lubin v. Panish, 415 U.S. 709, 721 n.* (1974).

In *District of Columbia v. Heller*, the Court found that there is an *individual* right to own a firearm, as opposed to just a *collective* right.[80] The Court found support for this determination in the language of the First, Fourth, and Ninth Amendment's use of the phrase "the people," saying that "all three of these instances unambiguously refer to individual rights, not 'collective' rights."[81] The *Heller* court used the Ninth Amendment to establish a previously unrecognized right—that of an individual to own a firearm.

In *McDonald v. City of Chicago*, another gun-rights case, the Court found that the Second Amendment was incorporated and applicable to the states through the Fourteenth Amendment.[82] The Court referred to "the venerable 'notion that governmental authority has implied limits which preserve private autonomy,' a notion which predates the founding and which finds reinforcement in the Constitution's Ninth Amendment."[83] So, the *McDonald* Court found the Ninth Amendment to be a factor in incorporating the Bill of Rights as applicable to the states, something that helped ensure that fundamental rights could actually be exercised.

Thus, we see that the Court has found the Ninth Amendment to be both a support for exercising enumerated rights, like the right to bear arms, but also a source for recognizing various fundamental unenumerated rights, like privacy of the family and the right to vote in state elections.

V. POST-GRISWOLD NINTH AMENDMENT PRIVACY JURISPRUDENCE

So formative was the expansive *Griswold* treatment of the Ninth Amendment, that of the 26 cases that cite the Ninth Amendment after *Griswold*, 15 of them also cite *Griswold.* Due to the importance of familial and personal privacy to reproductive rights, this section will focus on the post-*Griswold* cases that explored the use of the Ninth Amendment relating to questions of privacy. It will show that the Ninth Amendment, a separate source of the right to reproductive privacy in early abortion cases, was gradually shunted to the background as arguments shifted toward a focus on liberty rather than privacy.

A. Osbourne v. United States

Z.T. Osborn was a criminal defense attorney in Nashville, one of the team of lawyers defending Jimmy Hoffa, the notorious mob-associated labor leader.[84] Osborn had hired Robert Vick, a member of the Nashville Police Department, to conduct background investigations of the people in the jury pool for Hoffa's trial.[85] Unbeknownst to Osborn, and prior to Osborn hiring him, Vick had agreed with federal agents that he would report

[80] District of Columbia v. Heller, 554 U.S. 570 (2008).
[81] *Id.* at 579.
[82] McDonald v. City of Chicago, 561 U.S. 742 (2010).
[83] *Id.* at 863.
[84] Osborn v. U.S., 385 U.S. 323, 324-5 (1966).
[85] *Id.* at 325.

back to them "any 'illegal activities' he might observe."[86] Osborn was charged and convicted of asking Vick to approach potential juror Ralph Elliot and offer Elliot $10,000 for a vote to acquit Hoffa.[87] Some of the evidence that Osborn had asked Vick to do this came from a recording that Vick had surreptitiously made of a conversation between himself and Osborn.[88] Vick had told Osborn on Nov. 7 that he knew some of the prospective jurors, and that Ralph Elliot was his cousin.[89] Vick testified that Osborn asked Vick to approach Ralph Elliot and "see what arrangements could be made about the case."[90] Vick reported this conversation to the federal agents, testified to it in writing, and was authorized by Federal District Court Judges to wear a recording device to his subsequent conversation with Osborn on Nov. 11.

The Court had to answer the question of whether or not Vick's Nov. 11 recording should have been admissible into evidence.[91] Osborn argued that it was entrapment, but the Court held firmly that the recording had been obtained lawfully, in compliance with Fourth Amendment protections against unreasonable searches and seizures.[92]

The issue of Ninth Amendment privacy arose in the dissent.[93] Justice Douglas, who had delivered the *Griswold* opinion, wrote, "Privacy, though not expressly mentioned in the Constitution, is essential to the exercise of other rights guaranteed by it."[94] He spoke out in strong opposition to the decision, finding that the surreptitious recording violated a right to privacy found under the First, Third, Fourth, Fifth, and Ninth Amendments.[95] Justice Douglas stated, "We are rapidly entering the age of no privacy, where everyone is open to surveillance at all times,"[96] and decried what he described as "an alarming trend whereby the privacy and dignity of our citizens is being whittled away by sometimes imperceptible steps."[97] When those seemingly small steps are viewed as a whole, Justice Douglas said, "There begins to emerge a society quite unlike any we have seen—a society in which government may intrude into the secret regions of a man's life at will."[98] Douglas continued, "A free society is based on the premise that there are large zones of privacy into which the Government may not intrude except in unusual circumstances," and that this "aura of privacy" is found in the Bill of Rights, "including the First, Third, Fourth, Fifth, and Ninth Amendments."[99] The Ninth Amendment may not have factored into the majority

[86] *Id.*
[87] *Id.*
[88] *Id.* at 327.
[89] *Id.* at 326.
[90] *Id.*
[91] *Id.*
[92] *Id.* at 330.
[93] *Id.* at 340.
[94] *Id.* at 341.
[95] *Id.*
[96] *Id.* at 341.
[97] *Id.* at 343.
[98] *Id.* at 352.
[99] *Id.*

opinion, but as we see from Douglas's dissent, it was still very much part of an evolving discussion about a fundamental right to privacy.

B. Roe v. Wade

Roe v. Wade is one of the most influential cases to be decided in the wake of *Griswold*, a case that came out of Texas—at that time and presently one of the strictest anti-abortion jurisdictions in the nation.[100] In 1972, it was illegal to perform an abortion, or to "furnish the means for procuring an abortion" except to save the life of the pregnant person, with a two- to five-year prison sentence for violation.[101] Norma McCorvey was a Texas woman with a troubled life and a complicated story, seeking an abortion of her third pregnancy.[102] McCorvey, too poor to afford to leave the state, sued the state of Texas under the pseudonym of Jane Roe, hoping to "be the first girl in Texas to get a legal abortion."[103] Of course, given the typical timeline for a case to make its way through the courts, McCorvey (hereafter Roe) had already given birth and relinquished her baby for adoption by the time the Supreme Court granted certiorari to hear her case.[104]

Roe's argument was that the Texas statutes that prohibited abortion were both vague and a violation of the "right of personal privacy," asserted under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.[105] She was joined in her suit by James Hubert Hallford, a physician who cited his struggles in aiding patients who sought his help, because he was unable to determine whether their cases fit into the exceptions allowed by the Texas law, and argued that the statutes violated his and his patients' First, Fourth, Fifth, Ninth, and Fourteenth privacy rights.[106] (The Court affirmed the lower court's dismissal of one of the parties from the lower case: a childless married couple going by the pseudonyms of John and Mary Doe, who had been advised to not get pregnant because of Mrs. Doe's "neural-chemical" disorder.[107] Mrs. Doe had also ceased taking birth control upon advice from her physician, and the Does asserted that if Mrs. Doe were to become pregnant, they

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[100] Julia Haines et al., *Where State Abortion Laws Stand Without Roe*, U.S. NEWS AND WORLD REP. (Nov. 18, 2022), https://www.usnews.com/news/best-states/articles/a-guide-to-abortion-laws-by-state (accessed Nov. 21, 2022).
[101] María Méndez & Eleanor Klibanoff, *What the end of Roe v. Wade would mean for Texas' past, current and future abortion laws*, TEXAS TRIBUNE (May 4, 2022), https://www.texastribune.org/2022/05/03/texas-abortion-law-roe/ (accessed Nov. 21, 2022).
[102] Emily Langer, *Norma McCorvey, Jane Roe of Roe v. Wade decision legalizing abortion, dies at 69*, WASH. POST (Feb. 18, 2017), https://www.washingtonpost.com/national/norma-mccorvey-jane-roe-of-roe-v-wade-decision-legalizing-abortion-dies-at-69/2017/02/18/24b83108-396e-11e6-8f7c-d4c723a2becb_story.html (accessed Nov. 21, 2022).
[103] Joshua Prager, *The Accidental Activist*, VANITY FAIR (Jan. 8, 2013), https://www.vanityfair.com/news/politics/2013/02/norma-mccorvey-roe-v-wade-abortion (accessed Nov. 21, 2022).
[104] *Id.*
[105] Roe v. Wade, 410 U.S. 113, 120 (1973).
[106] *Id.* at 121.
[107] *Id.*

would wish to terminate the pregnancy.[108] The Court found that the Does, because they were not currently pregnant, lacked standing.[109])

The Supreme Court considered the question of whether, as was held by the lower court, the Texas statute violated the Ninth and Fourteenth Amendments.[110] They began by acknowledging the "sensitive and emotional nature of the abortion controversy," and recognized that abortion is a topic about which people have very strong opinions, and that issues such as "population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem."[111] But the Court said that their task was to assess the constitutionality of the issue "free of emotion and predilection."[112] They cited Justice Holmes's dissent (which they called "now-vindicated") in *Lochner v. New York*, where he said:

> The Constitution is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.[113]

The Court examined Roe's argument that the right to choose to terminate a pregnancy is in "the concept of personal liberty" found in the Due Process Clause of the Fourteenth Amendment, or in the privacy "said to be protected by the Bill of Rights or its penumbras."[114] The Court related a brief summary of the history of abortion, recognizing the "relatively recent vintage" of the abortion-prohibitive laws that were then on the books, and considered the many interests at play and "the weight to be attached to them."[115] The Court looked at its own prolific case history and agreed that, just as Justice Goldberg recognized in his *Griswold* concurrence, there is no right to privacy found in the text of the Constitution.[116] But the Court stated that, despite the lack of textual protection for privacy, "in a line of decisions" going back eighty years, "the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution," finding it under the penumbras of the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.[117] This right "has some extension to activities relating to marriage, procreation, contraception, family relationships, and child-rearing and education."[118] The Court ultimately determined that whether the privacy right is found

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[108] *Id.*
[109] *Id.* at 129.
[110] *Id.* at 122.
[111] *Id.* at 116.
[112] *Id.*
[113] Lochner v. New York, 198 U.S. 45, 76 (1905) (regarding the right to contract).
[114] Roe v. Wade, 410 U.S. 113, 129 (1973).
[115] *Id.* at 129, 152.
[116] *Id.* at 152.
[117] *Id.*
[118] *Id.* at 152-3.

under the Fourteenth (as they believed) or the Ninth Amendment (as the District Court found), it nonetheless is Constitutionally protected, and is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[119] The Court upheld the lower court's findings, and ruled the Texas law unconstitutional.[120] It declared that pre-viability, the State may not prohibit abortion; that the physician and patient may determine if the pregnancy should be terminated "free of interference by the State," and that the State may only regulate post-viability abortion "to the extent that the regulation reasonably relates to the preservation and protection of maternal health."[121]

Though *Roe* may have been overturned by the recent *Dobbs v. Jackson Women's Health* decision, the *Dobbs* decision is somewhat inaccurate in its description of the legal issue at play in the case. *Dobbs* points to the fact that the right to an abortion established by *Roe* is not found in the Constitution but in the right to privacy, "which is also not mentioned."[122] This tends to imply that the right to privacy is of dubious origin rather than established by over a hundred years of Supreme Court jurisprudence.[123] This is a mischaracterization of the *Roe* argument and disregards the ample jurisprudence, some of which has been examined in this paper, finding that the penumbral right of privacy must be recognized in order to protect the exercise of other fundamental rights.

C. Doe v. Bolton

The same day the Supreme Court decided Roe v. Wade, they decided the similar case of *Doe v. Bolton*, a case out of Georgia, which had similar abortion-restrictive laws to Texas, albeit with a few more exceptions in which abortion was permitted.[124] The facts are similar—a Georgia woman, poor and unable to care for the children she already had, sought an abortion and lacked the financial resources to travel to a state where the procedure was legal.[125] The Court's decision cited their *Roe* reasoning, finding that the Georgia laws were unconstitutional, and that they were a "violation of rights guaranteed her by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments."[126] This case is now "questioned," abrogated by the *Dobbs* decision, but the same logic applies—the right to abortion is not explicit, but it is implicit within the penumbral right of privacy, which is amply supported by Supreme Court jurisprudence, and necessary for the exercise of any other fundamental rights.

D. Planned Parenthood v. Danforth

Planned Parenthood v. Danforth is another reproductive rights case concerning a Missouri law that required a person seeking an abortion to get the permission of their

[119] *Id.* at 153.
[120] *Id.* at 166.
[121] *Id.* at 163.
[122] Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2245 (2022).
[123] Roe v. Wade, 410 U.S. 113, 152 (1973).
[124] Doe v. Bolton, 410 U.S. 179, 181-3 (1973).
[125] *Id.* at 185.
[126] *Id.* at 186.

spouse, or their parents if they were a minor.[127] The Court declared this law unconstitutional, citing the *Roe* language that said whether the right to privacy is found in the Fourteenth or Ninth Amendments, it covers a woman's right to decide whether or not to terminate a pregnancy.[128] *Danforth* is likewise questioned now, post-*Dobbs*, but again, the right being discussed is not a right to *abortion*, but a right to abortion under the right to *privacy*, which is long-settled law.

E. Bowers v. Hardwick

Post-*Danforth*, the nascent recognition of privacy as a Ninth Amendment unenumerated fundamental right functionally lost what steam it had, no longer mentioned explicitly in majority opinions, but relegated to the dissents in unsuccessful attempts to persuade. In the 1986 case of *Bowers v. Hardwick*, the Supreme Court upheld a Georgia law that criminalized sodomy.[129] Hardwick was charged with violating the law after "committing that act with another adult male in the bedroom of [his] home."[130] Hardwick brought a suit in the Federal District Court, arguing that the Georgia statute was unconstitutional for criminalizing consensual sodomy.[131] The District Court dismissed the suit, but the Eleventh Circuit Court of Appeals held that the Georgia statute was in fact unconstitutional, not because there was a guaranteed right to homosexual activity, but because the activity in question "is a private and intimate association that is beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment."[132]

The case came before the Supreme Court, which characterized the issue as whether there is a right to engage in a particular disfavored activity,[133] when in fact, the issue is whether there is a right to *privacy around that activity*, as Justice Blackmun's dissent recognizes.[134] The Court said that the case did not require a judgment on whether anti-sodomy laws are wise or desirable, but merely whether they are constitutional.[135] The Court refused to engage with the lower court's finding of Ninth Amendment protection, and instead went through the cases cited to demonstrate the right to privacy, and distinguished Hardwick's case from them.[136] The Court said, "Accepting the decisions in these cases and the above description of them, we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy."[137] But of course the privacy rights that are cited as established

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[127] Planned Parenthood v. Danforth, 428 U.S. 52, 58 (1976).
[128] *Id.* at 60.
[129] Bowers v. Hardwick, 478 U.S. 186, 197 (1986).
[130] *Id.* at 187.
[131] *Id.* at 188.
[132] *Id.* at 189.
[133] *Id.* at 190.
[134] *Id.* at 199.
[135] *Id.* at 190.
[136] *Id.*
[137] *Id.* at 190-1.

are all unlike each other; the right to educate your child as you choose[138] is arguably no more different from the right to engage in consensual gay sex than it is from the right to interracial marriage[139] or the right to obtain and use contraception.[140]

Justice Blackmun's dissent comprehended this, and described the issue more accurately: this was a case about "the most comprehensive of rights and the right most valued by civilized men, namely, the right to be let alone."[141] A State's prosecution of its citizens for making choices about "the most intimate aspects of their lives" has to be founded on more than an assertion that their choice is objectionable, or "an abominable crime not fit to be named among Christians."[142] He criticized the majority's refusal to engage with Hardwick's Ninth Amendment argument, and mentioned how heavily Hardwick relied on *Griswold*, "which identifies that Amendment as one of the specific constitutional provisions giving 'life and substance' to our understanding of privacy."[143] (*Bowers* was overturned in 2003 by *Lawrence v. Texas*, the Court saying, "Bowers was not correct when decided, and it is not correct today."[144] But to the point about Ninth Amendment privacy no longer carrying the persuasive weight it did under *Roe*, the *Lawrence* decision couches the right not as a right to privacy, but in terms of a right to *liberty* under the Fourteenth Amendment Due Process Clause.)[145]

F. Planned Parenthood v. Casey

Similar to *Danforth*, *Planned Parenthood v. Casey* concerned a Pennsylvania law that required spousal and parental notification prior to obtaining an abortion.[146] But resembling *Bowers* more than *Danforth* in one regard, Ninth Amendment privacy is not mentioned in the majority opinion, but in the dissent. The Court struck down the spousal notification requirement, but upheld the parental notification, with a judicial bypass.[147] *Casey* was a retraction of the rights granted under *Roe*, and is where the "undue burden" analysis of abortion restrictions was born—a state could regulate and restrict abortion, provided that the restrictions did not create an undue burden on the patient.[148]

Justice Stevens's dissent declaimed the Court's unwillingness to grapple with Ninth Amendment privacy.[149] He said the Ninth Amendment "is, despite our contrary

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[138] *Id.* at 190 (citing Pierce v. Society of Sisters, 268 U.S. 510 (1925) and Meyer v. Nebraska, 262 U.S. 390 (1923)).
[139] *Id.* at 190 (citing Loving v. Virginia, 388 U.S. 1 (1967)).
[140] *Id.* at 190 (citing Griswold v. Connecticut, 381 U.S. 479 (1965), and Eisenstadt v. Baird, 405 U.S. 438 (1972)).
[141] *Id.* at 199 (citing Olmstead v. U.S., 277 U.S. 438 (1928) (Brandeis, L., dissenting) (concerning search and seizure through wiretapping)).
[142] *Id.* at 200 (citing Herring v. State, 119 Ga. 709 (1904)).
[143] *Id.* at 201.
[144] *Lawrence*, 539 U.S. at 578.
[145] *Id.*
[146] Planned Parenthood v. Casey, 505 U.S. 833 (1992).
[147] *Id.* at 899.
[148] *Id.* at 878.
[149] *Id.* at 1000.

understanding for almost 200 years, a literally boundless source of additional, unnamed, unhinted-at rights" and called upon the Court to define and enforce such unnamed rights through "reasoned judgment."[150]

Privacy may be an unenumerated right, but, as this paper has shown, it is not an unnamed or unhinted-at right. It has been named and affirmed repeatedly throughout Supreme Court jurisprudence, and it can be found in both the textual intent and the penumbra of the Ninth Amendment.

G. Dobbs v. Jackson Women's Health Organization

By the time the Supreme Court decided *Dobbs v. Jackson Women's Health Organization,* Ninth Amendment privacy had been abandoned. Mississippi passed the "Gestational Age Act," which prohibited abortion after fifteen weeks, "except in a medical emergency or in the case of a severe fetal abnormality."[151] Jackson Women's Health Organization, which is an abortion clinic, sued in Federal District Court on the grounds that the Act violated a constitutional right to abortion.[152] The district court enjoined enforcement of the Act, the Fifth Circuit Court of Appeals affirmed the injunction, and the State appealed to the Supreme Court.[153] The Supreme Court, in a decision authored by Justice Alito, held that "the Constitution does not confer a right to abortion," explicitly overruling *Roe* and *Casey*.[154] The majority distinguished abortion as "inherently different" from other, established privacy rights, but as in the overruled *Bowers*, the strong language of the decision suggests that the differentiation is driven not by an assessment of constitutionality "free of emotion and predilection"[155] but by a distaste for a behavior that is considered objectionable by some because it involves "potential life."[156]

The *Dobbs* decision has wreaked havoc on settled privacy law, which, despite its assurance that "our decision concerns the right to abortion and no other right," has called into question privacy-related jurisprudence going back as far as *Griswold*.[157] Arguments for a limited interpretation of the Court's holding have been seen before, as in Justice Goldberg's *Griswold* concurrence, where he re-asserted the State's ability to regulate adultery and homosexuality,[158] but as we saw with *Lawrence* and *Obergefell*, once law is established, it expands, and now that the Supreme Court has laid the groundwork for retrenchment and retraction of rights, there is no reason to believe that the assault on privacy rights will stop with abortion.

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[150] *Id.*
[151] Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2243 (2022).
[152] *Id.* at 2244.
[153] *Id.*
[154] *Id.* at 2279.
[155] Roe v. Wade, 410 U.S. 113, 116 (1973).
[156] *Id.* at 150.
[157] *Dobbs*, 142 S. Ct. at 2277.
[158] Griswold v. Connecticut, 381 U.S. 479, 498-9 (1965).

VI. LIMITATIONS OF THE NINTH AMENDMENT

Considering the expansion and retraction of Ninth Amendment protections, what role might it play in future jurisprudence, and given that it only constrains the Federal Government, what is its applicability to state-level abortion restrictions?

Unfortunately, there is a substantial barrier to individuals taking full advantage of the potential of the Ninth Amendment, which is that the Ninth Amendment has not been incorporated as applying to the individual States, perhaps because the Supreme Court "rarely relies upon the Ninth Amendment when deciding cases."[159] So a scenario could conceivably arise in which the Supreme Court would find that a federal ban on abortion is not constitutional, but a ban at the state level—even a total ban—is permissible. This would have the result of functionally ending abortion access almost entirely. We have seen that in the wake of the *Dobbs* decision abortion rights are primarily being attacked on the state rather than the federal level. In the months since *Dobbs*, 24 states have already either banned abortion or are likely to do so, given their pre-*Dobbs* stance on abortion.[160] However, Senator Lindsey Graham's proposal of a federal 15-week abortion ban in September of 2022 met with a fair amount of resistance from his fellow Republicans, who voiced their opinion that abortion should be handled "at the state level."[161] And there is no need for anti-abortion advocates to court potential unpleasant political consequences by advocating for a federal ban, which would likely prompt a costly lawsuit from pro-choice groups, when the same effect can be reached through state-level restrictions—which they have already begun to do, as seen in the above-cited Guttmacher article.[162]

However, although there is no Ninth Amendment recourse against the states, a number of states, including Utah, have their own analogue to the Ninth Amendment, with nearly identical language.[163] So there is potential to still recognize privacy in making reproductive decisions as a protected right at the state level. And the Ninth Amendment still has value as a federal-level protection—in the event that there is an attempt at a national ban on abortion, the Ninth Amendment may prove to be a useful tool in that battle.

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[159] *Incorporation doctrine*, CORNELL LAW SCH., https://www.law.cornell.edu/wex/incorporation_doctrine (last visited Mar. 2, 2023).
[160] Elizabeth Nash & Isabel Guarnieri, *Six Months Post-Roe, 24 US States Have Banned Abortion or Are Likely to Do So: A Roundup*, GUTTMACHER INST. (Jan. 10, 2023), https://www.guttmacher.org/2023/01/six-months-post-roe-24-us-states-have-banned-abortion-or-are-likely-do-so-roundup.
[161] Johnathan Allen et al., *'Bad idea': Republicans pan Lindsey Graham's 15-week abortion ban*, NBC NEWS (Sept. 13, 2022, 1:52:00 PM), https://www.nbcnews.com/politics/congress/sen-graham-introduces-bill-ban-abortion-nationwide-15-weeks-rcna47530.
[162] Nash & Guarnieri, *supra* note 159.
[163] "This enumeration of rights shall not be construed to impair or deny others retained by the people." UTAH CONST. Art. 1 § 25.

VII. CONCLUSION: THE RIGHT TO PRIVACY IS INHERENT AND IMPLICIT WITHIN THE NINTH AMENDMENT

As I have illustrated in this paper, the recognition of a right to privacy is somewhat new, but once it was recognized the Court has repeatedly affirmed it as necessary to the exercise of the other fundamental rights within the Bill of Rights. The Ninth Amendment, specifically constructed by the Founders to protect rights which they could not anticipate, is the logical home for the right to privacy. It is consistently cited in the same arguments as the First, Fourth, Fifth, and Fourteenth Amendments, which are some of the strongest protections of individual rights we have. To question the ability of the right of privacy to encompass the right to abortion is to question the right to privacy as a whole. No matter the arguments in favor of State regulation, the fact remains that the decision to carry or terminate a pregnancy is a most intimate, personal decision. If a marriage of two people is intimate to the degree of being sacred, and if State intrusion into that relationship would be repulsive, how much more repulsive is State intrusion into a person's relationship with their own body, unquestionably more intimate and sacred than that of a marriage? As the *Casey* decision wisely recognizes, a state that does not recognize the right to terminate a pregnancy also has the power to not recognize the right to begin a pregnancy.

> The soundness of this prong of the Roe analysis (independence in making personal decisions) is apparent from a consideration of the alternative. If indeed the woman's interest in deciding whether to bear and beget a child had not been recognized as in Roe, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example.[164]

There is no more offensive State intrusion than the intrusion into personal decisions about one's own body, and it calls into question the ability to exercise all of the fundamental rights found in the Bill of Rights. Alexander Hamilton argued during the Constitutional Convention that enumeration of certain rights could give a "plausible pretense for the Government to claim powers not granted in derogation of the people's rights."[165] This is precisely what has happened; the government has asserted a power over the right to privacy and reproductive choice simply because those rights are not enumerated in the Constitution as being reserved to the people. This is the exact purpose for which the Ninth Amendment was written; this is the problem it was intended to prevent and resolve.

The Ninth Amendment has the potential to fill the gaps left in the Bill of Rights and allow more people to access the rights of life, liberty, and pursuit of happiness. It must be realized for the "literally boundless source of additional, unnamed, unhinted-at rights"[166] that it is. As Justice Brandeis so wisely advised in his famous dissent to the *New State Ice*

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[164] Planned Parenthood v. Casey, 505 U.S. 833, 859 (1992).
[165] THE FEDERALIST NO. 84, at 573, 4 (Alexander Hamilton).
[166] *Planned Parenthood*, 505 U.S at 1000.

case, "We must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold."[167] Thankfully, for the faint of heart, recognition of privacy rights, including reproductive choice, under the text and the penumbra of the Ninth Amendment does not require boldness, just awareness.

[167] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (dissenting) (1932).