antee of a right or a proscription of an infringement.[3] In 1965, however, the Amendment was construed to be positive affirmation of the existence of rights which are not enumerated but which are nonetheless protected by other provisions.

The Ninth Amendment had been mentioned infrequently in decisions of the Supreme Court[4] until it became the subject of some exegesis by several of the Justices in *Griswold v. Connecticut*.[5] The Court in that case voided a statute prohibiting use of contraceptives as an infringement of the right of marital privacy. Justice Douglas, writing for the Court, asserted that the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[6] Thus, although privacy is not mentioned in the Constitution, it is one of the values served and protected by the First Amendment through its protection of associational rights, and by the Third, the Fourth, and the Fifth Amendments as well. The Justice recurred to the text of the Ninth Amendment, apparently to support the thought that these penumbral rights are protected by one Amendment or a complex of Amendments despite the absence of a specific reference. Justice Goldberg, concurring, devoted several pages to the Amendment.

"The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments. . . . 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

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[3] To some extent, the Ninth and Tenth Amendments overlap with respect to the question of unenumerated powers, one of the two concerns expressed by Madison, more clearly in his letter to Jefferson but also in his introductory speech.

[4] In United Public Workers v. Mitchell, 330 U.S. 75, 94–95 (1947), upholding the Hatch Act, the Court said: "We accept appellant's contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments [is] involved. The right claimed as inviolate may be stated as the right of a citizen to act as a party official or worker to further his own political views. Thus we have a measure of interference by the Hatch Act and the Rules with what otherwise would be the freedom of the civil servant under the First, Ninth, and Tenth Amendments." *See* Ashwander v. TVA, 297 U.S. 288, 300–11 (1936), and Tennessee Electric Power Co. v. TVA, 306 U.S. 118, 143–44 (1939). *See also* Justice Chase's opinion in Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798), and Justice Miller for the Court in Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 662–63 (1875).

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

[6] 381 U.S. at 484. The opinion was joined by Chief Justice Warren and by Justices Clark, Goldberg, and Brennan.