Texas Tech Law Review
Winter, 2008

Articles

*249 AN UNENUMERATED RIGHT: TWO VIEWS ON THE RIGHT OF PRIVACY

Judge Harold R. Demoss Jr. [FNa1]

Michael Coblenz [FNaa1]

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I. Introduction

In April 2007, the Supreme Court of the United States upheld a congressionally enacted ban on so-called partial birth abortions. [FN1] The case, Gonzales v. Carhart, was the most recent decision in the Supreme Court's abortion jurisprudence since it originally authorized the procedure in Roe v. Wade in 1973. [FN2] Justice Clarence Thomas, a vocal abortion opponent, voted with the majority in supporting the ban, but wrote a short, separate concurrence stating that the Supreme Court's "abortion jurisprudence . . . has no basis in the Constitution." [FN3] Justice Thomas referred to Justice Antonin Scalia's partial dissent in Planned Parenthood of Southeastern Pennsylvania v. Casey, in ***250** which Justice Scalia said that the Court simply did not have the ability to create protectable liberty interests, such as abortion or privacy. [FN4]

This has been a consistent conservative argument since Justice Hugo Black's dissent in Griswold v. Connecticut, the case that established-or created out of whole cloth, depending upon your political viewpoint-the right of privacy. [FN5] A few years after Griswold, and based on the right of privacy it established, the Supreme Court held in Roe v. Wade that a woman had a constitutionally protected right to have an abortion. [FN6]

Since the Roe decision, abortion and privacy have run hand in hand. [FN7] In recent years, abortion has become a nearly toxic political subject that few people are willing to directly address. As a result, the fight over abortion has become an argument over whether a constitutionally protected right of privacy exists. This fight is most evident in judicial confirmation hearings, such as the recent hearings for John Roberts to become Chief Justice [FN8] and for Samuel Alito to become an Associate Justice of the Supreme Court. [FN9]

Judge Harold DeMoss addressed the issue of privacy, specifically in response to Roberts's confirmation hearings, in an article that was published in the Houston Chronicle on January 19, 2006. [FN10] Michael Coblenz wrote a critique of Judge DeMoss's essay, which he posted on the American Constitutional Society (ACS) blog in February 2006. [FN11] Mr. Coblenz contacted Judge DeMoss to obtain permission to post his essay along with the critique. Judge DeMoss granted permission but noted that the article that was published in the Houston Chronicle was substantially edited from the article he had originally written. At that point, Judge DeMoss and Mr. Coblenz agreed to write a joint article. What follows is Judge DeMoss's original essay, followed by Mr. Coblenz's critique, which has been modified to correspond to Judge DeMoss's original essay. [FN12]

***251** II. An Unenumerated Right of Privacy and What to Do About It

by Judge Harold R. DeMoss Jr.

One of the most perplexing legal issues currently confronting the American people in general and agitating the confirmation process of a Supreme Court nominee in particular is whether the U.S. Constitution contains a “right of privacy” or any of the other rights that the Supreme Court has found to be derived from that right, including the right to an abortion and rights related to sexual preference. I have personally concluded that a right of privacy is not enumerated in the U.S. Constitution and exists only in the minds of a majority of the Justices on the modern Supreme Court. The following questions and answers explain this conclusion.

Question: What does the word “unenumerated” mean? [FN13]

Answer: Webster's Dictionary defines “enumerate” as “to count” or “to specify one after another.” [FN14] Roget's Thesaurus states that the synonyms for “enumerate” are “to list, mention, identify.” [FN15] I have added the negative prefix “un” so that each of the definitions or synonyms are reversed. Therefore, “unenumerated” means “not counted,” “not specified,” “not listed,” “not mentioned,” or “not identified.”

Question: Why do I say the right of privacy is “unenumerated”? [FN16]

Answer: Neither the word “privacy” nor the phrase “right of privacy” appears anywhere in the U.S. Constitution or its amendments. [FN17] The same can be said of the words “abortion” and “sexual preference,” which are protected under the right of privacy in the minds of some Supreme Court Justices. [FN18]

Question: When was the right of privacy concept first recognized by the Supreme Court as a part of the U.S. Constitution? [FN19]

Answer: In 1965, Justice William O. Douglas used this concept when writing for the majority in Griswold v. Connecticut. [FN20] This opinion was issued 176 years after ratification of the Constitution in 1789, 174 years after ratification of the Bill of Rights in 1791, and 97 years after the ratification of ***252** the Fourteenth Amendment in 1868. [FN21] In Griswold, the Supreme Court held that a state law criminalizing the use of contraceptives was unconstitutional when applied to married couples because it violated a constitutional right of marital privacy. [FN22]

Question: What precisely did Justice Douglas say in Griswold about the right of privacy? [FN23]

Answer: The following quotation best captures the view of Justice Douglas:

> 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. [FN24]
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> . . . .
>
> We have had many controversies over these penumbral rights of ‘privacy and repose.’ These cases bear witness that the right of privacy which presses for recognition here is a legitimate one. [FN25]

Note the phrase “which presses for recognition here” in the last quoted paragraph. [FN26] That phrase indicates that the right of privacy, which is still hotly debated by the American people today, was first recognized by the Supreme Court in this opinion. [FN27] Note also that if the right of privacy had been “named,” “listed,” “specified,” or “itemized” in the Constitution, there would have been no need to “press[] for recognition” in this

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opinion. [FN28] Rather, the Supreme Court interpreted some of the specific protections enumerated in the Bill of Rights to indicate the existence of a general right of privacy that is not expressly written, and then to find a new specific right-freedom to use contraceptives-as an unstated part of the unstated general right of privacy. [FN29]

The Supreme Court majority used this same technique in Roe v. Wade:

> The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, 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. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, in the ***253** Fourth and Fifth Amendments, [and] in the penumbras of the Bill of Rights . . . .
>
> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. [FN30]

By substituting “a woman's right to terminate her pregnancy” (Roe) for “a married couple's right to use contraceptives” (Griswold), it becomes apparent that the Supreme Court was again finding an unstated specific right within the unstated general right of privacy. [FN31] Furthermore, the Supreme Court admitted in the first sentence of this quote from Roe v. Wade that “[t]he Constitution does not explicitly mention any right of privacy.” [FN32] In truth, the Constitution does not mention the right of privacy at all. [FN33] Therefore, I think that use of the adjective “unenumerated” in this context is both accurate and appropriate.

Question: What does the word “penumbra” mean in these opinions, and what does the phrase “penumbras of the Bill of Rights” refer to? [FN34]

Answer: Webster's Dictionary states that the word “penumbra” comes from two Latin roots: pene meaning “almost,” and umbra meaning “shadow.” [FN35] The first meaning of penumbra, as stated in the dictionary, is “a shadow case (as in an eclipse) where the light is partly but not wholly cut off by the intervening body.” [FN36] The second meaning of the word is “the shaded region surrounding the dark central portion of a sunspot.” [FN37] The third meaning of the word is “a surrounding or adjoining region.” [FN38] Only this third meaning could have any relevance in the phrase “penumbras of the Bill of Rights,” and so the word “penumbra,” as used by the Supreme Court, implies that the right of privacy exists somewhere in the region that surrounds and lies outside of the Bill of Rights. [FN39] But nothing in the text of the Bill of Rights mentions any such surrounding or outlying area, nor does any catch-all phrase like “other similar rights” indicate that the rights specifically enumerated exemplify a larger class of unenumerated rights. [FN40] Consequently, whatever rights might be found in the ***254** phrase “penumbras of the Bill of Rights” exist only in the mind of the reader and are not part of the constitutional text.

Question: Does the Fourteenth Amendment shed light on this question? [FN41]

Answer: Not really. Some proponents of a constitutional right of privacy say that it can be found in the Liberty Clause of the Fourteenth Amendment. [FN42] But the Liberty Clause of the Fourteenth Amendment is identical to the Liberty Clause in the Fifth Amendment, and just as in the Bill of Rights, neither the word “privacy” nor the phrase “right of privacy” appears in the Fourteenth Amendment, much less in the Liberty

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Clause. [FN43] Furthermore, "liberty" is not a synonym for "privacy," and "privacy" is not a synonym for "liberty." [FN44] The Supreme Court's view that the right of privacy could come from the First, Fourth, Fifth, or Fourteenth Amendments makes it appear as though the Court is just guessing where the right comes from. [FN45]

Question: Has the Supreme Court attempted to amend the Constitution by finding a right of privacy therein? [FN46]

Answer: Yes. The Supreme Court wrote new language into the Constitution. [FN47] It did not interpret existing language. [FN48] Written documents like the U.S. Constitution are amended in one of two ways: (1) by deleting words that already exist therein, or (2) by adding new words not previously included. The Supreme Court has done the latter, and this action differs fundamentally from the Court's legitimate task of interpreting and applying existing phrases like "cruel and unusual punishment," "due process," "public use," and "establishment of religion" that appear verbatim in either the text of the Constitution or its amendments. [FN49]

Question: Does the Constitution give the Supreme Court the power to amend the Constitution? [FN50]

Answer: No. Article V of the Constitution, which defines the process for amending the Constitution, mentions neither the Supreme Court (the Judicial Branch of Article III) nor the President (the Executive Branch of Article II). [FN51]

***255** Question: Where does the ultimate power to make changes or amendments to the Constitution lie? [FN52]

Answer: As defined in Article V, the power to amend lies with the people acting through the U.S. Congress and the state legislatures. [FN53] In our Declaration of Independence, one of the truths we declared to be self-evident is that "[g]overnments are instituted among [m]en, deriving their just powers from the consent of the governed." [FN54] Likewise, it is "[w]e, the People, of the United States" who are expressly denominated as the acting parties in our Constitution who "do ordain and establish this Constitution for the United States of America." [FN55]

In his farewell address to the nation in 1796, President George Washington stated:

> The basis of our political systems is the right of the people to make and to alter their constitutions of government. But the [C]onstitution which at any time exists till changed by an explicit and authentic act of the whole people is sacredly obligatory upon all. The very idea of the power and the right of the people to establish government presupposes the duty of every individual to obey the established government.
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> . . . .
>
> . . . If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed. [FN56]

Former Chief Justice John Marshall echoed President Washington's thoughts in the historic Marbury v. Madison opinion:

> That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fab-

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> ric has been erected. . . .
>
> This original and supreme will organizes the government, and assigns, to different departments, their respective powers. . . .
>
> . . . .
>
> ***256** From these, and many other selections which might be made, it is apparent, that the framers of the [C]onstitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature.
>
> . . . .
>
> Thus, the particular phraseology of the [C]onstitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the [C]onstitution is void; and that courts, as well as other departments, are bound by that instrument. [FN57]

Question: Does the Constitution speak to the circumstance of unenumerated rights? [FN58]

Answer: Yes, in the Ninth and Tenth Amendments. [FN59] 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." [FN60]

The right of privacy is not one of the rights enumerated in the Constitution, and consequently, the Ninth Amendment gives two instructions: (1) do not "deny or disparage" the existence of a right of privacy simply because it is not enumerated in the U.S. Constitution, and (2) recognize that any such right of privacy is "retained by the people." [FN61] Clearly, a right of privacy exists at some level, but it has not been made subject to the Constitution unless and until the people act to make it so.

Likewise, the Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." [FN62]

The U.S. Constitution does not delegate to the Supreme Court any power to define, apply, or enforce whatever right of privacy the people may retain. [FN63] Similarly, the U.S. Constitution does not prohibit any particular state from defining, applying, or enforcing whatever the people of that state may choose as the right of privacy. [FN64] Therefore, as the Tenth Amendment provides, the power to define, apply, or enforce a right of privacy is "reserved to the States respectively, or to the people." [FN65]

The framers appear to have intended the Tenth Amendment to leave a whole raft of legal rights, issues, duties, responsibilities, and privileges-which fall into the generic category of local and domestic matters-as the responsibility of the states to define, regulate, and control. This category ***257** includes marriage and divorce, ownership and transfer of real property, wills and probate, intestate succession, birth and death certificates, child custody and protection, and adoption and abortions. And the Supreme Court should have left these matters to the states.

The Ninth and Tenth Amendments are the very heart and soul of the concepts of limited government, separation of powers, and federalism-the unique contributions of the U.S. Constitution to the philosophy and principles of government. [FN66]

Because the Supreme Court has found a constitutional right of privacy that is not expressly enumerated in the Constitution, it has, in President Washington's words, "usurped" the roles and powers of the people, the Congress, and the state legislatures. [FN67] Shed of all semantical posturing, the critical issue becomes whether the U.S. Constitution permits amendment by judicial fiat.

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Granted, many people take a contrary view by arguing that the Constitution must be a “living, breathing instrument,” and that it is right and proper for a majority of the Supreme Court to decide when, where, and how the Constitution needs to be changed to be “relevant to modern times.” These people believe that the Supreme Court is infallible and omnipotent, and that once the Supreme Court has spoken, there is no way to change its ruling. I disagree with that view. Nonetheless, our society must decide which view should prevail.

On several occasions, the Supreme Court has held that Congress does not have the power to change by legislation how the Supreme Court has interpreted the Constitution. [FN68] Similarly, the Constitution does not authorize the President to change a Supreme Court ruling on constitutional language. [FN69] Therefore, to remedy the usurpation by the Supreme Court as to a right of privacy, we must go to the highest authority-the people.

Question: How do we determine what the people want? [FN70]

Answer: We must ask the people who ordained and established the Constitution to consent. The ultimate remedy to this controversy lies not with the individual members of the Supreme Court but with the people in the form of a national referendum that either affirms or rejects the Supreme Court's actions.

Such a national referendum would be a win-win situation. For those who support the power of five Justices to amend the Constitution as they see fit, this ***258** referendum would afford the opportunity to demonstrate that a majority of the people agree with the Supreme Court and that, therefore, the right of privacy should be treated as a part of the Constitution, just as if it had been adopted by the amendment process outlined in Article V. [FN71]

On the other hand, for those who believe the Supreme Court has usurped the power of the people to accept or reject a constitutional change, a national referendum would afford the opportunity to demonstrate that a majority of the people reject the power of the Supreme Court to make constitutional changes. The will of the people would then override any judicially fabricated constitutional amendment, and the right of privacy would not be treated as part of the U.S. Constitution. Congress could call this referendum and then place it on a future national ballot. Such a referendum would reflect the will of all of the people and not just the view of a small sample, as reflected in public opinion polls.

This controversy has been brewing for more than thirty years with few signs of resolution. But as more people become fully informed about the shaky foundation on which the Supreme Court has exercised its power, the pressure mounts to correct this action. The best thing for our society, our nation, and our federal government would be to settle this controversy as quickly as possible. The best, and perhaps only, way to settle the issue is to allow all of the people to vote on the proper resolution. Therefore, Congress should call a national referendum to permit the people to just say no, or yes, to the Supreme Court's usurpation of the power to amend the U.S. Constitution.

III. Analysis of Judge DeMoss's Article

by Michael Coblenz

A. Introduction

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Judge DeMoss's Article sets out many of the arguments commonly raised by conservative politicians, lawyers, and commentators who oppose the so-called right of privacy. [FN72] Rather than try to provide alternate answers to Judge DeMoss's hypothetical questions, this Part will address the issues he raises thematically, starting with the idea that a right must be enumerated in the Constitution for it to exist. [FN73]

***259** B. Unenumerated Rights

Judge DeMoss correctly notes that the word “privacy” does not appear in the Constitution, nor does the phrase “right of privacy.” [FN74] He then argues that because the right of privacy is not specifically set out in the text of the Constitution, the right is unenumerated and cannot exist. [FN75]

There are two related errors with this argument. First, it implies that the Constitution is a detailed exposition of rights, duties, and obligations. This simply is not true. The Constitution is a brief document that primarily establishes the framework of our government. [FN76] According to Alexander Hamilton in The Federalist No. 84, the framers drafted a Constitution that “is merely intended to regulate the general political interests of the nation . . . .” [FN77] They did not produce a Constitution that “has the regulation of every species of personal and private concerns.” [FN78]

In fact, as originally drafted, the Constitution did not even contain a bill of rights. [FN79] According to Judge DeMoss's logic, if the Bill of Rights had not been added to the Constitution, citizens would have no federally protected rights because none are listed. [FN80] Of course, this notion is absurd.

The second problem with Judge DeMoss's interpretation is that other fundamental rights-rights that no one could argue do not exist-are not in the Constitution. Judge DeMoss notes that “privacy,” “abortion,” and “sexual preference” do not appear anywhere in the Constitution, but neither do the words “marriage,” “procreation,” “education,” “employment,” or others. [FN81] Is Judge DeMoss suggesting that people have no right to wed because the Constitution does not contain the word “marriage”?

Even the right to own property is not explicit in the Constitution. [FN82] It is found only tangentially in the Third and Fifth Amendments. [FN83] Both amendments presuppose that citizens own property, but neither amendment defines that ownership in terms of “rights.” [FN84] So, is the right to own property a lesser right because it is only implied and not specifically enumerated like freedom of speech?

***260** The word “constitutional” also creates problems because it is subject to at least two possible meanings. The first meaning, presented by Judge DeMoss, is that the Constitution must specifically mention all words, phrases, or concepts. [FN85] This meaning is simple enough, but the Constitution must incorporate things not expressly stated in the document. For example, the Constitution never uses the term “separation of powers”; yet the U.S. government, which was established by the Constitution, is predicated upon the separation of powers principle. [FN86] Those words are never used in the Constitution, but the very form of government that the Constitution establishes is based on the principle of separation of powers. [FN87] Therefore, even though the words are never used in the document itself, separation of powers is a constitutional principle. [FN88]

There are also those matters of human affairs that the Constitution must allow, though they are not specifically addressed in the text. [FN89] These include marriage, procreation, education, and employment, but consider employment for now. The Constitution clearly recognizes that commerce exists, as it provides that Congress can regulate commerce. [FN90] Undoubtedly, the framers understood that commerce involves people who trade

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labor for wages and thus are employed. If Congress can regulate commerce, then it can presumably also regulate employment, even though the word is not specifically set out in the Constitution. Moreover, if Congress does regulate employment, its control must have some boundaries. And if there are boundaries, then there must be some protectable interest in employment. The term “right” is another way to describe a protected interest.

When Congress passes a law relating to constitutional or human rights, it is frequently challenged as “unconstitutional” and subsequently defended as “constitutional.” The issue, then, is whether the law violates any specific provision of the Constitution. Thus, the second, more common, definition of “constitutional” arises: proper and valid under the Constitution. [FN91]

Words are imperfect vessels for holding ideas. [FN92] As Oliver Wendell Holmes once said, “a word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used.” [FN93] “Constitutional” is used ***261** loosely, but Judge DeMoss confuses poor linguistics with poor jurisprudential principles. No one argues that the right to privacy is constitutional because it is expressly in the Constitution, just as no one argues that the Sherman Antitrust Act is constitutional because the words of the Act are in the Constitution. [FN94] Both are constitutional because they do not conflict with specific provisions of the Constitution. Perhaps it is linguistically more accurate to say that the right of privacy or the Sherman Antitrust Act is “not anti-constitutional.” Of course, because double negatives are confusing, the negatives are dropped, and thus “not anti-constitutional” becomes “constitutional.”

The Sherman Antitrust Act was mentioned for a reason. It states that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.” [FN95] This provision clearly intrudes on the ability of people to freely enter into contracts and seems to conflict with the Contracts Clause, which states that “[n]o state shall . . . pass . . . any Law impairing the Obligation of Contracts.” [FN96] In Standard Oil Co. of New Jersey v. United States, Standard Oil made precisely this argument when they were prosecuted under the Sherman Antitrust Act at the beginning of the twentieth century, but the Supreme Court found a way around the express words of the Constitution. [FN97] In that case, the Supreme Court essentially held that the Constitution envisioned a system of free and fair trade; therefore, Congress could limit contracts that impair free trade. [FN98] In other words, the right to free trade trumps the right to contract despite the explicit constitutional right to enter into contracts. [FN99]

In both privacy and free trade, the Supreme Court found a “right” that was not enumerated. [FN100] But does a right need to be enumerated-does it need to be expressly mentioned in the Constitution-to exist?

C. The Ninth Amendment

The Ninth Amendment seems to indicate that rights do not need to be specifically listed in the Constitution to exist. [FN101] It states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage ***262** others retained by the people.” [FN102] Many conservatives ignore this Amendment, but others suggest that it means something more than what it says. [FN103] The history of the drafting of the Bill of Rights, however, clearly shows that the Ninth Amendment means what it says. [FN104]

During the ratification debates in the states after the Constitution was drafted in Philadelphia, many complained that the proposed constitution did not contain a bill of rights. [FN105] Some politicians, most notably James Madison, argued that the structure of the proposed government, with limited and specifically enumerated

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powers, was the best guarantor of individual rights. [FN106] Alexander Hamilton made the same argument against a bill of rights in one of his Federalist letters. [FN107] Hamilton describes the English "bill of rights," which was derived from the Magna Carta, the Petition of Rights, and the Declaration of Rights-each of which was a grant of rights from the king to the people. [FN108] According to Hamilton, such grants of rights "have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations." [FN109] In other words, the Constitution grants only limited power to the government, and the people retain everything else, including every enumerated and unenumerated right.

The other danger of specifically listing rights, according to Hamilton, is that an exception to a power not granted will eventually lead some to presume that a power had been granted. [FN110] "Why, for instance, should it be said that the liberty of the press shall not be restricted when no power is given by which restrictions may be imposed?" [FN111] Hamilton concludes his argument by declaring that "the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS." [FN112] "Is it one object of a bill of rights to declare and specify the political privileges of the citizens in the structure and administration of the government? This is done in the most ample and precise manner in the plan of the convention" by creating a government of strictly enumerated powers. [FN113]

***263** Despite Hamilton's writings and Madison's opposition, those demanding a bill of rights won the day, and many states conditioned ratification upon the creation of a bill of rights. [FN114] Madison chaired the committee in the First Congress, which was tasked with developing a bill of rights. [FN115] Opponents of a bill of rights said that there was no way that a list of rights could be all-inclusive and suggested that any list would eventually become the definitive list of all rights available to citizens. [FN116] Opponents also feared losing any right not listed. [FN117] So, to prevent this loss, Madison proposed the following amendment:

> The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution. [FN118]

Unfortunately this amendment was reduced to the ambiguous verbiage we now have. [FN119] And the fears of the framers have been realized because many people now say that those rights specifically enumerated are the only rights that exist.

D. The Tenth Amendment

Judge DeMoss recognizes that the Ninth Amendment affords the "people" certain unenumerated rights, but he suggests that the Ninth Amendment must be read in conjunction with the Tenth Amendment and that providing or defining those unenumerated rights is "reserved to the States." [FN120]

This argument is not a new one. The matter was discussed during the framing of the Constitution, during the ratification debates in the states, and during the nearly one hundred year period after the Constitution was drafted. [FN121] Unfortunately, the issue was never clearly resolved.

***264** 1. The Constitution Is a Mix of Federal and Republican Principles

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The framers debated the nature of the government they were creating during the drafting debates in Philadelphia in 1787, particularly when they debated the composition of the two houses of the legislative branch. [FN122] Some framers wanted the people to select the legislature-to represent Republican principles. [FN123] Others wanted the states to control the legislature and thus to select representatives according to Federalist principles. [FN124] This division led to a lengthy discussion of the nature of representative government. [FN125]

Luther Martin dominated the June 27 session with a lecture on his views of the nature of the proposed government. [FN126] He believed that the federal government should be fully subordinate to the state governments and not unlike the government then existing under the Articles of Confederation. [FN127] On June 28, Madison gave a lengthy speech on the benefits and problems associated with a confederation of states. [FN128] Then, on June 29 various members of the delegation discussed their views of the nature of government and their hopes for the new government. [FN129] Some thought the new government should represent the people-a Republican form of government-while others thought it should largely be subservient to the states-a Federation of states. [FN130]

The framers never formally determined the form of government that they created. [FN131] They compromised on the legislative branch: the House of Representatives would be selected directly by the people, and the Senate would be selected by the states. [FN132] The compromise on the legislative branch-with one body based on Republican principles and the other body based on Federalist principles-seems to indicate a compromise on the nature of the government. This second resulting compromise seems to be Madison's point in The Federalist No. 39, in which he describes both the Republican and the Federalist principles of the new government. [FN133] “The proposed constitution therefore . . . is in strictness neither a national nor a federal constitution; but a composition of both.” [FN134]

***265** When Madison discussed the creation of the Ninth Amendment, he was considering Republican principles. [FN135] Similarly, the Tenth Amendment seems to describe Federalist principles. [FN136] Judge DeMoss says that the two must be read together, but the framers felt the two principles could co-exist exclusively, and nothing suggests that Madison did not feel the same when he drafted the Ninth and Tenth Amendments. [FN137]

Some of the most divisive disputes during this time concerned the relationship between the states and the new national government. [FN138] Fights occurred between the advocates of states' rights, who oddly called themselves Republicans, and the advocates of a strong national government as an instrument of the people, who confusingly called themselves Federalists. [FN139] Had the framers of the Constitution resolved the matter, the Federalists and the Republicans would not have had anything to fight about after ratification. [FN140]

2. States' Rights

The Supreme Court joined the dispute over the relationship between the states and the federal government in Chisholm v. Georgia in 1793. [FN141] Chisholm sued the State of Georgia in federal court to recover money for uniforms supplied to the Georgia militia during the Revolutionary War. [FN142] Georgia claimed that it was a sovereign equal to the federal government and, therefore, immune from the jurisdiction of the federal courts. [FN143] Georgia asserted that the states existed and had sovereignty when the Constitution was drafted, and that they did not lose that sovereignty when the Constitution was ratified. [FN144]

The Court did not agree, though it was a seriatim opinion. [FN145] Chief Justice John Jay said that the Con-

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stitution was a document created by the people that provided certain rights, powers, and duties and that the government created by the people had the power to create courts for those people to use to protect their rights. [FN146]

> ***266** [T]he people, in their collective and national capacity, established the present Constitution. It is remarkable that in establishing it, the people exercised their own rights, and their own proper sovereignty, and conscious of the plenitude of it, they declared with becoming dignity, 'We the people of the United States, do ordain and establish this Constitution.' Here we see the people acting as sovereigns of the whole country; and in the language of sovereignty, establishing a Constitution by which it was their will, that the State Governments should be bound, and to which the State Constitutions should be made to conform. Every State Constitution is a compact made by and between the citizens of a State to govern themselves in a certain manner; and the Constitution of the United States is likewise a compact made by the people of the United States to govern themselves as to general objects, in a certain manner. By this great compact however, many prerogatives were transferred to the national Government, such as those of making war and peace, contracting alliances, coining money, etc. etc. [FN147]

Only Justice James Iredell dissented. [FN148] He stated that this case involved assumpsit (the common law term for an action for breach of contract), that such actions have traditionally been in state courts, and that nothing in the Constitution alters such jurisdiction. [FN149] This dissent is somewhat akin to Judge DeMoss's argument, but Chief Justice Jay ruled that the people, not the states, controlled the Constitution and created the rights established by the Constitution by implication. [FN150] Chief Justice Jay ignored Justice Iredell's point. [FN151]

This decision did not resolve the matter and outraged proponents of states' rights quickly passed the Eleventh Amendment, which stripped the federal courts of jurisdiction over cases between a state and a citizen of another state. [FN152] That change, however, did not end the matter, and the fight between proponents of states' rights and proponents of a strong national government continued for another seventy years. [FN153]

Proponents of states' rights won some battles. [FN154] In Sturges v. Crowninshield, the Court held that bankruptcy is not exclusively a federal matter; [FN155] and in Barron v. Baltimore, the Court famously held that the Bill of Rights limits only federal action and not state action. [FN156] Proponents of states' ***267** rights, however, lost many more cases than they won. [FN157] In Martin v. Hunter's Lessee, the Court held that a state supreme court decision is appealable to the Supreme Court of the United States; [FN158] in Cohens v. Virginia, the Supreme Court held that it can interpret the constitutionality of state laws; [FN159] and in Gibbons v. Ogden, the Court held that a federal shipping statute supersedes a state statute under the Commerce Clause of the Constitution. [FN160] These losses increasingly agitated the proponents of states' rights, but the larger point is that the matter was in flux. If the issue had been as clear-cut as Judge DeMoss suggests, then constitutional history and indeed American history would look very different.

Neither the Court nor the political system resolved the disagreement. Instead, it was resolved on the battlefield. [FN161] Ultimately, states' rights were lost at Gettysburg and buried by the Thirteenth, Fourteenth, and Fifteenth Amendments. [FN162]

The Civil War Amendments did not, in fact, repeal the Tenth Amendment, but the political idea of states' rights lost much of its credence because of the outcome of the Civil War. [FN163] Advocates of states' rights, who were primarily from the southern states and interested in protecting the right to own slaves in those states, exercised the extreme expression of a state's sovereignty by seceding from the Union after Lincoln was elected

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president. [FN164] After the Civil War, the power of the federal government was on the rise, and the states' rights argument had lost much of its luster. [FN165] The Constitution had not changed, but the political trends had, and the Thirteenth, Fourteenth, and Fifteenth Amendments soon followed. [FN166]

These amendments imposed a national agenda on the states. The Thirteenth Amendment abolished the single state right that southerners were willing to fight and die for-slavery. [FN167] The Fourteenth Amendment interferes with states' rights: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law . . . ." [FN168] While the chief draftsman of the Fourteenth Amendment, Congressman John A. Bingham, felt that this language was sufficient to apply ***268** the Bill of Rights to the states, [FN169] the Supreme Court initially did not agree and so held in the Slaughter-House Cases. [FN170] But these cases represented a shift of power from the states to the federal government. Finally, the Fifteenth Amendment was enacted after the states refused to enfranchise the recently freed slaves, and also represents an imposition of federal authority and a concurrent diminution of states' rights. [FN171]

Political trends always fluctuate, and judicial philosophies (and constitutional interpretation) change accordingly. Because of the structure of our government, views of states' rights are almost always involved. At one time, for example, the Supreme Court ignored states' rights when they conflicted with the constitutional right to contract. [FN172] In a long line of cases starting with Fletcher v. Peck [FN173] and Trustees of Dartmouth College v. Woodward, [FN174] the Court held that the right to contract superseded various state actions. [FN175]

One area, however, in which the Court recognized a state's right to impede the right to contract was that of the so-called police powers of the states. [FN176] Judge DeMoss notes that there have always been certain matters traditionally left to the states because they are local and domestic in nature, including the police powers-a state's ability to regulate a broad range of criminal and social matters within its jurisdiction. [FN177] Even when the Supreme Court struck down state laws based on the right to contract, it specifically said that the right to contract could not restrict a state's police power. [FN178] For example, in Gibbons v. Ogden, the Court held that Congress can regulate commerce but that the state still has the police power-the "immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government . . . ." [FN179]

Not long after the Civil War, the Court affirmed this deference to a state's police power, beginning with the Slaughter-House Cases [FN180] and Munn v. ***269** Illinois. [FN181] But then, the Supreme Court dramatically changed course and determined that the right of property (as protected by the Due Process Clause of the Fourteenth Amendment) [FN182] and the right to contract, usually supersede a states right to regulate commerce. [FN183] The Court merely followed the general political belief that the right to contract was central to a strong national economy. [FN184] The nadir of this theory was perhaps Lochner v. New York, in which the Court struck down a state law regulating the working hours of bakers because such a law violated the rights of workers and their employers to contract freely with one another. [FN185]

This view of the apportionment of state and federal power lasted from just after the end of the Civil War until the Great Depression. Again, changes in the political and economic environment brought changes in the Supreme Court's thinking. In Home Building & Loan Assoc. v. Blaisdell [FN186] and Nebbia v. New York, [FN187] the Court, in response to the economic turmoil of the Great Depression, held that states must have broad authority to regulate economic affairs within a state even when doing so might impede a contract. [FN188]

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Any fair reading of this history shows that over the years the Court has alternately deferred to and ignored states' rights to achieve other overarching political goals. Modern political conservatives, however, tend to focus on acts of judicial deference while overlooking those cases in which the Court essentially ignored states' rights. They want to have it both ways-both in their view of history and in their modern adherence to states' rights.

Republican politicians, who typically proclaim themselves conservatives, also claim deference to states' rights, but as soon as they confront an issue they don't like, states' rights go out the window. The Bush Administration interfered with the long tradition that education is a local and domestic matter that should be decided at the state level when it passed the federal No Child Left Behind Act of 2001. [FN189] Other matters that have long been local and domestic, such as tort law and criminal law, are just as easily federalized by Republicans in Congress to achieve their political goals. Republicans have long, though unsuccessfully, sought to federalize punitive damages in tort cases and recently succeeded in federalizing certain aspects of class actions in the ***270** Federal Class Action Fairness Act of 2005. [FN190] Examples of federal involvement in criminal law, another area long governed by the states, includes the Adam Walsh Child Protection and Safety Act, [FN191] the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, [FN192] the Prison Rape Elimination Act of 2003, [FN193] and the Unborn Victims of Violence Act of 2004. [FN194] All may serve important purposes, but each act clearly imposes a federal solution on a traditional area of state law. All were also enacted with the overwhelming support of purportedly conservative Republicans in the House and Senate, and signed with much fanfare by a supposedly conservative president.

Judicial conservatives-like Supreme Court Associate Justice Antonin Scalia-often do much the same thing, relying on states' rights to strike down federal laws that they disagree with, like the Gun-Free School Zone Act, which was declared unconstitutional in United States v. Lopez. [FN195] They then ignore the Tenth Amendment and states' rights when striking down state laws they find objectionable, such as the Oregon law allowing a doctor to assist a terminally ill patient in committing suicide [FN196] or the California law allowing the use of marijuana for medicinal purposes. [FN197]

Ultimately, the states' rights argument could be taken much more seriously if it had been applied consistently in the past, and if it were applied consistently by its modern adherents. But that simply was not-and is not-the case. States' rights were-and are-a tool (real or rhetorical) used to achieve political ends.

E. The Development of the Right of Privacy

Judge DeMoss briefly mentions Griswold v. Connecticut, in which a right of privacy was first explicitly set out. [FN198] His analysis implies that the Supreme ***271** Court just pulled the right of privacy out of thin air, but that is not the case. [FN199] Judge DeMoss states that Justice Douglas, the author of Griswold, listed a few cases and then noted that those cases "bear witness that the right of privacy which presses for recognition [in this case] is a legitimate one." [FN200] Judge DeMoss fails, however, to provide any analysis of Justice Douglas's reasoning. [FN201]

In Griswold, Justice Douglas set out a number of unenumerated rights that the Supreme Court had found or defined through recognition over the years. [FN202] They included the right of parents to control what was taught to a child, [FN203] the right to send a child to private school, [FN204] the right to procreate, [FN205] the right to be free from certain bodily intrusions, [FN206] and the right to travel abroad. [FN207]

After discussing the history of unenumerated rights, Justice Douglas then looked at the various elements of

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the Bill of Rights. [FN208] The right of freedom of speech and press includes not only the right to utter or print words and ideas, but it also includes the right to distribute them, the right to receive them, and the right to read them. [FN209] This dissemination of words and ideas has led to a judicially recognized freedom of inquiry, freedom of thought, and freedom to teach. [FN210]

In 1886, the Supreme Court, in Boyd v. United States, described the Fourth and Fifth Amendments as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." [FN211] One hundred years later, in Mapp v. Ohio, the Court said the Fourth Amendment creates a "right to privacy, no less important than any other right carefully and particularly reserved to the people." [FN212] Finally, the Fifth and Fourteenth Amendments provide that no person shall be deprived of liberty without due process of law. [FN213]

***272** The Bill of Rights provides a right to be left alone to some degree. [FN214] The First Amendment provides the right to say what one feels, to read what one pleases, to associate with whomever one desires, and to worship in the manner of one's choosing. [FN215] The Fourth Amendment prevents intrusions into the home without justification, and the Fifth Amendment contains a right to be silent. [FN216] All of these, in one form or another, provide a right to be left alone. [FN217] These can be described as constitutional liberties, constitutional freedoms, or perhaps constitutional rights.

Judge DeMoss states that "'liberty' is not a synonym for 'privacy,"' but clearly the concepts are related. [FN218] Philosophers have debated the nature of freedom and the nature of liberty since the days of Socrates. Alexander Hamilton recognized this problem in Federalist No. 84 when he addressed concerns about a bill of rights. [FN219] He used the liberty of the press as an example and asked: "What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion?" [FN220] So when we speak of liberty, what exactly are we describing? Is it defined by a laundry list of acceptable behaviors, or is it defined broadly and generally? Is liberty synonymous with freedom, and is privacy an element of either or both?

Whether privacy is a type of liberty or an element of freedom has been discussed since the late Renaissance. [FN221] The twentieth century political philosopher Isaiah Berlin discussed this history in the essay Two Concepts of Liberty. [FN222] The two concepts of liberty are positive liberty and negative liberty. [FN223] Positive liberty is the freedom to do what one pleases, or as Berlin says, it allows "the individual to be his own master." [FN224] This concept is what most people think of when they think of freedom. The freedom of speech contained in the First Amendment is a tangible example of a positive liberty. [FN225]

Negative liberty, according to Berlin, is freedom from interference or coercion. [FN226] The Fourth Amendment right of citizens "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" is an example of negative liberty. [FN227] Privacy, according to Berlin, was ***273** an idea first explored by the medieval philosopher William Ockham, and it is an essential element of negative liberty. [FN228] We retain a zone where we are free from interference or coercion, and in that zone, we have privacy. [FN229]

Berlin recognized that positive liberty-the freedom to do-and negative liberty-the freedom from, which also incorporates privacy-are two sides of the same coin. [FN230] My liberty to do ends at your liberty to be left alone, and vice versa. [FN231] Most people understand this concept instinctively and seem to feel that they have the right to be left alone. [FN232]

F. National Referendum

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Finally, Judge DeMoss suggests that if the American people want a right of privacy, they have to amend the Constitution to incorporate one. [FN233] He notes that the Constitution clearly has two amendment provisions: a constitutional convention provision (the amendment process of passing two-thirds of both houses) and ratification by the states provision. [FN234] In lieu of a formal constitutional amendment, Judge DeMoss suggests a national referendum as a way to gauge what the public wants. [FN235] He ends his article with a petition to Congress "to call a national referendum to permit the people to just say no, or yes, to the Supreme Court's usurpation of the power to amend the U.S. Constitution." [FN236]

I presume that Judge DeMoss couches his proposed referendum in terms of the Supreme Court's power, rather than in terms of the right of privacy, because he understands how deeply ingrained the desire to be left alone is in the American character. In fact, I suspect that most Americans would be surprised to learn that the Constitution does not protect their right to be left alone. Americans have expressed their desire for privacy in many ways, from one of the first colonial battle flags depicting a coiled snake with the phrase "Don't tread on me" to the recent and widespread disgust towards congressional involvement in the tragedy of Terri Schiavo. [FN237] The comment that I heard most frequently regarding Terri Schiavo's fate was that the situation was a private family matter, and the government should not get involved. But ***274** if there is no right to privacy, then there is no such thing as a constitutionally protectable private family matter. Again, this would probably shock most Americans.

The rhetoric of privacy permeates the public debate, and it crosses party lines. The current debate over the National Security Administration's (NSA) wiretapping and monitoring of phone calls is couched by both proponents and opponents in terms of privacy rights. [FN238] During General Michael Hayden's confirmation hearings to become the Director of the Central Intelligence Agency, General Hayden, the former head of the NSA, said that his agency always did its best to protect the privacy rights of American citizens: "There are privacy concerns with everything that we do, of course. We always balance privacy and security, and we do it within the law." [FN239] So the concept of privacy rights seems to be universally accepted by the American public and most politicians.

We do not make laws by national referendum, but it is an interesting idea. And it may be worthwhile to determine where the public stands on the issue. So I support Judge DeMoss in his call for a referendum, but I believe that his referendum incorrectly focuses on the procedure and not the result. [FN240] If he is concerned about a right of privacy, then the referendum should deal with that directly. The referendum should ask the public if it believes it has a right of privacy. It should ask the citizens whether they believe they have a right to be left alone by the government except in situations when the government can express a legitimate need to invadetheir privacy. Perhaps then we will be able to put this issue behind us.

IV. Questions by Judge DeMoss and Replies by Michael Coblenz

Judge DeMoss: In your discussion of the Tenth Amendment in Part III.D.2, you do not quote the text of the Tenth Amendment, and a good bit of your discussion relates to the circumstances that led to the adoption of the Eleventh Amendment, which took away federal court jurisdiction of suits by citizens of one state against another state and was interpreted by the Supreme Court to take away jurisdiction of suits by an individual against his own state. [FN241] And all of this discussion had nothing to do with the textual language of the Tenth Amendment. [FN242]

***275** Michael Coblenz: You are correct that none of the historical discussion had anything to do with the

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textual language of the Tenth Amendment. My discussion centered on the power struggle between the states and the federal government, and between the advocates of states' rights and the advocates of a strong national government. [FN243]

But, my point is that the Constitution operated then and continues to operate now in a political and legal framework. Questions about states' rights and federalism and about the interplay between the rights and powers of the states and the federal government, also operate in both a political and a legal framework. One dispute in apportioning rights and powers between the states and the federal government was over the jurisdiction of the federal courts, and that dispute was what I was addressing in my discussion of Chisholm v. Georgia. [FN244] In that case, the Supreme Court thought the Constitution gave federal courts jurisdiction over cases between an individual and a state, but clearly many citizens disagreed and subsequently amended the Constitution. [FN245] Chisholm did not change the Tenth Amendment, but it did reflect the changing balance of power between the Federalists, who advocated a strong national government, and the Jeffersonian Republicans, who favored states' rights.

Judge DeMoss: Ultimately, in Part III.D.2, you state: “Neither the Court nor the political system resolved the disagreement. Instead, it was resolved on the battlefield. Ultimately, states' rights were lost at Gettysburg, and buried by the Thirteenth, Fourteenth, and Fifteenth Amendments.” [FN246] Are you contending that the Civil War Amendments repealed the Tenth Amendment?

I see nothing in the text of the Thirteenth, Fourteenth, or Fifteenth Amendments that could be construed as a repealer of the Tenth Amendment. And as the amendments relating to prohibition clearly demonstrate, a repealer of a prior amendment must be expressly and explicitly accomplished by a separate amendment to that effect. [FN247] I have not made a detailed examination of the legislative history behind the Thirteenth, Fourteenth, or Fifteenth Amendments, but I have never before seen or heard any contention that these amendments “buried” the Tenth Amendment. [FN248] I am interested in seeing whatever items of legislative history contemporaneous to the adoption of these amendments that you have found that support your contention in this regard.

I am, of course, aware of the fact that the Supreme Court has relied on certain language in the Fourteenth Amendment to make various provisions of the first ten amendments applicable to the states, in addition to Congress, as they were originally drafted. But making express provisions of the Bill of ***276** Rights applicable to the states does not constitute a repealer of the Tenth Amendment as to the unenumerated rights that the Tenth Amendment expressly reserves to the states and to the people. [FN249]

Michael Coblenz: My point was not that the post-Civil War Amendments literally repealed the Tenth Amendment. My contention is that the political idea of states' rights lost much of its credence after the Civil War. [FN250] After the Civil War, the power of the federal government was in ascendancy because the political trends had changed, not because the Constitution had changed. The change in the political landscape led to the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments, which imposed a national will on the states. [FN251] These amendments took away the rights that southerners had fought for and led to the application of the Bill of Rights to the states.

Judge DeMoss: The dilemma you and I are arguing about can only be settled by the people. I return, therefore, to the utility and efficaciousness of my suggestion for a national referendum. [FN252] If a majority of the people voted in favor of your position that the Tenth Amendment is dead and buried, then I will haul down my flag. On the other hand, if a majority of the citizens voted to give life and meaning to the Tenth Amendment by

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concluding that there really are many matters so "local and domestic" in nature that they should be decided at the state level, I hope you would be willing to do likewise.

Michael Coblenz: I certainly would accept the decision of the public. I suspect that most people would support whatever political (and constitutional) structure they perceive gives them maximum liberty. Moreover, I suspect that most people want the states to protect them from overreaching by the national government-and thus approve of states' rights in that regard-but are quite happy when the federal government grants and protects individual liberties.

I imagine we would get a split decision. I would be very surprised if a majority of the American people said they do not believe that they have a right of privacy, which is where this discussion began. I also suspect they would say there are many matters that are local and domestic in nature and that should be decided at the state level. Unfortunately, this might not be very logical or philosophically coherent, but the history of these issues has not been logical or coherent. Had it been, we might not be debating these issues.

[FNa1]. Judge DeMoss practiced law for thirty-four years in Houston, Texas, before he was appointed by former President George H. W. Bush in 1991 to the Fifth Circuit Court of Appeals, where he assumed Senior Status on July 1, 2007.

[FNaa1]. Michael Coblenz is an attorney in private practice in Lexington, Kentucky. He is a graduate of Gonzaga University School of Law and has a L.L.M. in Intellectual Property Law from the University of Houston Law Center. He is licensed to practice in Texas and Kentucky.

[FN1]. Gonzales v. Carhart, ___ U.S., 127 S. Ct. 1610, 1639 (2007). ______

[FN2]. Id.; Roe v. Wade, 410 U.S. 113, 166 (1973).

[FN3]. Carhart, ___ U.S. at, 127 S. Ct. at 1639 (Thomas, J., __________ concurring).

[FN4]. Id. (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 979-82 (1992) (Scalia, J., concurring in part and dissenting in part)).

[FN5]. See Griswold v. Connecticut, 381 U.S. 479, 507-09 (1965) (Black, J., dissenting) (arguing that the Supreme Court lacked the authority to establish rights not enumerated in the Constitution); see infra notes 17-19 and accompanying text.

[FN6]. Roe, 410 U.S. at 165-66.

[FN7]. See, e.g., Casey, 505 U.S. at 874 (majority opinion).

[FN8]. The Nomination of John G. Roberts Jr. to be Chief Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2005).

[FN9]. The Nomination of Samuel A. Alito Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006).

[FN10]. Harold R. DeMoss Jr., Unacceptable Argument: Figment of Imagination-There Is No Constitutional

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Right to Privacy. Call A National Referendum to Settle the Issue, Hous. Chron., Jan. 15, 2006, at Outlook.

[FN11]. Posting of Michael Coblenz to ACS Blog, http://www.acsblog.org/cat-guest-bloggers.html (Feb. 22, 2006, 16:05 EST) (on file with Texas Tech Law Review).

[FN12]. See infra Parts II-III.

[FN13]. For reference purposes, this question and its answer will be referred to as Question 1.

[FN14]. Merriam-Webster's Collegiate Dictionary 418 (11th ed. 2004).

[FN15]. Webster's New World Roget's A-Z Thesaurus 266 (Wiley Publ'g, Inc. 1999).

[FN16]. For reference purposes, this question and its answer will be referred to as Question 2.

[FN17]. See U.S. Const.

[FN18]. See id.

[FN19]. For reference purposes, this question and its answer will be referred to as Question 3.

[FN20]. See Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965).

[FN21]. See id.

[FN22]. Id. at 485-86.

[FN23]. For reference purposes, this question and its answer will be referred to as Question 4.

[FN24]. Griswold, 381 U.S. at 484.

[FN25]. Id. at 486 (citation omitted).

[FN26]. Id.

[FN27]. See id.

[FN28]. See id.; U.S. Const.

[FN29]. See Griswold, 381 U.S. at 484, 486.

[FN30]. Roe v. Wade, 410 U.S. 113, 152-53 (1973) (citations omitted).

[FN31]. Id. at 113; Griswold, 381 U.S. at 479.

[FN32]. Id. at 152.

[FN33]. See U.S. Const.

[FN34]. For reference purposes, this question and its answer will be referred to as Question 5.

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[FN35]. Merriam-Webster's Collegiate Dictionary 917 (11th ed. 2004).

[FN36]. Id.

[FN37]. Id.

[FN38]. Id.

[FN39]. See Roe v. Wade, 410 U.S. 113, 152 (1973); Griswold v. Connecticut, 381 U.S. 479, 483-84 (1965).

[FN40]. See U.S. Const. amends. I-X.

[FN41]. For reference purposes, this question and its answer will be referred to as Question 6.

[FN42]. See U.S. Const. amend. XIV.

[FN43]. Compare U.S. Const. amend. XIV, with U.S. Const. amend. V.

[FN44]. See Webster's New World Roget's A-Z Thesaurus 462, 615 (Wiley Publ'g, Inc. 1999)

[FN45]. See Roe v. Wade, 410 U.S. 113, 152-53 (1973).

[FN46]. For reference purposes, this question and its answer will be referred to as Question 7.

[FN47]. See U.S. Const.; Question 4, supra note 23.

[FN48]. See U.S. Const.; Question 4, supra note 23.

[FN49]. See U.S. Const.

[FN50]. For reference purposes, this question and its answer will be referred to as Question 8.

[FN51]. U.S. Const. art. V.

[FN52]. For reference purposes, this question and its answer will be referred to as Question 9.

[FN53]. U.S. Const. art. V.

[FN54]. The Declaration of Independence para. 2 (U.S. 1776).

[FN55]. U.S. Const. pmbl.

[FN56]. Letter from George Washington (Sept. 19, 1796), reprinted in 10 A Compilation of the Messages and Papers of the Presidents 1789-1904, 213 (1897) (1796) (emphasis added), available at http:// www.yale.edu/lawweb/avalon/washing.htm.

[FN57]. Marbury v. Madison, 5 U.S. 137, 176, 179-80 (1803).

[FN58]. For reference purposes, this question and its answer will be referred to as Question 10.

[FN59]. See U.S. Const. amends. IX, X.

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[FN60]. U.S. Const. amend. IX.

[FN61]. Id.

[FN62]. U.S. Const. amend. X.

[FN63]. See U.S. Const.

[FN64]. See U.S. Const. art. I, § 10.

[FN65]. See U.S. Const. amend. X.

[FN66]. Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 123 (Yale Univ. 1998).

[FN67]. See Letter From George Washington, supra note 56, at 213.

[FN68]. See, e.g., McCulloch v. Maryland, 17 U.S. 316, 421 (1819).

[FN69]. See U.S. Const. art. II.

[FN70]. For reference purposes, this question and its answer will be referred to as Question 11.

[FN71]. See U.S. Const. art. V.

[FN72]. See supra Part II.

[FN73]. See infra Part III.B.

[FN74]. See U.S. Const.; Question 2, supra note 16.

[FN75]. See Question 2, supra note 16.

[FN76]. See U.S. Const.

[FN77]. The Federalist No. 84, at 455 (Alexander Hamilton) (J.R. Pole ed., 2005).

[FN78]. Id.

[FN79]. See generally id. (addressing concerns that adding the Bill of Rights to the Constitution would limit the rights of citizens).

[FN80]. See supra Part II.

[FN81]. See supra notes 17-18 and accompanying text.

[FN82]. See U.S. Const.

[FN83]. See U.S. Const. amend. III ("No soldier shall . . . be quartered in any house, without the consent of the Owner . . . ."); U.S. Const. amend. V ("No person shall . . . be deprived of . . . property, without due process of law . . . .").

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[FN84]. See U.S. Const. amends. III, V.

[FN85]. See Question 2, supra note 16.

[FN86]. See U.S. Const.; The Federalist Nos. 47, 48 (James Madison).

[FN87]. See U.S. Const.

[FN88]. See id.

[FN89]. See id.

[FN90]. Id. art. I, § 8, cl. 3.

[FN91]. Black's Law Dictionary 331 (8th ed. 2004).

[FN92]. See, e.g., The Federalist No. 37 (James Madison), supra note 77, at 196 ("But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas.").

[FN93]. Towne v. Eisner, 245 U.S. 418, 425 (1918).

[FN94]. See Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (noting that U.S. jurisprudence "bears witness that the right of privacy which presses for recognition is a legitimate one"); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 68 (1911) (holding the Sherman Antitrust Act constitutional). See generally U.S. Const.

[FN95]. 15 U.S.C. § 1 (2004).

[FN96]. U.S. Const. art. I, § 10.

[FN97]. Standard Oil, 221 U.S. at 68 (upholding the Sherman Antitrust Act).

[FN98]. Id.

[FN99]. See U.S. Const. art. I, § 10; Standard Oil, 221 U.S. at 81.

[FN100]. See Griswold v. Connecticut, 381 U.S. 479, 484 (1965); Standard Oil, 221 U.S. at 56-57.

[FN101]. See U.S. Const. amend. IX.

[FN102]. Id.

[FN103]. See Roger Pilon, A Court Without a Compass, 40 N.Y.L. Sch. L. Rev. 999, 1010 (1996).

[FN104]. See Kurt T. Lash, The Lost Original Meaning of the Ninth Amendment, 83 Tex. L. Rev. 331, 348 (2004).

[FN105]. Id.

[FN106]. Id.

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[FN107]. See The Federalist No. 84 (Alexander Hamilton), supra note 77, at 454-56.

[FN108]. Id.

[FN109]. Id. at 455.

[FN110]. The Federalist No. 84 (Alexander Hamilton), supra note 77, at 455.

[FN111]. Id.

[FN112]. Id. at 456.

[FN113]. Id.

[FN114]. Lash, supra note 104, at 350.

[FN115]. Paul Finkelman, James Madison and the Bill of Rights: A Reluctant Paternity, 1990 Sup. Ct. Rev. 301, 338 (1990).

[FN116]. Rene de Visme Williamson, Political Process or Judicial Process: The Bill of Rights and the Framers of the Constitution, 23 J. Pol. 199, 203 (1961).

[FN117]. See 1 Annals of Cong. 456 (Joseph Gales ed., 1834), available at http://memory.loc.gov/cgi-bin/ampage? collId=llac&fileName=001/llac001.db&recNum=229; see also Laurence H. Tribe, American Constitutional Law 774 (2d ed. 1988) (stating the fears of Madison that the rights not granted in the Bill of Rights would be perceived within the powers of government).

[FN118]. 1 Annals of Cong. 452, available at http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=227.

[FN119]. See U.S. Const. amend. IX.

[FN120]. See Question 10, supra note 58; U.S. Const. amend. X.

[FN121]. See Lash, supra note 104, at 331, 427.

[FN122]. See James Madison, The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America 166-70 (Gaillard Hunt & James Brown Scott eds., Greenwood Press 1970) (1920).

[FN123]. See id. at 143.

[FN124]. See id. at 142.

[FN125]. See id. at 139-200.

[FN126]. See id. at 174-75.

[FN127]. Id.

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[FN128]. Id.

[FN129]. See id. at 177-88.

[FN130]. See id.

[FN131]. See Catherine Drinker Bowen, Miracle at Philadelphia 254-64 (1966).

[FN132]. See id. at 186-96.

[FN133]. See The Federalist No. 39 (James Madison), supra note 77, at 206-11.

[FN134]. Id. at 211.

[FN135]. Amar, supra note 66, at 123-24, 280-81.

[FN136]. Id.

[FN137]. See Question 10, supra note 58.

[FN138]. Christopher Collier & James Lincoln Collier, Decision in Philadelphia: The Constitutional Convention of 1787, at 184-94 (1986).

[FN139]. See id.

[FN140]. See id. at 202-05.

[FN141]. See Chisholm v. Geogia, 2 U.S. 419, 470-79 (1793).

[FN142]. See David P. Currie, The Constitution in Congress: The Federalist Period 1789-1801, at 195-97 (1997).

[FN143]. Chisholm, 2 U.S. at 469-70.

[FN144]. Id. at 470-71.

[FN145]. Id.

[FN146]. See id.

[FN147]. Id. at 470-71.

[FN148]. Id. at 429.

[FN149]. Id. at 430-34.

[FN150]. See id. at 470-71.

[FN151]. See Chisholm, 2 U.S. at 470-78.

[FN152]. See U.S. Const. amend. XI; Currie, supra note 142, at 195-98.

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[FN153]. See Amar, supra note 66, at 128-29, 140-44.

[FN154]. Id.

[FN155]. See Sturges v. Crowninshield, 17 U.S. 122, 176-208 (1819).

[FN156]. See Barron v. Baltimore, 32 U.S. 243, 248-49 (1833).

[FN157]. See Gibbons v. Ogden, 22 U.S. 1, 67 (1824); Cohens v. Virginia, 19 U.S. 264, 345 (1821); Martin v. Hunter's Lessee, 14 U.S. 304, 351-52 (1816).

[FN158]. See Martin, 14 U.S. at 351-52.

[FN159]. See Cohens, 19 U.S. at 345.

[FN160]. Gibbons, 22 U.S. at 67.

[FN161]. See Collier & Collier, supra note 138, at 137-52.

[FN162]. See Amar, supra note 66, at 225-26.

[FN163]. Id.

[FN164]. See Collier & Collier, supra note 138, at 137-52.

[FN165]. See Amar, supra note 66, at 163-69.

[FN166]. See id. at 162-72, 273-74.

[FN167]. See U.S. Const. amend. XIII.

[FN168]. See U.S. Const. amend. XIV, § 1.

[FN169]. See Amar, supra note 66, at 181-87 (citing Cong. Globe, 39th Cong., 1st Sess. 1088-94 (1866)).

[FN170]. The Slaughter-House Cases, 83 U.S. 36, 74-75, 77 (1872).

[FN171]. See U.S. Const. amend. XV; The Slaughter-House Cases, 83 U.S. at 71 (discussing enfranchisement of blacks).

[FN172]. See U.S. Const. art. I, § 10, cl. 1; Fletcher v. Peck, 10 U.S. 87, 123 (1810).

[FN173]. Fletcher, 10 U.S. at 123.

[FN174]. Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819).

[FN175]. Dartmouth Coll., 17 U.S. at 650-54 (holding that state legislatures cannot enact laws that alter provisions of an existing corporate charter); Fletcher, 10 U.S. at 123 (holding that state legislatures cannot enact laws that impact an existing land contract).

[FN176]. See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) ("[P]olice power . . . is an

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exercise of the sovereign right of the Government . . . and is paramount to any rights under contracts . . . . ").

[FN177]. See Question 10, supra note 58.

[FN178]. See, e.g., Gibbons v. Ogden, 22 U.S. 1, 203 (1824).

[FN179]. Id.

[FN180]. See The Slaughter-House Cases, 83 U.S. 36, 57-60 (1872) (holding that states can regulate location of slaughter houses).

[FN181]. Munn v. Illinois, 94 U.S. 113, 123, 130-32 (1877) (holding that a state can regulate the rates for grain elevators).

[FN182]. See U.S. Const. amend. XIV.

[FN183]. See Lochner v. New York, 198 U.S. 45, 64 (1905).

[FN184]. See id.

[FN185]. Id.

[FN186]. Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 437-39 (1934).

[FN187]. Nebbia v. New York, 291 U.S. 502, 523-25 (1934).

[FN188]. See Blaisdell, 290 U.S. at 437-39; Nebbia, 291 U.S. at 523-25.

[FN189]. See No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.).

[FN190]. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

[FN191]. See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified as amended in scattered sections of 18 & 42 U.S.C.).

[FN192]. See Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18 & 42 U.S.C.).

[FN193]. See Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601-09 (Supp. IV. 2004).

[FN194]. See Unborn Victims of Violence Act of 2004, Pub. L. No. 108-212, 118 Stat. 568 (codified as amended in scattered sections of 10 & 18 U.S.C.).

[FN195]. See United States v. Lopez, 514 U.S. 549, 551 (1995).

[FN196]. Gonzales v. Oregon, 546 U.S. 243, 275 (2006) (Scalia, J., dissenting) (arguing that the U.S. Attorney General should have the power to prohibit Oregon's allowance of the prescription of physician-assisted suicide drugs).

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[FN197]. See Gonzales v. Raich, 545 U.S. 1, 33-42 (2005) (Scalia, J., concurring) (upholding federal preemption of California's regulation of medicinal marijuana).

[FN198]. See Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Question 3, supra note 19; Question 4, supra note 23.

[FN199]. See Question 3, supra note 19; Question 4, supra note 23.

[FN200]. See Griswold, 381 U.S. at 485; Question 3, supra note 19; Question 4, supra note 23.

[FN201]. See Question 3, supra note 19; Question 4, supra note 23.

[FN202]. See Griswold, 381 U.S. at 481-85.

[FN203]. See Meyer v. Nebraska, 262 U.S. 390, 400-02 (1923).

[FN204]. See Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534-36 (1925).

[FN205]. See Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942).

[FN206]. See Rochin v. California, 342 U.S. 165, 209-10 (1952).

[FN207]. See Aptheker v. Sec'y of State, 378 U.S. 500, 505 (1964).

[FN208]. See Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965).

[FN209]. See Martin v. City of Struthers, 319 U.S. 141, 143-47 (1943).

[FN210]. See Wieman v. Updegraff, 344 U.S. 183, 194-95 (1952) (Frankfurter, J., concurring).

[FN211]. See Boyd v. United States, 116 U.S. 616, 630 (1886).

[FN212]. See Mapp v. Ohio, 367 U.S. 643, 656 (1961).

[FN213]. To the extent that they agreed that the Constitution does provide a right to privacy, both John Roberts and Samuel Alito stated at their confirmation hearings that they found the right to privacy in the liberty provisions of these amendments. See The Nomination of John G. Roberts Jr. to be Chief Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2005); Nomination of Samuel A. Alito Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006).

[FN214]. See U.S. Const. amend. V.

[FN215]. See U.S. Const. amend. I.

[FN216]. See U.S. Const. amends. IV, V.

[FN217]. See U.S. Const. amends. I, IV-V.

[FN218]. See supra text accompanying note 44.

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[FN219]. See The Federalist No. 84 (Alexander Hamilton), supra note 77, at 452.

[FN220]. See id. at 456.

[FN221]. See Isaiah Berlin, Two Concepts of Liberty, in Liberty 176 (Henry Hardy ed., Oxford Univ. Press 2002) (1958).

[FN222]. See id.

[FN223]. See id. at 168-69.

[FN224]. See id. at 178.

[FN225]. See U.S. Const. amend. I.

[FN226]. See Berlin, supra note 221, at 169.

[FN227]. See U.S. Const. amend. IV.

[FN228]. See Berlin, supra note 221, at 169. Ockham is best known for the philosophical tenet of simplicity known as "Ockham's Razor."

[FN229]. See Berlin, supra note 221, at 176.

[FN230]. See id. at 169.

[FN231]. See id.

[FN232]. See id. at 168-69.

[FN233]. See Question 9, supra note 52.

[FN234]. See U.S. Const. art. V.

[FN235]. See Question 11, supra note 70.

[FN236]. See Question 11, supra note 70.

[FN237]. See, e.g., The Flags of the United States of America, http:// www.usflag.org/history/gadsden.html (last visited Jan. 31, 2008); Euthanasia and Terri Schiavo, http://www.religioustolerance.org/schiavo5.htm (providing responses from different groups) (last visited Jan. 31, 2008).

[FN238]. See, e.g., James X. Dempsey, Communications Privacy in the Digital Age: Revitalizing the Federal Wiretap Laws to Enhance Privacy, 8 Alb. L.J. Sci. & Tech. 65 (1997).

[FN239]. See Nomination of General Michael V. Hayden, USAF, to Be Director of the Central Intelligence Agency Before the S. Comm. on Intelligence, 109th Cong. 29 (2006) (statement of General Michael V. Hayden, USAF).

[FN240]. See Question 11, supra note 70.

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[FN241]. See supra Part III.D.

[FN242]. See U.S. Const. amend. X.

[FN243]. David J. Barron, A Localist Critique of the New Federalism, 51 Duke L.J. 377, 377-79 (2001).

[FN244]. See Chisholm v. Georgia, 2 U.S. 419, 470-79 (1793); supra Part III.D.2.

[FN245]. See Chisholm, 2 U.S. at 470-79.

[FN246]. See U.S. Const. amends. XIII, XIV, XV; supra text accompanying note 161.

[FN247]. See U.S. Const. amend. XVIII, repealed by U.S. Const. amend. XXI.

[FN248]. See U.S. Const. amends. XIII, XIV, XV.

[FN249]. See U.S. Const. amends. IX, XIV.

[FN250]. See supra Part III.D.2

[FN251]. See Amar, supra note 66, at 162-72, 273-74.

[FN252]. See Question 11, supra note 70.
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