# An Unenumerated Right of Privacy... And What to Do About It

*By Judge Harold R. DeMoss, Jr.**

One of the most perplexing issues now confronting the American people in general, and agitating the confirmation process of recent Supreme Court nominees in particular, is the question of whether the Constitution contains 'a right of privacy,' or any of the other rights 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 come to the personal conclusion that a 'right of privacy' is clearly not enumerated in the Constitution, and exists only as a figment of the imagination of a majority of the Justices on the modern Supreme Court. I will attempt to set forth for the public the reasons for that conclusion in Question-and-Answer format.

*Question:* What does the word unenumerated mean?

*Answer:* Webster's Dictionary defines enumerate as "to name or count or specify one by one." Roget's Thesaurus states that the synonyms for enumerate are "to itemize, list, or tick off." I have added the negative prefix 'un' so that each of the definitions or synonyms is reversed. Therefore, unenumerated means "not named," "not counted," "not specified," "not itemized," "not listed."

*Question*: Why do I say the 'right of privacy' is "unenumerated"?

*Answer*: Because neither the word privacy nor the phrase right of privacy appears anywhere in the Constitution or its amendments. The same can be said of the word 'abortion' and the words 'sexual preference,' which are protected under the right of privacy in the minds of some Supreme Court Justices.

*Question*: When was the 'right of privacy' concept first recognized by the Supreme Court as a part of the Constitution?

*Answer*: In 1965, Justice Douglas used this concept when writing for the majority in *Griswold v. Connecticut*.[1] 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 the Fourteenth Amendment in 1868. 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.

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

*Answer*: The following quotations best capture 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.[2]
> .....
> 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.[3]

Note the phrase 'which presses for recognition here' in the last quotation above. That phrase clearly 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. Note also that if the right of privacy had been "named" or "listed" or "specified" or "itemized" in the Constitution, there would have been no need for it to "press[] for recognition" in this opinion. What the Supreme Court was really doing with such language was interpreting some of the specific protections enumerated in the Bill of Rights as indicating the existence of a general right of privacy that is not expressly written, and then finding a new specific right, i.e., freedom to use contraceptives, as an unstated part of the unstated general right of privacy.

This same technique was used by the Supreme Court in *Roe v. Wade*, in which the majority stated:

> The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific Railroad Company v. Botsford*, 141 U.S. 250 (1891), 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 Fourth and Fifth Amendments, . . . [and] in the penumbras of the Bill of Rights. . . .
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> 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.[4]

If you substitute "a woman's right to terminate her pregnancy" (*Roe*) for "a married couple' 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. Note also that the Supreme Court admitted in the first sentence of this quote from *Roe v. Wade* that "the Constitution does not explicitly mention any right of privacy." In truth, the Constitution does not "mention" the right of privacy at all, in anyway, shape, or form. Therefore, I think my use of the adjective 'unenumerated' in this context is both accurate and appropriate.

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*Question:* What does the word 'penumbra' mean in these opinions, and what does the phrase 'penumbras of the Bill of Rights' refer to?

*Answer: Webster's Dictionary* states that the word "penumbra" comes from two Latin roots: *paene* meaning 'almost,' and *umbra* meaning 'shadow.' The first meaning of penumbra, as stated in the dictionary, is "a partial shadow, as in an eclipse, between regions of total shadow and total illumination." The second meaning of the word is "a partially darkened fringe around a sunspot." The third meaning of the word is "an outlying, surrounding region." This third meaning is the only one that could have any relevance in the phrase "penumbras of the Bill of Rights," and so the use of the word "penumbra" by the Supreme Court should be understood to mean that the right of privacy exists somewhere in the region that surrounds and lies outside of the Bill of Rights. But there is absolutely nothing in the text of the Bill of Rights about any such surrounding or outlying area nor is there any catch-all phrase (like 'other similar rights') indicating that the rights specifically enumerated exemplify a larger class of rights that were not enumerated. Consequently, whatever rights might be found in the phrase 'penumbras of the Bill of Rights' exist only in the mind, contemplation, and imagination of each individual reader and are not part of the constitutional text.

*Question*: What light does the Fourteenth Amendment shed on this question?

*Answer*: Not much. Some proponents of a constitutional right of privacy say that it can be found in the "liberty clause" of the Fourteenth Amendment. But the "liberty clause" of the Fourteenth Amendment is identical to the "liberty clause" in the Fifth Amendment; and just as in the case of the Bill of Rights, neither the word 'privacy' nor the phrase 'right of privacy' appears anywhere in the Fourteenth Amendment, much less in the "liberty clause." Furthermore, "liberty" is not a synonym for "privacy" and "privacy" is not a synonym for "liberty." The fact that the Supreme Court has said that the right of privacy could come from the First, Fourth, Fifth, or Fourteenth Amendments strikes me as evidence that the Court is just guessing about where it does come from. [One might add here: even if liberty did include privacy, the Amendments say that liberty can be denied so long as due process is followed—e.g., so long as the law is the product of the normal legislative process.]

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

*Answer*: Yes, clearly. The Supreme Court wrote new language into the Constitution. It did not interpret existing language. When dealing with a written document like the Constitution, there are two ways to amend it: (1) you can delete words that already exist therein, or (2) you can add new words not previously included. The latter is what the Supreme Court has done, and this action differs fundamentally from its legitimate task of interpreting and applying existing words and phrases like 'cruel and unusual punishment,' 'due process,' 'public use,' and 'establishment of religion' that appear verbatim either in the text of the Constitution or its amendments.

*Question*: Does the Constitution give the Supreme Court the power to amend the Constitution?

*Answer*: No. Neither the Supreme Court (the Judicial Branch of Article III) nor the President (the Executive Branch of Article II) is mentioned in Article V of the Constitution, which defines the process for amending the Constitution.

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

*Answer*: As defined in Article V, the power to amend lies with "the People," acting through the Congress and the state legislatures. In our Declaration of Independence, one of the truths we declared to be self-evident is that "governments are instituted among men, deriving their just powers from the consent of the governed." Likewise, it is "We, the People, of the United States" who are expressly denominated as the acting parties in our original Constitution who "do ordain and establish this Constitution for the United States of America."

Our first president, George Washington, in his farewell address to the Nation in 1796, put it as follows:

> The basis of our political systems is the right of the people to make and to alter their constitutions of government. But the Constitution 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. (Emphasis added.)

Finally, Chief Justice John Marshall echoed the thoughts of President Washington in his historic opinion in *Marbury v. Madison:*[5]

> 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 fabric has been erected.[6]
>
> This original and supreme will organizes the government, and assigns, to different departments, their respective powers.[7]
>
> 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.[8]

> 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.[9]

*Question*: Does the Constitution speak to the circumstance of unenumerated rights?

*Answer:* Yes, clearly, in the Ninth and Tenth Amendments. The Ninth Amendment in simple plain English says: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The right of privacy is not one of the rights enumerated in the Constitution, and consequently, the Ninth Amendment gives us two instructions: first, we are not "to deny or disparage" the existence of a right of privacy simply because it is not enumerated in the Constitution; and second, we are required to recognize that any such right of privacy is "retained by the people." 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 simply 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."

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The Constitution does not delegate to the Supreme Court (or any other branch of the government) any power to define, apply, or enforce whatever may be the right of privacy retained by the People. Similarly, the Constitution does not prohibit any state in particular, nor all states in general, from defining, applying, or enforcing whatever the people of that state may choose as the right of privacy (*see* U.S. CONST. art. III, § 10). Therefore, as the Tenth Amendment clearly provides, the power to define, apply, or enforce a right of privacy is "reserved to the States respectively, or to the people." The Ninth and Tenth Amendments are the very heart and soul of the concepts of limited government, separation of powers, and federalism that were the unique contributions of the Constitution to the philosophy and principles of government.

For these reasons, I conclude that by finding a constitutional right of privacy that is not expressly enumerated in the Constitution, the Supreme Court has, in President Washington's words, "usurped" the roles and powers of the People, the Congress, and the state legislatures. Shed of all semantical posturing, the critical issue becomes: Does the Constitution permit amendments by judicial fiat?

I am certainly aware that there are those who take the contrary view, 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 so as to be "relevant to modern times." These folks operate on the premise 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. But we as a society must decide which view should prevail.

The Supreme Court has on several occasions held that Congress does not have the power to change by legislation what the Supreme Court interprets the Constitution as saying. Similarly, there is nothing in the Constitution that authorizes the President to change a Supreme Court ruling regarding constitutional language. Therefore, to remedy the "usurpation" by the Supreme Court as to a 'right of privacy,' we must go to the highest authority —the People. We must ask the people who ordained and established the Constitution for a declaration as to their consent, one way or the other. The ultimate remedy to this controversy lies not with the individual members of the Supreme Court, but in getting an expression from the People in the form of a national referendum either affirming or rejecting 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 referendum would afford the opportunity to demonstrate that a majority of the people in each of a majority of the states agree with the Supreme Court and, therefore, that the right of privacy should be treated as a part of the Constitution, just as if it had been adopted by the amendment process in Article V.

On the other hand, for those of us who believe the Supreme Court has usurped the power of the People to consent or not to consent to a constitutional change, a national referendum would afford the opportunity to demonstrate that a majority of the people in each of a majority of the states 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 Constitution.

This referendum could be called by Congress and placed on the ballot. Such a referendum would reflect the will of all of the people, not just the view of a very small sample as is reflected in private polls.

This controversy has now been brewing for more than thirty years with little sign of resolution. But as more of the general public (the People) become fully informed and aware of 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 one way or another as quickly as possible. The best way, and perhaps the only way, to settle it is to allow all of the people to vote on the proper resolution. Therefore, as a U.S. citizen, I respectfully petition the 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 Constitution.

**Footnotes**

[1] 381 U.S. 479 (1965).

[2] *Id.* at 484.

[3] *Id.* at 486 (citations omitted).

[4] 410 U.S. 113, 152-153 (1973).

[5] 5 U.S. 137 (1803).

[6] *Id.* at 176.

[7] *Id.*

[8] *Id.* at 179-80.

[9] *Id.* at 180.