Privacy and Social Contract: A Defense of Judicial Activism in Privacy Cases

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One of the central issues in political debate over the past several decades has been the question of whether or not the courts are justified in voiding statutes that do not run afoul of any explicit constitutional limitation on the legislative power. The debate has pitted those who assert that our culture's commitment to democracy requires that the legislative power be supreme, at least when not in conflict with the Constitution, against those who argue that other values, most notably justice, dictate a more active role for the courts.

While the argument often proceeds in historical or constitutional terms, it is, in fact, a philosophical debate. By asking whether the courts ought to play an expansive or only a limited role, one raises an issue of political philosophy. Answering that democracy requires the role be limited is dispositive, only if the requirements of democracy are taken as normative. If democratic values are not normative, the “answer” is, in fact, only a statement that a system with an activist judiciary is less, or non, democratic. Similarly, arguing that our history dictates a particular role suffices only if historical conclusions are taken as being normative. Even an appeal to the Constitution requires that the Constitution be accepted as normative.

Accepting democratic values and the Constitution as having normative content would seem noncontroversial. Philosophical arguments might be offered for majority rule. While limitations on that rule may also be argued for, one might assert that democratic values are normative in the sense that, to the extent that a practice furthers democracy without negatively affecting certain other values, that practice furthers some moral good.

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1. See infra notes 95-241 and accompanying text.
2. See infra notes 138-55 and accompanying text.
3. See infra notes 189-241 and accompanying text.
4. “Requires” here is used normatively. One might argue that democracy requires a passive court in the sense that only such a court is consistent with the theory of democracy. Similarly, a constitution could require a passive court to be consistent with the theory of that document. To make the normative claim that a court ought to be passive, the theory of democracy or of the constitution under consideration must have normative power.
The normative content of the Constitution requires some additional explanation. The fact that the rules embodied in the Constitution were drafted and accepted by the Framers makes them normative, only if one accepts the rule that whatever the Framers took as norms worthy of incorporating in the Constitution are normatively binding on later generations. That argument would appear difficult to make. Instead, one must argue either that the dictates of the Constitution have normative strength, independent of the fact that they are contained in the Constitution, or that the Constitution as a whole derives normative strength from some source, such as the present consent of the people to be ruled under it.

If the democratic principle of majority rule, limited by constitutional norms, is to be countered, so as to allow the judiciary to declare invalid statutes on other than a constitutional basis, the argument must rest on philosophical grounds as strong as those on which democracy rests. The grounds to be offered here are those of the social contract and the consent of the governed to be ruled under the contract. Those principles dictate that the will of the majority be controlled not only by the Constitution, but also by other non-constitutional bounds; and that the courts, rather than the legislatures, are the proper entities to define those bounds.

A pure democratic principle requires that the courts never override a democratic legislature and holds that the legitimacy of government rests on the supremacy of that branch. A constitutional democratic principle allows the courts to override the outcome of the democratic process, but only when the constitution explicitly bars that outcome. A court employing an implicit or penumbral bar reduces or destroys the legitimacy of the government.

The principles asserted in this Article lead to the conclusion that the legitimacy of government requires that the courts at least consider bars to some democratic outcomes. If those bars may be found in constitutional penumbras, that may help the political acceptance of the court's decision. If the penumbra argument is strained, that affects political acceptance, but the courts must still be willing to consider voiding the statute. The legitimacy of government demands that the courts be willing to go beyond constitutional checks in protecting the individual from the political process.

There are two ways in which the nature of the argument offered here might be unclear. First, while purporting to present a philosophical argument, there are references both to history and to the current strength of our society's commitment to government by the consent of the governed. Purely jurisprudential arguments may be offered that only consent of the governed legitimates a government, but consent theory has also had its critics. Rather than joining that debate, this Article begins with the assumption that a government is legit-


6. For early criticism, see Hume, Of the Original Contract, in HUME'S ETHICAL WRITINGS 255 (A. MacIntyre ed. 1965).

7. See generally Simmons, supra note 5.
imate only when rule is by the consent of the governed.\(^8\) The philosophical aspects of the argument then provide the steps from that assumption to the conclusion that legitimacy also requires an activist judiciary in the privacy cases.

The role of the historical and political material is to show that society agrees with the assumption on which the Article is based. While that does not establish the validity of the assumption, the relationship shown between consent and judicial activism should lead a society so committed to the conclusion that legitimacy also requires activism. The argument is, then, conditional. If a society is committed to the necessity of government by consent, then that society must, to be consistent, also be committed to judicial activism in the privacy arena. Our society is so committed to government by consent, hence, our society must accept an active role for the judiciary.

This argument, even based on an assumption, is stronger than its strongest counterargument, the argument from democracy.\(^9\) That argument also generally begins with an assumption — the value of democracy — and argues from democracy to establish legislative supremacy.\(^10\) Yet, society’s commitment to government by consent appears to be stronger than its commitment to democracy.\(^11\) Furthermore, at least one of the arguments for the value of democracy rests on the theory that it establishes consent,\(^12\) so consent would appear to be the more basic value.

The second way in which the nature of the argument might be unclear is in its mix of philosophical argument with constitutional cites. The argument is not that the Constitution establishes an activist judiciary; neither is the argument from democracy an argument that the Constitution explicitly bars an activist judiciary.\(^13\) Each is extra-constitutional. The argument from democracy contends that whatever constitutional provision an activist attempts to employ to invalidate a statute, unless the authority is explicit, it is unacceptable as violating the principle of democracy. The argument from consent contends that activism is required. Constitutional cites provide only the location of some non-explicit points of attachment to the Constitution, if such attachment is politically necessary.

The argument begins with an examination of the privacy cases and the recognition that the claims raised in those cases are best seen as claims about the power of the legislature under the social contract. The argument offered by those who use the value of democracy to further legislative supremacy is then examined to see what accounts for its strength, why its opponents have been

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8. Much of the criticism of this position is due to the impossibility of showing any actual or tacit consent on the part of the governed. See infra notes 67 & 248 and accompanying text. Recognizing this impossibility, this Article proceeds along the lines of hypothetical consent. See infra notes 249-52 and accompanying text.

9. See infra notes 138-55 and accompanying text.

10. See, e.g., Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 2-3 (1971) ("We need not pause here to examine the philosophical underpinnings of that assumption [of majority rule] since it is a ‘given’ in our society....").

11. See infra notes 162-72 & 242-47 and accompanying text.


13. See infra notes 133-37 and accompanying text.
unsuccessful in countering it, and to examine the character of any argument likely to be strong enough to overcome it. The concepts of consent to be governed and the social contract are then examined for strength as normative concepts. Concluding that these concepts do have normative strength points to the need for further examination of the contract and the parties thereto. Lastly, the understanding gained of the contract leads to a conclusion as to who should interpret the contract and determine the limits on legislative authority.

I. PRIVACY AS A SOCIAL CONTRACT ISSUE

An individual asserting a privacy interest may be making any of a wide variety of claims. One such class of claims, not of great interest to constitutional law, consists of claims of private, non-governmental violations of some right. These claims are the stuff of the privacy torts. But even those constitutional privacy claims that may be asserted only against the government admit of differing varieties.

Privacy claims asserted against the government fall into two classes. Both classes protect the individual against government intrusion, but differ in

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14. Professor Parker lists ten categories of privacy claims, before going on in search of unifying principles: interference with family or home life, interference with physical or moral integrity or moral and intellectual freedom, an attack on reputation or honor, false light, the embarrassing and irrelevant disclosure of facts about an individual, the use of a person's name or identity or likeness, spying on or besetting an individual, interference with correspondence, misuse of a person's private communications, and the disclosure of information in violation of professional confidentiality. Parker, A Definition of Privacy, 27 RUTGERS L. REV. 275, 277 (1974) (citing Conclusions of the Nordic Conference on the Right of Privacy, in PRIVACY AND THE LAW, A REPORT BY THE BRITISH SECTION OF THE INTERNATIONAL COMMISSION OF JUSTICE 45 (Littman & Carter-Rusk eds. 1970)). Even Parker's list may not be exhaustive, unless the entries are read broadly enough that, for example, personal autonomy (see infra notes 24-39 and accompanying text) could be included within physical or moral integrity or moral and intellectual freedom.

Professor Henkin notes several meanings that may be given to a privacy claim, even when privacy is seemingly restricted to the right to be let alone. The claimed right may be: a right to be alone, to be free from unwanted intrusion, to be secreted and secretive; a right to be unknown ("incognito"), free from unwanted information in the hands of others, unwanted scrutiny, unwanted "publicity"; a right to "intimacy" and a freedom to do intimate things; ... a right to be free from physical, mental, or spiritual violation, a right to the "integrity" of one's "personality."


15. A constitutional interest may, even here, be implicated where a right is judicially enforced. Legal resolution of a conflict between an individual's interest in keeping information private and the interest of the press in publishing that information may raise first amendment concerns.


17. Rights of privacy that may be asserted against non-governmental actors might also be argued to fall into the two classes presented, infra, at text accompanying notes 18-20, but the claims would not be constitutional claims.

the nature of the intrusion. One class consists of claims that access to places or information ought to be restricted.¹⁹ The other class consists of claims to the right to make decisions free from government interference.²⁰

Informational and access privacy claims have long been recognized²¹ and have a firm constitutional foundation. The third, fourth and fifth amendments, and perhaps the first amendment, may be viewed as protecting informational privacy. The fourth amendment, in protecting one’s person, house and papers from unreasonable searches and seizures, serves as a limit on government access and limits the methods by which information about the individual may be gathered. The third amendment limitation on the quartering of troops protects against intrusion into the area of one’s house, and the fifth amendment privilege against self-incrimination provides another limitation on gathering information. The first amendment may also further informational privacy by providing freedom to publish or speak anonymously and to not disclose one’s religion or associations.²²

The other class of privacy claims against the government is less firmly established in the Constitution²³ and may seem to be of more recent vintage.²⁴ Justice Douglas, in Griswold v. Connecticut,²⁵ found within the “penumbra” of various amendments to the Constitution a right of privacy that prevented the State of Connecticut from interfering with the decision of a married couple to use contraceptive devices. The privacy asserted was not a claim that there should be a limit on the information or locations to which the government might enjoy access. Rather, Justice Douglas found a right to be free from government interference or coercion in making certain decisions.²⁶

While the two classes of privacy claims differ, Justice Douglas glossed over that difference in establishing the privacy protected by Griswold.²⁷ He cited to the third, fourth and fifth amendments,²⁸ but those amendments are better viewed as concerned with informational and access privacy.²⁹ His cite to

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¹⁹. See Allen, supra note 18, at 464; Rubenfeld, supra note 18, at 740; D. Richards, supra note 18, at 243.
²⁰. See Allen, supra note 18, at 465-66; Rubenfeld, supra note 18, at 740; D. Richards, supra note 18, at 243-44.
²¹. See Henkin, supra note 14, at 1420 (“From the beginning, indisputably, the Constitution has protected some elements of ‘privacy’ even narrowly defined.”).
²². See Henkin, supra note 14, at 1420.
²³. See infra notes 27-33 and accompanying text.
²⁴. See supra notes 21-22 and accompanying text. See also Perry, Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases, 71 Nw. U.L. Rev. 417, 440 & n.153 (1977) (noting the distinction between two classes of privacy rights and placing Griswold on one side of the distinction and the fourth, fifth and, perhaps, first and third amendments on the other); Posner, The Uncertain Protection of Privacy by the Supreme Court, 1979 Sup. Ct. 815
the first amendment freedom of association may fare no better.30 His cites to Pierce v. Society of Sisters31 and Meyer v. Nebraska,32 while sometimes criticized as a reinvocation of substantive due process,33 were at least directed to the right he sought to establish. Each case served to protect a right to make decisions, free from government interference, with respect to certain aspects of one's children's education.

The term "privacy" as a label for the freedom from government interference in certain individual choices has become firmly affixed,34 despite the confusion engendered by the label.35 Justices, judges and commentators, in some cases motivated by a desire to clear the confusion, have suggested various substitute labels for the right at issue in Griswold and its progeny. A partial list includes: "personhood,"36 "autonomy,"37 "freedom of action"38 and "the right

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30. See supra note 22 and accompanying text.
31. 268 U.S. 510 (1925) (cited in 381 U.S. at 482).
32. 262 U.S. 390 (1923) (cited in 381 U.S. at 482).
34. In Roe v. Wade, 410 U.S. 113 (1973), the Court agreed with the position that "the right of privacy ... is broad enough to cover the abortion decision...." Id. at 155. Conversely, but using the same terminology, the Court in Bowers v. Hardwick, 478 U.S. 186 (1986), declined to extend the right of privacy to insulate one from state proscription of homosexual activities. The Court also spoke in terms of privacy when it protected the right of unmarried individuals to decide whether to use contraceptives. See Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).
35. In his Roe v. Wade dissent, Justice Rehnquist, while recognizing that the majority might be discussing the insulation of the abortion decision from state coercion, professed to have difficulty finding "privacy" even involved in the case, noting that "privacy" must not be being used in its ordinary or even its fourth amendment sense. 410 U.S. at 173 (Rehnquist, J., dissenting). Even in the majority opinion in Roe, Justice Blackmun wrote that "[t]he pregnant woman cannot be isolated [from her fetus] in her privacy" and that such a "woman's right to privacy is no longer sole." Id. at 159. While Justice Blackmun may well have been stating only that the right to decisional privacy is reduced as others become affected by the decision, the language he used has led at least one commentator to the conclusion that he "conflate[d] restricted access privacy rights with decisional privacy rights." Allen, supra note 18, at 468.

This confusion may be understandable, since the place in which an act occurs may be a factor in the determination of whether or not the act (in the particular location) should be insulated from state proscription. See Ravin v. State, 537 P.2d 494 (Alaska 1975), where the Supreme Court of Alaska found in the Alaska Constitution a privacy right to the possession and consumption of marijuana in one's home. While the language of the opinion indicates that the privacy right under consideration is that of decisional privacy, the court found relevant the location in which that claimed right was exercised, and stated that such privacy rights were at their strongest when exercised in the home. Id. at 502-03. Furthermore, the two classes may be viewed as protecting similar interests. Each right removes something, either information or decisions, from public concern.

Professor Richards argues that both protect the same interests. He sees decisional privacy as protecting the individual's right to conscience. The same interest is protected by informational privacy, because the gathering of private information serves to control the individual's exercise of moral power and stifles moral independence. D. Richards, supra note 18, at 243.
38. Dixon, supra note 27, at 84; Posner, supra note 29, at 195.
Rather than adding an alternative label for the right of decisional privacy, this Article provides an alternative description of what is at issue in the privacy cases. The alternative description leads to a different understanding of the issue as to who should resolve the claim.

The assertion of a decisional privacy right may be seen as a claim about the nature of social contract. The claimant asserts that the right to regulate activity within the sphere at issue is not one of the rights given the sovereign under the social contract. The action is said to be private in the sense that it is not the legitimate concern of the government. The claim is that the decision is to be free, and that the individual should be allowed to exercise "autonomy" and to develop his or her "personhood" through making individual decisions of conscience. To use the two remaining labels, an individual has "freedom of action" under the contract and has a social contract "right to be let alone."

Employing the theory of social contract, the Griswold line of cases is seen as part of a much longer line. In Supreme Court opinions, the line stretches back to Calder v. Bull. In that 1798 opinion, Justice Chase wrote:

The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of legislative power, they will decide what are the proper objects of it: The nature, and ends of legislative power will limit the exercise of it.... An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.

Justice Chase's position seems clear: the social compact or contract empowers the legislature to enact certain varieties of legislation; legislation outside the power granted under the contract is without authority.

Justice Field, in dissent in the Slaughterhouse Cases, argued that the privileges and immunities clause of the fourteenth amendment "assumes that

39. Bowers v. Hardwick, 478 U.S. 186, 207 (1986) (Blackmun, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). Olmstead concerned a wiretap, so Justice Brandeis, despite the fact that his language may be read broadly to include decisional privacy, may have been writing more in terms of informational privacy.

40. Certainly others have seen Griswold v. Connecticut and Roe v. Wade as part of a longer line but usually in criticism of the decisions. The line is one that is traced back to the substantive due process cases and claimed to be a revival of the approach taken in the discredited Lochner v. New York, 198 U.S. 45 (1905). See, e.g., Griswold, 381 U.S. at 514-16 (Black, J., dissenting).

41. 3 U.S. (3 Dall.) 386 (1798). Philosophical discussion of the social contract has even older roots. See infra notes 76-80 & 262-71 and accompanying text.

42. 3 U.S. (3 Dall.) at 388 (opinion of Chase, J.). The opinions of each of the Justices participating were presented seriatim.

43. Even Justice Iredell, writing in opposition to the approach taken by Justice Chase, seemed more concerned with the ability of the courts to discover principles of "natural justice" than with the proposition that natural justice or social contract might serve, in the abstract, as a limitation on legislative power. Id. at 398-99 (opinion of Iredell, J.).

there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by state legislation... The privileges and immunities designated are those which of right belong to the citizens of all free governments." Justice Bradley took a similar dissenting position, writing: "[T]here are certain fundamental rights which [the state's] right of regulation cannot infringe.... I speak now of the rights of citizens of any free government." Both Justice Field and Justice Bradley argued that the legislature lacked the power to abridge certain rights. Those rights were not to be found only in the text of the Constitution, but seemed to come from natural law or social contract theory. The difference between the Slaughterhouse dissents and Justice Chase's Calder v. Bull position was that Justices Field and Bradley then had the text of the privileges and immunities clause within which to attempt to incorporate social contract limitations.

Social contract language reached a majority opinion in Citizens' Savings & Loan Association v. Topeka. Justice Miller, writing for the Court, stated:

It must be conceded that there are ... rights in every free government beyond the control of the State.... There are limitations on [government] power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.

The Court clearly believed that the social contract served as a limitation on government power. Furthermore, it did not restrict itself to those aspects of social contract found in the text of the Constitution but argued instead in terms of theoretical principles.

Two years later, in Munn v. Illinois, Justice Waite, in his majority opinion wrote:

"A body politic ... is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private....

Once again the Court offered a clear view that under the social contract the power of the legislature is limited, and once again the limitations did not appear to be confined to those found in the text of the Constitution.

While the language of social contract has disappeared from modern opinions, Griswold, Roe v. Wade, Bowers v. Hardwick and the other cases discussing decisional privacy are the progeny of those earlier cases. They too

45. Id. at 96-97 (Field, J., dissenting).
46. Id. at 114 (Bradley, J., dissenting).
47. 87 U.S. (20 Wall.) 655 (1875).
48. Id. at 662-63.
49. These limitations "grow out of the essential nature of all free governments." Id.
50. 94 U.S. 113 (1877).
51. Id. at 124 (quoting Preamble of the Constitution of Massachusetts) (citation omitted).
52. Griswold, 381 U.S. 479; Roe, 410 U.S. 113. See also supra note 34.
53. 478 U.S. 186. See supra note 34.
consider the claim that certain legislative acts may be invalid because they are beyond the power of the legislature. The acts are argued to be beyond the power of the legislature, not because they contradict some explicit provision of the Constitution, but rather because they violate some principle regarding the rightful province of government in the lives of individuals.54

Once again, it should be emphasized that recasting the issue in terms of social contract is not motivated solely by the position that it provides a more accurate label. It is the position of this Article that the social contract description of the claim is more accurate, but the importance of that belief is that it leads to a re-examination of the question of whether courts or legislatures are the better organs for the resolution of conflicting views as to what is protected by "decisional privacy" or is denied the legislature under "social contract" analysis.

It must be admitted that it is difficult to assert the historical existence of an actual contract.55 In fact, if the Constitution were taken to be the social contract, an argument based on social contract might be used to argue against judicial activism in privacy cases. As Professor Perry structures that position, while arguing against it, the Constitution is viewed as a social contract between the nation and the states and among the branches of the federal government, in addition to the usual view of the social contract as between the people and the sovereign or among the people.56 As such, the tenth amendment is a clause of the social contract that is violated by judicial activism where state legislation is involved.57 Similarly, activist review of congressional and executive actions violates article III of the social contract.58

54. *Lochner*, 198 U.S. 45, has not been left out of the historical chain simply because it is an embarrassment to those who would defend judicial activism. Rather, the case does not use the social compact language of the earlier opinions nor the privacy language of the modern opinions. It must be admitted that the language of "liberty" in the fourteenth amendment is akin to the language of "privacy" in the later cases. There is legitimacy to the claim that modern privacy cases are a revival of the substantive due process cases, including *Lochner*. A defense of judicial activism from the point of view offered here would have to include a defense of the Court insofar as its authority to issue the *Lochner* opinion, although clearly there is still room to argue that the Court was simply wrong in its conclusion that wage and hour legislation is the sort of legislative act that is beyond its power under the social contract. It may be admitted that the regulation of relations between people of unequal power would appear to be a proper subject of state regulation, even if one wishes to argue that consensual acts between competent, equal adults are beyond that power. See *Bowers*, 478 U.S. 186; Carey v. Population Services Int'l, 431 U.S. 678 (1977).

55. The United States Constitution might be viewed as the embodiment of the social contract (but see infra notes 87-88 and accompanying text), but it is not a contract between each individual and the sovereign or among all individuals. See infra notes 262-73 and accompanying text. The Mayflower Compact might also seem to be a social contract in that it bound at least the heads of families to each other, but the Mayflower Compact was only an agreement to be bound together to regulate local affairs, while acknowledging the continued supremacy of the British Crown as sovereign. But see M. LESSNOFF, SOCIAL CONTRACT 42 (1986) (stating that the Mayflower Compact is a social contract).


57. See Perry, supra note 56, at 584-85.

58. Id. at 585.
While the Framers of the Constitution may have been affected by social contract theory, the Constitution is not itself the social contract. The social contract is not a contract among the branches of the sovereign government or between sovereigns — the states and the federal government. The social contract is among the people or between the people and the sovereign. Although no social contract has ever expressly existed historically, social contract theory serves as an important explanatory device in political philosophy, and it certainly has had its place in the development of American political thought. The use of social contract as an explanatory device is exemplified by the work of John Rawls. Professor Rawls examined the concept of justice by considering not what any actually existing social contract demands, but rather what rational contractors in an original position establishing a society would decide was just. The contractors must make their decisions under the "veil of ignorance," not knowing what positions in society they will occupy. Unable to identify self-interest, other than in a general sense of interests shared by all, the contractors will make decisions that treat the interests of all equally and must be considered just.

While Rawls uses social contract as a hypothetical method of determining what is just, he seems also to find additional importance in the idea of contract. Classical social contract theory is, at bottom, an explanation of the consent of the governed to the rule of the sovereign. If no real contract exists, in what sense may citizens be said to have consented to be ruled or to be voluntary participants in society? For Professor Rawls the principles of justice that result from his consideration of hypothetical contract come as close as is possible to a society being a voluntary scheme, a society in which the obligations of the citizen are self-imposed. Contract (the hypothetical contract) not only leads to justice, but justice leads to contract (the consent to be governed). Rawls' position not only uses social contract as an explanatory device, but recognizes that the element of voluntariness inherent in social contract theory is important to governmental legitimacy, even if that voluntariness must be found in a society's principles rather than in its formation.

Rawls' approach to social contract has found its way into the debate over the role of judges. Dworkin argued that judges must consider constitutional

59. See infra notes 76-82 and accompanying text.
60. It may be questionable whether the states and the federal government can both claim sovereignty, as that term is usually used in social and political philosophy. See infra notes 277-82 and accompanying text.
61. See infra notes 262-76 and accompanying text.
62. See infra notes 63-86 and accompanying text.
64. Id. at 11-19.
65. See infra notes 242-52 and accompanying text.
67. Professor Philip Soper has also examined the question of how to establish the legitimacy of government without demonstrating actual consent to be governed. He rejects such bases as tacit consent and concludes that legal obligation to obey the law is found in the good faith of the ruler in taking into account the interests of the ruled. See P. Soper, A Theory of Law (1984).
theory in resolving hard cases and suggested that Rawls' philosophy must at least be considered in developing that constitutional theory.\textsuperscript{68} Taking up Dworkin's challenge, David Richards derives liberty, self-respect and autonomy as Rawlsian general goods — goods that would universally be chosen by those in Rawls' original position and are central to justice.\textsuperscript{69} Furthermore, he justifies judicial review and supremacy to the extent the judiciary furthers the attainment of those general goods; that is, judicial review is justified on the basis of justice,\textsuperscript{70} and, it appears, by the fact that, according to Richards, contractarian theory is the theory of the Constitution.\textsuperscript{71} Thus, for Richards, Rawls' philosophy establishes a concept of justice and identifies certain goods, including the right to decisional privacy, that are judicially enforceable as a part of the Constitution.

Rawls has clearly made a major contribution to philosophy, and social contract concepts were important as an explanatory device in making that contribution. Richards may also be seen to have made a contribution in the same area making similar use of social contract concepts. However, the basis for his conclusions with regard to judicial review stands apart from his consideration of what is just and may be attacked separately.

Michael Perry attacks Richards' claim that contractarian theory is the theory of the Constitution and so constitutionally justifies judicial activism.\textsuperscript{72} Professor Perry argues that Richards has never shown that his claim is historically justified and that, while some or many of the Framers may have agreed with contractarian philosophy, one may not conclude that the Framers adhered to a modern Rawlsian social contract theory.\textsuperscript{73} Perry recognizes that Richards' claim might also be established on non-historical grounds by arguing that contractarian philosophy is so compelling that it must be adopted as the theory of any just constitution. Perry finds it difficult to accept contractarian philosophy, or any other philosophical theory, as so compelling as to have an exclusive warrant to define justice.\textsuperscript{74}

Richards' appeal to justice as a basis for judicial review is also suspect. As Perry has argued, his claim cannot be that justice demands that judicial review be a part of our constitutional system. If, instead, his claim is that government should strive to attain a just system, his position is on solid moral ground. However, justifying judicial review on that basis requires an argument that the courts are a better instrument for the attainment of justice. That argument, which is accepted by Perry but does present problems, will be considered and rejected in discussing Professor Perry's work.\textsuperscript{75}

\textsuperscript{68.} \textit{R. DWORKIN, TAKING RIGHTS SERIOUSLY} 106-07, 149 (1978).
\textsuperscript{70.} See D. Richards, \textit{The Moral Criticism of Law} 50 (1977). See also D. Richards, \textit{supra} note 18, at 290-92.
\textsuperscript{71.} D. Richards, \textit{supra} note 70, at 51.
\textsuperscript{73.} \textit{Id.} at 302-03.
\textsuperscript{74.} \textit{Id.} at 303-04.
\textsuperscript{75.} See infra notes 203-27 and accompanying text.
The final basis on which it was suggested that the social contract could be found to have some form of existence and to be of importance is as a part of American political history and philosophy. The concept of social contract seems firmly established both by the influence of social contract theory on the Framers and certain aspects of the Constitution that may be seen as influenced by social contract concepts.

The place of social contract in the philosophical underpinnings of the Constitution is established by Professor Corwin. Professor Corwin traced the movement of social contract theory into American constitutional theory from Locke and Hobbes, through the Mayflower Compact and the writings of Hooker and Otis, as establishing the philosophical background against which the Constitution was written. Indeed, the nation may owe its existence to social contract theory since "[i]t is axiomatic that a major element in the justificatory theory for the American Revolution was derived from John Locke's theory of social contract...." The Framers, too, were influenced by Locke's social contract, natural rights and natural law theory, and Hobbes and Locke have been said to be "the philosophic forefathers of the American Constitution." It has even been suggested that the very idea of a written constitution is based on social contract theory.

There also appear to be elements of the Constitution itself that embody aspects of social contract. Professor Henkin notes several aspects of Locke's and Rousseau's philosophies of social contract blended in the Constitution — "the original equality and independence of the individual, the sovereignty of the people (before as well as after government is established), limited government by consent of the governed for purposes determined by them, and rights retained under government." He also cites to the preamble as reflecting the same philosophy in stating: "We the People ... do ordain and establish this Constitution."

Professor Corwin also found natural law, natural rights, and social contract concepts in the Constitution. He went so far as to conclude his article on

78. See Barnett, Are Enumerated Constitutional Rights the Only Rights We Have? The Case for Associational Freedom, 10 HARV. J.L. & PUB’Y POL’Y 101, 103 (1987) ("the authors of our Constitution were very much influenced by the Lockean philosophy of 'rights first — government second’"); id. at 104 ("the ‘historical Constitution’ that judges are called upon to interpret may be seen most accurately as a product of Lockean philosophy’); Massey, supra note 77, at 314 ("the constitutional framers ... clearly relied upon natural law principles in formulating constitutional guarantees").
80. See D. RICHARDS, supra note 18, at 54 ("The idea of a written constitution does not arise in a historical and cultural vacuum. It flows out of deep currents in Western political and religious thought, and the moral ideal to which both political and religious thought points is contractarian").
81. Henkin, supra note 14, at 1412.
82. Id.
the "higher law" background of the Constitution with: "[I]n the American written Constitution, higher law at last attained a form which made possible the attribution of an entirely new sort of validity, the validity of a statute emanating from the sovereign people." Drawing guidance from Corwin, Professor Dixon states: "[T]he written Constitution can be viewed as a tangible embodiment of a new agreement. In this manner, the social contract concept is brought down from the rarified stratosphere of natural law-natural rights theorizing and made concrete." 84

While the flavor of social contract may be found in the general structuring of the national government as one of limited, enumerated powers, the most obvious inclusion of Lockean philosophy is in the ninth amendment. The amendment speaks not in terms of social contract, but rather in the language of natural rights and natural law that accompany Locke's social contract theory. The ninth amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." 85 That these rights are retained by the people requires that they have existed prior to the Constitution. While in some circumstances retained rights might find their prior existence in other sources of positive law, the philosophical context in which the Constitution and the ninth amendment were written indicates that the rights retained are inherent or natural rights. 86

While the Constitution contains a flavor of social contract, it is important to note that the Constitution is not the social contract itself. 87 The social contract is between the individual and other individuals or the sovereign. 88 While containing social contract aspects in setting out limits on its power and recognizing rights of the people, the Constitution is concerned largely with the structure of government.

While the Constitution may contain aspects of the social contract, if the social contract is to be entirely contained in a constitution, it will be only in what has been referred to as the "unwritten constitution." 89 Even the strong social contract flavor found in the ninth amendment differs from most of the

83. Corwin, supra note 76, at 409 (emphasis in original).
84. Dixon, supra note 27, at 46 (footnote omitted).
85. U.S. CONST. amend. IX (emphasis added).
86. See, e.g., B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT 19 (1955) ("The Ninth Amendment ... is a basic statement of the inherent natural rights of the individual.... [T]he framers of the Constitution ... carried with them into the work the English concept of individual liberties, as being inherent in the individual irrespective of the form of government."); M. GOODMAN, THE NINTH AMENDMENT: HISTORY, INTERPRETATION, AND MEANING 30-33 (1981) (examining the use of "rights" in other documents of the era and finding them to be natural or inherent rights that cannot be given up under a social contract); Abrams, The Ninth Amendment and the Protection of Unenumerated Rights, 11 HARV. J.L. & PUB. POL'Y 93, 93 (1988) (The ninth amendment protects "rights the framers believed were inherently held by people in a free society."). See also supra notes 76-84 and accompanying text.
87. But see Meese, The Law of the Constitution, 61 TUL. L. REV. 979, 981-82 (1987) ("The Constitution is ... the instrument by which the consent of the governed — the fundamental requirement of any legitimate government — is transformed into a government complete with the powers to act and a structure designed to make it act wisely or responsibly.").
88. See infra notes 262-76 and accompanying text.
Constitution in that it is "about rather than of the Constitution." The ninth amendment recognizes other sources of rights and may be seen as authorizing resort to those unwritten sources.

Without the distinction between the Constitution and social contract, the only social contract rights would be those recognized by the Framers. Modern views on natural or inherent rights would play no role. But the social contract is the consent of the governed, not simply the consent of our ancestors but the continuing consent of the people presently governed. Since the parties to the social contract change and the consent of the new parties continues to be required for legitimacy, evolution of views as to the content of natural law speak to the powers denied the government under the social contract.

II. IDENTIFYING NONTEXTUAL RIGHTS: MAJORITARIANISM AND COMPETING VALUES

A. The Existence of Nontextual Rights

The argument that individuals enjoy rights beyond those identified in the Constitution is strong. On purely philosophical grounds, arguments for natural law and inherent rights that are prior to, and survive the establishment of, governments have had a long and distinguished history. The inherent rights position was certainly widespread at the time of the adoption of the Constitution, and the Framers of the Constitution and the Bill of Rights were influenced by it. Its history has continued within our legal culture to the

91. See Grey, The Uses of an Unwritten Constitution, supra note 89, at 221.
92. See G. McDOWELL, supra note 79, at 49-50.
93. See infra notes 242-52 and accompanying text.
94. It would be wrong to attempt to reconstruct what natural law meant in the eighteenth century and pretend that that version of natural law is enshrined in the ninth amendment.... While natural law is immutable, people's understanding of it can improve, and it can be revealed that a previous appreciation of its content was erroneous.
95. See supra notes 76-80 and accompanying text. See also J. LOCKE, A TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION, ch. II, §§ 5-12, ch. IX, §§ 123-31 (1689).
96. See Corwin, supra note 76, at 383-400.
97. See Griswold v. Connecticut, 381 U.S. at 488 (Goldberg, J., concurring) ("The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are fundamental rights, protected from government infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments."). See also supra notes 76-84 and accompanying text.

Indeed, it has been noted that the ninth amendment was added to the Constitution out of fear that the enumeration of certain rights in the first eight amendments would be taken to imply that there were no other rights against the government. See, e.g., Redlich, Are There "Certain Rights ... Retained by the People"?, 37 N.Y.U. L. REV. 787, 810-11 (1962).
A lengthy pedigree does not, of course, establish the validity of a philosophical position; and like all philosophical positions, the inherent rights position is subject to attack. It is certainly tenable to argue that there are no rights against the government other than those present in positive law. The argument is that of the moral skeptic. If there are, in fact, no inherent or natural rights, then a government can do no wrong. The government would do no wrong, in a moral sense, even if it were to violate a textual fundamental right, but it would have violated positive law and positive law would provide a basis for the courts to declare the action void. Where there is no violation of positive law, the moral skeptic can find no basis for judicial intervention.

While moral skepticism is a credible theory, it is not the basis on which the judicial enforcement of nontextual rights is commonly attacked. Judge Bork, in his inkblot analogy, did not say that there are no unenumerated rights, but only that it is not the role of the courts to "make up what might be under the inkblot." Indeed, when Professor Barber attacked "Bork's constitutionalism" by arguing that it led to the conclusion that the public (through the legislature) could do no wrong but could at worst be accused of behaving inconsistently with its own chosen principles, Professor McConnell felt compelled to defend the position against such a charge of moral skepticism. Professor McConnell noted that "Bork's constitutionalism" depends not on the premise that the community can do no wrong, but rather on the premise that there are no institutions in our system better than representative institutions to answer moral questions. The legislature, as well as the courts, may be wrong, so moral skepticism is not the issue, but where there is disagreement over what is right and wrong, the legislature's view, under Bork's theory, should control.

The true moral skeptic, one who holds that there are no natural, inherent or moral rights, and particularly that the individual has no non-positive rights against the government, will not be swayed by the arguments offered in this Article. Such a skeptic may denounce the entire line of privacy cases as beyond the authority of the judiciary. Of course, the moral skeptic cannot bring any moral outrage to bear against the court and must simply note, dispassionately, that the courts have exceeded their positive law authority.

The moral skeptic must still contend with the ninth amendment's recognition of non-enumerated rights, but the skeptic may maintain that the amend-

98. See supra notes 26-35 and accompanying text.
99. Wall St. J., Oct. 5, 1987, at 22, col. 2 (Testimony of Robert Bork Before the Senate Judiciary Committee). Judge Bork's view of the ninth amendment was as though it said there are additional rights and listed them, but an ink blot covered the list. He recognized that there were unenumerated rights but could not identify them.
102. The argument that the courts have violated positive law may be more difficult to make. See infra note 156 and accompanying text.
ment is a "philosophical mistake." Nonetheless, the existence of the ninth amendment within the Constitution indicates the acceptance of a natural rights philosophy by the founding generation. The continued acceptance of the existence of rights against the government is illustrated by the privacy cases, the political climate, and the unwillingness of even critics of judicial activism in the privacy arena to be characterized as moral skeptics.

A philosophical argument is not won by a comparison of the numbers of people adhering to the conflicting positions. However, if the issue is the public's acceptance of the active role of the courts in privacy cases, the fact that the skeptic is out of touch with the majority view on the existence of rights against the government makes it difficult for the moral skeptic to convince that public that the courts are behaving in an unacceptable manner. There are then political, as well as philosophical, reasons why the attack on judicial activism has not been that of the moral skeptic.

In addition to philosophical argument, the Constitution explicitly recognizes the thesis that there exist non-enumerated rights. The ninth amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." It is widely accepted that this language means what it says: the people enjoy rights in addition to those enumerated in the Constitution. Even Professor Berger, no advocate of judicial enforcement of such rights, accepts the ninth amendment recognition of unenumerated rights. Additional textual bases recognizing the existence of unenumerated rights arguably exist in the article IV privileges and

104. See, e.g., Corwin, supra note 76, particularly at 152-53. See also Barnett, supra note 103, at 28-29 (arguing that the Constitution would look significantly different had the Framers shared or anticipated the moral skeptic view of rights).
105. See supra notes 25-35 and accompanying text.
106. See R. DWORKIN, supra note 68, at 138-39 (noting that most American politicians may be able to accept an argument that the judiciary should defer to the political branches on unenumerated rights but that they could not accept the moral skepticism argument).
107. See supra notes 99-101 and accompanying text.
108. U.S. CONST. amend. IX.
109. See, e.g., Abrams, supra note 86, at 94.
immunities clause\textsuperscript{111} and the fourteenth amendment privileges and immunities clause,\textsuperscript{112} but these suggested additional bases are not as well accepted.\textsuperscript{113}

While the language of the ninth amendment seems clear, there have been attempts to limit the ability to find rights within it.\textsuperscript{114} Any broad discretion in the courts to find rights retained by the people under the ninth amendment may be limited by the argument that those retained must be of similar nature to those enumerated in the first eight amendments.\textsuperscript{115} The amendment then is treated as a sort of \textit{ejusde generis} rule.\textsuperscript{116} Even if this approach were to be accepted, it may not provide strong limitation on the courts. Justice Douglas, in \textit{Griswold}, claimed not to have plucked privacy out of the ether, but to have found it in the penumbra of the enumerated rights. Thus, privacy might be viewed as being similar to the rights enumerated in the Constitution. A wide variety of rights, classified as privacy interests, could then be protected even if the ninth amendment were so limited.\textsuperscript{117} If, on the other hand, ninth amendment rights are required to be so closely tied to the enumerated rights as to flow directly from them, the enumerated rights disparage the existence of other rights retained by the people, in violation of the terms of the amendment.\textsuperscript{118}

It has also been suggested that the ninth amendment may not be a statement of the existence of legal rights but merely a statement of "constitutional aspiration," which, like the preamble to the Constitution, would be unenforceable.\textsuperscript{119} This view would appear similar to Professor Berger's view that whatever ninth amendment rights may exist, they are not judicially enforceable because they do not arise under the Constitution.\textsuperscript{120} However, as various commentators have noted, to argue that ninth amendment rights are not judicially enforceable, while enumerated rights are, is to disparage the retained rights, despite the amendment's command that such rights not be disparaged.\textsuperscript{121}

Another limiting reading of the ninth amendment is the theory that it simply protects, against federal interference, the states' ability to grant rights to their citizens.\textsuperscript{122} The rights protected by the ninth amendment would then be


\textsuperscript{113} With regard to the fourteenth amendment privileges and immunities clause, see the \textit{Slaughterhouse Cases}, 83 U.S. (16 Wall) 36. \textit{But cf. M. Curtis, No State Shall ABRIDGE} (1986) (arguing for the application of the clause to invalidate state infringements of rights).

\textsuperscript{114} \textit{See infra} notes 115-23 and accompanying text.

\textsuperscript{115} \textit{See} Redlich, \textit{supra} note 97, at 810, 812.

\textsuperscript{116} \textit{See} Laycock, \textit{supra} note 109, at 369.

\textsuperscript{117} There would be disagreement over whether privacy rights are sufficiently similar, but the relativity of "similarity" allows the advocate of the enforcement of privacy rights to accept the requirement of similarity and, with Justice Douglas, find sufficient similarity.


\textsuperscript{119} Grey, \textit{The Uses of an Unwritten Constitution}, \textit{supra} note 89, at 213.

\textsuperscript{120} R. \textit{BERGER, GOVERNMENT BY JUDICIARY} 390 (1977); \textit{Berger, supra} note 110, at 9.

\textsuperscript{121} \textit{See, e.g., Laycock, supra} note 109, at 349; Massey, \textit{supra} note 77, at 318; Mitchell, \textit{The Ninth Amendment and the "Jurisprudence of Original Intention,"} 74 GEO. L.J. 1719, 1729 (1986).

\textsuperscript{122} \textit{See} Sager, \textit{supra} note 90, at 243-45.
positive law rights, rather than natural law, inherent rights. A similar approach is to argue that the ninth amendment is simply a limitation on federal powers, rather than an affirmation of individual rights. Given that the first eight amendments specifically recognize individual rights against the federal government and the tenth amendment's clear role as a limitation on federal powers, these readings of the ninth amendment are, at best, strained.

There are, then, both solid philosophical arguments for, and constitutional recognition of, the existence of unenumerated rights. The philosophical argument may have broader scope than the constitutional argument. The constitutional acceptance of unenumerated rights might be argued to be limited to those rights the Framers either accepted or would have accepted. As philosophy advances and the concepts of inherent rights and social contract change, any rights that rest on a philosophical foundation may also change. It is the idea of social contract and the need for continuing consent to be governed that is central to this Article. Thus, the constitutional argument is intended only as an additional indication of the important place unenumerated, inherent rights have in our history and current society.

The real problem seems not to be with the existence of unenumerated rights, but rather with the question of what branch of the government should identify those rights. Justice Iredell, in his *Calder v. Bull* opinion, did not rest on a denial of the concept of natural justice, but rather on the view that should a judge disagree with the legislature on a question of natural justice, it is the legislature, as the branch responsible to the people, whose view should control. The same concern has been expressed by the Court in recent history. Justice White, writing for the Court in *Bowers v. Hardwick*, declined to take an expansive view of the Court's authority to find fundamental rights, because in doing so the Court would be furthering its authority to govern, without having been given express constitutional authority to do so.

While Justice White may be correct in noting that there is no express constitutional authorization given the Court to find fundamental rights, neither is there any express constitutional rule limiting judicial review to clear cases. Indeed, Professor Tribe argues that to counsel caution in the identification of unenumerated rights and suggest that the Court should limit itself to clear cases is to disparage the unenumerated, and hence less clear, rights retained by the people.

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123. See Paust, supra note 109, at 239-48.
124. The fact that the Bill of Rights, when adopted, applied only to the federal government raises the question whether the ninth amendment applies to the states. That issue is discussed, infra, at notes 307-17 and accompanying text.
125. See Sager, supra note 90, at 243-51; Paust, supra note 109, at 239-48.
126. See supra notes 5 & 94 and accompanying text.
127. See infra notes 242-51 and accompanying text.
128. 3 U.S. (3 Dall.) at 399 (opinion of Iredell, J.).
129. 478 U.S. at 194-95.
130. This view may, on the other hand, be seen as disparaging the unenumerated rights in comparison to the judicially enforceable enumerated rights.
131. R. DWORCKIN, supra note 68, at 141.
The Constitution does not resolve whether the legislature or judiciary should decide privacy issues. The Court is not explicitly granted such power and Professor Tribe must look to the effect of its denial to argue for its existence. Neither is the Court explicitly denied such authority, and Justice White must assume that the Court may only act where such explicit authority is granted in order to deny such authority.\textsuperscript{133}

Lacking constitutional resolution, the issue must be resolved on other, extra-constitutional grounds.\textsuperscript{134} As Professor Kay argues, we must turn to "nonlegal criteria, to our basic political, moral, or aesthetic convictions."\textsuperscript{135} It is to these criteria that critics of the privacy cases turn for their arguments against judicial activism,\textsuperscript{136} also thereby confessing the lack of constitutional resolution. It is also to these convictions that the advocate for the judicial recognition of privacy rights must turn to justify that active judicial role.\textsuperscript{137}

B. The Argument From Democracy

The critics of judicial activism and the right to privacy have turned to the value of democracy to justify their position. The argument from democracy does not rest on the position that individuals can have no rights against the government, but rather on the claim that the courts are not the institution to identify those rights.\textsuperscript{138} Where rights against the government are not textually based, they turn, at least to some degree, on personal view. The argument from democracy asserts that there is impropriety in allowing the personal views of the judges to control the personal views of legislators whom the people have elected to make society's policy choices.\textsuperscript{139} Our system is a democratic system, and "majority rule has been considered the keystone of a democratic political system...."\textsuperscript{140}

The argument from democracy has a long history. It may be found in Justice Iredell's opinion in \textit{Calder v. Bull}.\textsuperscript{141} It is mixed with federalism con-
cerns in the *Slaughterhouse Cases*,\textsuperscript{142} and it may be seen in the words of Justice Holmes, stating that the concept of “liberty ... is perverted when it is held to prevent the natural outcome of a dominant opinion....”\textsuperscript{143} Justice White’s dissent, joined by Justice Rehnquist, in *Roe v. Wade*,\textsuperscript{144} expresses clear concern over the Court “imposing [its] priorities on the people and legislatures....”\textsuperscript{145}

The argument is well articulated by Chief Justice Rehnquist. He argues that a judiciary exercisingontextual review becomes a fortunately situated small group with “a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country.”\textsuperscript{146} He finds no justification, for a third legislative branch and argues that even if there were a justification, that branch should at least be elected by and responsible to the people.\textsuperscript{147} Arguments based on nontextual rights and a “living Constitution” are “genuinely corrosive of the fundamental values of our democratic society.”\textsuperscript{148}

Those who have argued against the imposition of the views of the judiciary to supplant those of the people or the legislature have accepted such intervention under some circumstances. Justice Iredell’s deference to the legislature stood so long as the legislature did not transgress the boundaries of its authority.\textsuperscript{149} Similarly, the *Slaughterhouse* Court did find some privileges and immunities protected by the Constitution against the will of the state legislatures.\textsuperscript{150} Justice Holmes’ view in *Lochner* was limited to cases in which the statute at issue did not infringe on fundamental rights as understood by our traditions and law,\textsuperscript{151} and Justice White’s unwillingness to overturn the abortion statutes at issue in *Roe v. Wade* was because the Court was, in his view, without constitutional warrant to do so.\textsuperscript{152} Lastly, Chief Justice Rehnquist’s concern over an activist judiciary’s corrosive effect on democratic values arises only when the courts abandon the tie between their authority to declare laws unconstitutional and the language of the Constitution.\textsuperscript{153}

The interplay between the concept of democracy and constitutional limitations is explained by Judge Bork in discussing the privacy cases. Judge Bork believes our major freedom to be the freedom “to choose to have a public morality” and the liberty to make laws to be the liberty that constitutes us as a free people.\textsuperscript{154} Judge Bork would allow the will of the legislature to be overturned in certain instances. For Judge Bork those instances are defined by the Constitution.

\textsuperscript{142} 83 U.S. (16 Wall.) at 78.
\textsuperscript{143} *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting).
\textsuperscript{144} 410 U.S. 113.
\textsuperscript{145} *Id.* at 222 (White, J., dissenting).
\textsuperscript{147} *Id.*
\textsuperscript{148} *Id.* at 706.
\textsuperscript{149} 3 U.S. (3 Dall.) at 399.
\textsuperscript{150} 83 U.S. (16 Wall.) at 79.
\textsuperscript{151} 198 U.S. at 76 (Holmes, J., dissenting).
\textsuperscript{152} 410 U.S. at 222 (White, J., dissenting).
\textsuperscript{153} See Rehnquist, *supra* note 146, at 698.
Judge Bork's view of our society is not of a purely democratic society, but rather as a "Madisonian system." In such a system, there are areas where the majority has complete control and other areas in which the Constitution calls for the protection of the rights of political minorities.155 His appeal is not, then, to pure democracy, but to a modified form of democracy. When used to criticize judicial activism and the privacy decisions, it is a form of the argument from democracy. The same is true of the other invocations of democracy. While the Constitution or traditional fundamental rights may provide the courts a basis for interfering with the will of the legislature and the people, the claim of lack of authority in the courts when such a basis is lacking is an appeal to the value of democracy.

The argument from democracy is not itself a constitutional argument.156 It is, instead, an argument that, where there is no express constitutional denial of a power to the legislature, democracy dictates that the view of the legislature, as expressing the view of the people as to what does or does not infringe on liberty or privacy is superior to the view of the judiciary. Since it is an extra-constitutional appeal to values, its strength depends on the strength of the value to which it appeals.

Our society seems firmly committed to the value of democracy. While it may be argued that the Constitution does not establish a democratic system, at least democracy understood so as to preclude nontextual judicial review,157 certain aspects of the Constitution do reflect an acceptance of the value of democracy. Placement of the lawmaking authority in a legislature at least one house of which was to be elected by the people, is one such democratic element.158 Naming as electors of members of the House of Representatives those in each state who were electors for the most numerous branch of the state's legislature is another such element.159 That brought as many people as the states recognized as electors into an electoral role in the national government, assuring a large, democratic participation.160 The guaranty to each state of a republican form of government presents a similar element of democracy.161

On the other hand, in other areas the Framers' Constitution showed a lack of commitment to democracy. Certainly the continued acceptance of slavery and the failure to include women within the electorate limited popular participation in the government. If the will of the majority was to control, at least

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156. A constitutional argument can certainly be made for representative government as opposed to a more pure form of democracy. However, such an argument loses the evocative power of the word "democracy." It is also open to arguments that a constitutional and philosophical commitment to representative government leaves open the form that representative government is to take. See infra note 185 and accompanying text. While the response, when the appeal is to democracy, is that a form including judicial review is not just different but is also less democratic (see infra note 186 and accompanying text), it is not as clear that a government with judicial review is less a representative government, at least given the limited representation provided by the original Constitution.
157. See R. DWORKIN, supra note 68, at 141; Barber, supra note 100, at 84.
160. But see infra notes 162-63 and accompanying text.
in the House of Representatives, it was only to be the will of white males.\textsuperscript{162} Even for the white male population, democratic participation was restricted. While the House of Representatives would be popularly elected, the senators from each state were to be chosen by the state legislatures.\textsuperscript{163} Half the lawmaking authority was then to be exercised by individuals chosen not by the common people but by those of rank and position.

These anti-democratic elements in the Constitution reflect anti-democratic sentiments among the Framers. At the Federal Convention, Edmund Randolph argued that the chief danger to the state governments "arises from the democratic parts of our constitutions."\textsuperscript{164} Randolph also spoke of the evils under which the United States labored at the time, and said that "in tracing these evils to their origin every man had found it in the turbulence and follies of democracy."\textsuperscript{165} In discussing the Senate, Randolph hoped it would act as a check on the House "to restrain, if possible, the fury of democracy,"\textsuperscript{166} and objected to election of Senators by even the state legislatures because that procedure would not provide a sufficient check.\textsuperscript{167} His procedure, appointment of Senators by the House, would have further removed the Senate from the people.

Others shared Randolph's views. Roger Sherman favored election of the national legislature by the state legislatures rather than by the people, saying "[t]he people ... should have as little to do as may be about the government."\textsuperscript{168} Elbridge Gerry immediately agreed, noting that "[t]he evils we experience flow from the excess of democracy."\textsuperscript{169} Acting as a moderating influence, George Mason argued for election of the larger house by the people. "He admitted that we had been too democratic but was afraid we [should] incautiously run into the opposite extreme."\textsuperscript{170} Alexander Hamilton, while not speaking so strongly against democracy at the Federal Convention, later came to call democracy "the real disease" of our nation.\textsuperscript{171} Indeed, it has been argued that the Federalists, while employing the rhetoric of democracy, were not that strongly committed to democracy.\textsuperscript{172}

While the dedication of the Framers to democracy might then be somewhat suspect, our history after the framing and ratification of the Constitution shows some increase in society's acceptance of democracy as an important value. Most notable are several amendments to the Constitution. The seven-

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  \item \textsuperscript{162} The exclusion of "Indians not taxed" from the basis for apportioning representation in the House (U.S. CONST. art. I, § 2, cl. 3 (later changed by U.S. CONST. amend. XIV, § 2)) may also signal acceptance of denying participation to Indians.
  \item \textsuperscript{163} See U.S. CONST. art. I, § 3, cl. 1 (later changed by U.S. CONST. amend. XVII).
  \item \textsuperscript{164} 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 26 (M. Ferrand ed. 1966) (McHenry's notes of May 29, 1787).
  \item \textsuperscript{165} Id. at 51 (Madison's notes of May 31, 1787).
  \item \textsuperscript{166} Id. at 58 (Pierce's notes of May 31, 1787).
  \item \textsuperscript{167} Id.
  \item \textsuperscript{168} Id. at 48 (Madison's notes of May 31, 1787).
  \item \textsuperscript{169} Id.
  \item \textsuperscript{170} Id. at 49.
  \item \textsuperscript{171} G. STOURZH, ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT 40 (1977).
  \item \textsuperscript{172} See Miller, supra note 12. Miller's position may require a restrictive view as to what counts as democracy. If Hamilton's and Madison's lack of commitment was limited to direct, participational democracy, it would not mean a lack of commitment to the representational democracy on which the argument from democracy is based.
\end{itemize}
teenth amendment provided for the direct election of the Senate by the people of the various states. \(^{173}\) Rather than remaining as a check on democracy, the Senate joined the House of Representatives as a democratic element in national government. In addition, the electorate was expanded by the fifteenth, \(^{174}\) nineteenth \(^{175}\) and twenty-sixth \(^{176}\) amendments, showing an increasing commitment to popular participation in government and to placing the lawmaking power in a more fully representative body.

Even if one accepts the importance of the value of democracy both historically and as a current societal value, the question remains as to what form of government and judicial role are entailed by a commitment to democracy. Professor Perry recognizes the "axiomatic or canonical status" of "electorally accountable policymaking" in our political-legal culture, \(^{177}\) though he questions the priority of that value in relation to other values. \(^{178}\) However, he characterizes it as a false assumption to conclude that a particular concept of democracy is axiomatic in our political tradition. \(^{179}\) Perry suggests that our culture's aspiration to the achievement of justice is sufficiently central to lead to the adoption of a form of democracy in which the judiciary may exercise non-textual review. \(^{180}\)

One may question whether a commitment to democracy is equivalent to a commitment to legislative supremacy. Scholars as varied as Professor Perry and Justice Scalia seem to accept the legitimacy of a court appealing to conventional morality to overrule the will of the legislature. \(^{181}\) Under some circumstances the basis for the appeal may be the claim that the legislature is out of step with the moral consensus; that is, the legislature has failed to act as a representative body and deference to the legislature would not further democracy. In other cases the legislature may be in step with the majority, but the majority's current moral stance has deviated from its historical position. In either

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173. U.S. CONST. amend. XVII.
174. U.S. CONST. amend. XV (prohibiting the denial of the right to vote on account of race, color or previous condition of servitude).
175. U.S. CONST. amend. XIX (prohibiting the denial of the right to vote on the basis of sex).
176. U.S. CONST. amend. XXVI (prohibiting denying citizens 18 years old or older the right to vote on account of age).
177. Perry, supra note 135, at 1217.
178. Id. at 1218. See also infra note 185 and accompanying text.
179. Id. at 1219; Perry, supra note 56, at 575.
180. See infra notes 207-19 and accompanying text. Perry also questions how great a departure from democracy it is to permit non-textual review, noting both political checks on the courts and the lack of popular participation in the legislative process. Perry, supra note 29, at 467-68. Elsewhere, however, Perry notes that the responsiveness of the Court to the polity is not immediate and that immediacy does count in analyzing how democratic an institution is. Perry, supra note 56, at 581.
181. See Perry, supra note 29, at 417; Perry, Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process, 23 U.C.L.A. L. REV. 689, 731 (1976); AMERICAN ENTERPRISE INSTITUTE, AN IMPERIAL JUDICIARY: FACT OR MYTH? 36 (1979) (comment of then Professor Scalia) ("I am not saying the Court always has to go along with the consensus of the day. The Court may find that the traditional consensus of the society is against the current consensus. If that is the case, then the Court overrides the present beliefs of society on the basis of its historical beliefs. I can understand that.").
case, it is questionable whether a court's substitution of its view in place of the legislature's doesn't run counter to the value of democracy.\textsuperscript{182}

Where the court claims that the legislature has failed to follow the moral consensus, the claim is that the court is in fact furthering democracy. It substitutes not its own, but the majority's view in place of that of the legislature. This argument, however, assumes that the courts can identify a moral consensus that conflicts with the statute. It may be questioned whether or not there is any such popular consensus to discover in a situation in which there is conflict.\textsuperscript{183} Furthermore, it is questionable whether the courts are in a position superior to the legislature to identify that consensus.\textsuperscript{184} Courts' abilities are especially suspect when the issue is the nature of the current consensus. The only basis for a claim of judicial superiority cannot be in sampling current view but in the scholarly examination of society's historic moral view. On that analysis, however, the argument collapses into the argument that the present moral consensus is in conflict with the historic moral view.

The argument that the courts may invalidate a law when it conflicts with the traditional or historic moral view of society still runs counter to the value of democracy. Just because it is a past majority that is appealed to does not overcome the fact that it is the current majority's view that is being invalidated. That is not to say that such an approach is unacceptable, but only to note that it too must overcome the argument from democracy. Its attempt to do so by appealing to the value of tradition, consistency, or even the Framers' intent to overcome the value of democracy leaves open the possibility of still other values serving as a basis to invalidate other laws not in conflict with the traditional moral view.

Professor Perry questioned whether our commitment to democracy commits us to legislative supremacy. Arguments based on past moral view answer that question by limiting the commitment to a democracy that maintains tradition, as Perry's democracy would maintain justice. Perry's question, however, may be better viewed as questioning whether there might be other values, justice in his view,\textsuperscript{185} that compete with democracy in determining our society's choice of government and the scope of judicial review.

Any deviation from legislative supremacy and the placement of policy-making authority in the judiciary is more than simply the selection of an alternative form of democracy. It is the selection of a less democratic system. That selection may be justified by appeal to another value, but that value will conflict with and must be balanced against democracy. Perry has found a strong value

\textsuperscript{182} A commitment to pure democracy might require that, even in these cases, the remedy be at the polls. While the limited democracy theories may have to explain the willingness to impose such a limit, the position of this Article requires that the decision be removed from the people, as well as from the legislature.


\textsuperscript{184} This is, of course, the central issue in the criticism of the privacy decisions. The claim that the decisions are anti-democratic rests on the assumption that any consensus that exists is found in the position of the legislature and that the courts, in invalidating a statute on non-textual grounds, are interfering with the democratic process.

\textsuperscript{185} See infra notes 207-08 and accompanying text.
in justice, a value which is for him superior to democracy. While other values may also be offered as sufficiently important to act as limitations on democracy, our cultural commitment to democracy must be recognized as a strong value to be limited only by similarly strong values.

C. Values to Counter the Commitment to Democracy

Professor Dworkin argues that the value of democracy may be limited by other values. Dworkin notes that the argument for judicial "passivism" by appeal to fairness rests on two claims. The first is that for a political system to be fair, the majority must be constrained only by principles endorsed or at least accepted by the majority at the moment when the constraint is urged on that majority. Secondly, fairness, so understood, must be taken to be a singularly important value and to be preferred to justice when the two conflict. Dworkin argues that political fairness does not require adherence to such a strict form of majoritarianism, and on this point he is joined by even such majoritarians as Professor Bork. Professor Dworkin also finds such strength in the value of justice that democracy does not necessarily ride roughshod over justice.

If fault is to be found in Professor Dworkin's conclusion, it is in the failure to include values other than justice as values that may balance or counter an appeal to democracy. Professor Nagel has argued more broadly that a variety of rights are sufficiently important to provide limitations on the power of the majority.

Various commentators, most notably Professors Ely, Perry and Richards, have suggested nontextual values that might properly serve as the basis for

186. See M. Perry, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY 10 (1982) ("If I were unable to defend constitutional policymaking by the judiciary as consistent with the principle of electorally accountable policymaking, then, given my commitment to constitutional policymaking by the judiciary, I would have to question the axiomatic character of the principle of electorally accountable policymaking.").

187. See infra notes 189-241 & 292-317 and accompanying text.

188. Once again (see supra notes 5-8 and accompanying text), the fact that our society is strongly committed to democracy does not add strength to a purely jurisprudential argument that consent is more important than democracy. However, since society is at least as strongly committed to government by consent (see supra notes 166-72 & infra notes 242-47 and accompanying text) as it is to democracy, the argument for judicial activism, which flows from consent, should be as strong as the argument for legislative supremacy, flowing from democracy. This is not a jurisprudential point, but a call to recognize the conclusion to which our actually held values lead.

190. Id. at 376.
191. Id.
192. Id. at 377.
193. Bork, supra note 155, at 2-3 (discussing "tyranny of the majority" a position that must recognize that some areas, for Professor Bork those areas set aside by the Constitution, are beyond the control of the majority).
194. R. DWORKIN, supra note 189, at 377. See also infra notes 207-19 and accompanying text.
195. Nagel, The Supreme Court and Political Philosophy, 56 N.Y.U. L. REV. 519, 520 (1981). For Nagel, "equal liberty" is such a value or right, but he leaves open the possibility of appeal to other values.
declaring a statute invalid.\textsuperscript{196} Before turning to the examination of the value of adherence to the social contract and consent of the governed as another such value, it would be useful to examine the efforts of Ely, Perry and Richards as examples of the appeal to alternative values in refusing to defer to the legislature’s policy determinations.

John Hart Ely, in his influential book, Democracy and Distrust, offers a justification for noninterpretive review, and thus a more active role for the courts, in both first amendment and equal protection cases.\textsuperscript{197} He argues that his grant of authority to judges in these areas is consistent with our societal commitment to democracy, because the judges are not to select and protect substantive values but are instead to protect process.\textsuperscript{198} Both the first amendment and the equal protection clause protect participation in the political process, and the courts may further, in a noninterpretive way, the value of participation. When a group has been underrepresented in, or shut out of, the political process, the representative system cannot be trusted to protect the interests of the nonparticipating group and the court must take an expanded role.\textsuperscript{199}

Professor Ely’s approach does not justify judicial activism in the privacy cases, since he limits its application to first amendment and equal protection cases. That limitation has been criticized by Perry and Dworkin as involving the judge in the same sort of substantive decisionmaking Professor Ely would disallow in the privacy arena.\textsuperscript{200} Perry argues that Ely is inconsistent in that any justification of noninterpretive review in first amendment and equal protection cases will also justify noninterpretive review in substantive due process cases, because the two forms of noninterpretive review are “the same animal.”\textsuperscript{201} Both call for judges to look not to the value judgments of the Framers but to the values of the individual judges.\textsuperscript{202} Furthermore, in Perry’s view, there is no basis for the belief that elected officials are more trustworthy in their resolution of disputes involving nonparticipational values than in resolving disputes involving participational values.\textsuperscript{203} Dworkin also criticizes Ely’s distinction in that both types of cases involve judges in the same sort of decision-making.\textsuperscript{204}

Perry and Dworkin may be correct in arguing that the decisions in both the nonparticipational and participational values cases are of the same variety and that elected officials are not to be trusted more in one area than in the other. Nonetheless, there is a distinction between the two types of cases that makes Ely’s position consistent. The most powerful argument for deference to

\textsuperscript{196} See infra notes 197-239 and accompanying text.
\textsuperscript{197} J. ELY, DEMOCRACY AND DISTRUST (1980).
\textsuperscript{198} Id. at 102.
\textsuperscript{199} Id. at 103.
\textsuperscript{200} See infra notes 201-04 and accompanying text.
\textsuperscript{201} Perry, supra note 72, at 318; M. PERRY, supra note 186, at 119.
\textsuperscript{202} Perry, supra note 72, at 318-19. Perry does note that the individual values of the judge are rooted in the culture, so the determination will not be idiosyncratic (id. at 319), but for him the two types of review remain the same.
\textsuperscript{203} M. PERRY, supra note 186, at 121.
legislatively expressed values over those of the judges has been the argument from democracy. Professor Ely's justification for departing from that deference in first amendment and equal protection cases is that that departure may be necessary to further democratic, participational values. Ely accepts the primacy of democracy as a normative value and argues that democracy itself requires the imposition of the values of the judiciary in disputes over participation. In the privacy cases it is not in the name of democracy that the courts invalidate a statute, but in the furtherance of some other value. Ely may then stand on his distinction. His approach is limited to the cases he delineates. In criticizing, rather than simply distinguishing, the privacy cases, however, Ely makes the mistake of assuming that democracy is the only value to be considered in determining where decisionmaking authority should lie.

Professor Perry finds his justification for nontextual review in the existence of another value that, like democracy, is central to our society. Perry examines our history and finds a "religious," in the sense of a binding vision, commitment to the realization of "higher law." He recognizes a commitment to representative government and democratic ideals, but argues that that is not the only constitutive aspiration of our political tradition. Also central to our aspirations is the achievement of justice. Perry has identified justice as another value that history and present commitment show has sufficient strength to serve as a balance to our commitment to democracy. The step that remains for Perry is to demonstrate how that commitment to justice leads to the conclusion that the judiciary is justified in exercising nontextual review to overturn decisions arrived at through the democratic process.

Perry takes that remaining step to noninterpretive review through what he styles as a functional argument. The judiciary is justified in exercising non-textual review if such review furthers our commitment to justice more than it damages the democracy to which we are also committed, that is, if it allows us to keep faith with both traditions. Perry is willing to conclude that the balance tips in favor of nontextual judicial review.

Perry minimizes the negative effect on democracy. He recognizes that the judge must make an individual determination as to the contours of conventional moral culture, but he notes that it is extremely unlikely that an unconventional individual would sit on the Supreme Court. The views of the Justices are then likely to reasonably reflect those of society. If the view of the Justice does conflict with that of society and the Justice recognizes that conflict, the duty of the Justice is to defer to society's morality. If a sufficient number of Justices fail to give deference to the public morality, when a conflict has become obvious, Perry argues that history shows that the polity rather than the

205. Perry tries to include these other values, for him justice, within the concept of democracy, but they are better viewed as being balanced against democracy. See supra notes 185-86 and accompanying text & infra notes 207-19 and accompanying text.
206. See P. SOPER, supra note 67, at 182 n.10.
207. M. PERRY, supra note 186, at 97.
208. See Perry, supra note 56, at 577; Perry, supra note 135, at 1220.
210. Id.
211. Perry, supra note 181, at 730.
212. Id.
Court will prevail.\textsuperscript{213} Thus, democracy, even if delayed, prevails, and the cost of the delay may be made up for by the gain in justice by allowing noninterpretive review.\textsuperscript{214}

With regard to the attainment of justice through nontextual review, Perry approves of the Court's performance, at least during the modern era.\textsuperscript{215} He recognizes that even one who agrees with him on the performance of the modern Court might be given pause to reconsider, if the longer term performance of the Court were the basis for testing the value of nontextual review. If the \textit{Dred Scott}\textsuperscript{216} and \textit{Lochner}\textsuperscript{217} decisions are taken into consideration, the Court's performance is less admirable. Perry's response is to limit consideration to the modern era. The justification for the current and future practice of judicial review is the current or predicted future performance of the Court. The best evidence for future performance is performance in the recent, rather than the distant, past.\textsuperscript{218} While he admits that the Court is fallible and might serve to retard rather than further moral growth,\textsuperscript{219} the balance for Perry cuts in favor of nontextual review.

Perry's argument might be attacked both on the grounds that it underestimates the effect of nontextual review on democracy and that its tendency to further justice is less than Perry takes it to be. To be faithful to the ideal of democracy, Perry requires that the Justice, in examining a statute, be guided not by his or her own moral vision but by conventional morality. That task, however, is made more difficult by the tendency to confuse justice with one's own perception of justice.\textsuperscript{220} This difficulty is even greater if the Court is to take any lead in the development of morality. If morality is to move forward toward right answers\textsuperscript{221} and the Court is to play a prophetic role,\textsuperscript{222} the task becomes even more difficult. If it is easy to confuse one's own vision of current morality with actual current morality, it must be even more likely that one will confuse one's view as to the direction morality should be taking with the direction it is actually taking. This is especially so in the context of rapidly changing moral vision most likely to call for, and make controversial, nontextual review.\textsuperscript{223}

The other attack on Perry's approach is to question the degree to which the courts have furthered justice. To agree with Perry one must agree both that

\begin{itemize}
\item \textsuperscript{213} Perry, \textit{supra} note 56, at 580.
\item \textsuperscript{214} \textit{Id.}
\item \textsuperscript{215} \textit{See}, e.g., \textit{Id.} at 578 ("In the modern period ... the Court's record in service of individual rights is admirable."). \textit{See also} R. DWORKIN, \textit{supra} note 189, at 356 ("The United States is a more just society than it would have been had its constitutional rights been left to the conscience of majoritarian institutions.").
\item \textsuperscript{216} 60 U.S. (19 How.) 393 (1857).
\item \textsuperscript{217} 198 U.S. 45.
\item \textsuperscript{218} \textit{See} Perry, \textit{supra} note 56, at 579; Perry, \textit{supra} note 135, at 1222.
\item \textsuperscript{219} M. PERRY, \textit{supra} note 186, at 115.
\item \textsuperscript{220} \textit{See} G. MCDOWELL, \textit{supra} note 79, at 21 (discussing Dworkin's similar requirement that a judge distinguish morality from his or her own perceptions of morality).
\item \textsuperscript{221} \textit{See} M. PERRY, \textit{supra} note 186, at 113.
\item \textsuperscript{222} \textit{See} Perry, \textit{supra} note 135, at 1195.
\item \textsuperscript{223} \textit{See} Lupu, Untangling the Strands of the Fourteenth Amendment, 77 Mich. L. Rev. 981, 1037 (1979).
\end{itemize}
the Court has contributed to justice in the recent past and that the more distant past is either irrelevant or outweighed by the recent past. While any article attempting to justify the privacy decisions would conclude, with Perry, that the recent Court has furthered justice, not all would agree. The legislatures that passed the statutes at issue, and presumably the public they represented, seemingly had a different view of justice.224

Perry's concentration on the record of the Warren Court may also be "a careful underestimation of past Supreme Court error."225 Dred Scott and Lochner do not stand alone as cases in which justice was not furthered. They may be the clearest examples of nontextual review impeding moral progress and justice, but there are certainly other cases in which the Court either impeded or failed to further what most would now agree is just. Korematsu v. United States226 is a more recent dramatic example of the Court failing to provide moral leadership and further justice and in a situation that did not even require resort to nontextual review. Furthermore, reliance on the recent past makes little sense when the personnel of the Court has changed. One who, like Perry, applauds the performance of the Court in its past employment of nontextual review might take pause in considering the employment of such review by the current Court or an even more conservative future Court.

Richards, too, bases his justification of the privacy cases on the existence of important values that may serve to counter democracy-based arguments. While Richards cites various values or principles, the most important seems to be his principle of equal liberty and basic opportunity, under which each individual is given "the greatest equal liberty and basic opportunity compatible with a like liberty and basic opportunity for all."227 Richards also lists a second important principle that limits the right of the government to violate the first principle. His principle of justified inequality requires that inequalities be "allowed only if those inequalities are a necessary incentive to elicit the exercise of superior capacities and only if the exercise of those capabilities advances the interests of typical people in all standard classes ... more than equality would...."228

Richards also relies on the values of autonomy and equal concern and respect as bases for the establishment of privacy rights,229 but the right to privacy, as well as those of autonomy and equal concern and respect, may be deriveable from the right to equal liberty and basic opportunity. For Richards, the "elaboration of an independent constitutional right to privacy in Griswold et al. represents an implementation of underlying moral values of treating persons as equals...."230

224. Where the statute was promulgated in the distant past, it may say little about the current view of the legislature or people with regard to justice.
227. D. RICHARDS, supra note 70, at 48.
228. Id. at 49. See also D. RICHARDS, supra note 18, at 245.
229. See, e.g., Richards, supra note 69, at 969, 999.
Even taking these rights and principles as basic, the problem of justifying the invalidation of statutes on privacy right grounds remains. While admitting that there is no textual root for the right of privacy, Richards finds such a right to be constitutionally established. He says that for a contractarian, like himself, it is the principles of justice, rather than an acceptance of the ultimate good of majority rule or neutral principles, that provide the starting premises for constitutional democracy. One form of constitution that would be justified by these premises is one like the Constitution of the United States which he finds to embody the principle of greatest equal liberty. Richards' approach seems to be that rational contractors in Rawls' original position would select a constitution embodying such a principle, therefore the delegates to the Federal Convention of 1787 must have done so. Hence, the principle of equal liberty and basic opportunity is to be found, by inference, within our Constitution.

Once Richards has established his principles as within the Constitution, he seems to view it as a short step to the justification of the judicial invalidation of statutes on right of privacy grounds. He suggests that there be a division of labor among the branches of the government based on the differing competencies of those branches. Application of the principle of equal liberty and basic opportunity is felt to be well within the judiciary’s competence, while applying the principle of justified inequality, which requires balancing social and economic facts and theories, is left to the legislature.

It is not clear, however, that Richards' division of labor is along a well-defined line. Since the principle of justified inequality is what allows the legislature to infringe upon the principle of equal liberty and basic opportunity, there may well be situations in which an equal liberty challenge to a statute is met with a justified inequality defense. The courts will then have two choices. They may either decide that the legislative view on justified inequality should control or they may make their own assessment of the justification for the inequality. The choice is the same as the choice between accepting the argument from democracy or exercising some form of nontextual policy or philosophical review. The change in the language in which the basic problem is phrased does not serve in itself to justify the activist role for the judiciary.

Richards' approach also faces a problem in what appears to be his view that the United States Constitution embodies his principles. He asserts that those who fail to appreciate the theoretical usefulness of contractarian theory in this area underestimate the historical importance of contractarian thinking in the minds of the Framers. In his view “[c]ontractarian theory ... is the theory of the Constitution....” However, while social contract theory was influential

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231. See D. RICHARDS, supra note 18, at 232.
232. D. RICHARDS, supra note 70, at 49-50. Thus, for Richards, as for Perry, justice is a value more basic than democracy.
233. Id. at 50.
234. See infra notes 236-37 and accompanying text. See also supra notes 72-74 and accompanying text.
235. See D. RICHARDS, supra note 70, at 54-55.
236. Id. at 51.
237. Id. Richards also argues that it is the moral theory, rather than a set of specific moral rights, that is encompassed within the Constitution. Thus, there is no reason to limit the finding of moral rights to those regarded by the Framers as fundamental.
among the Framers,\textsuperscript{238} that theory was not the Rawlsian social contract theory on which Richards’ principles are based.\textsuperscript{239} Richards fails to establish that his principles are constitutional principles, which is not to say that they are unimportant as extra-constitutional values, and fails to justify judicial enforcement of those principles.

The difficulty with the approaches to justifying judicial activism in privacy cases examined thus far is that they are based on the correctness of results. Perry bases his theory on the importance of justice even at the expense of democracy. Even accepting that view, however, it is not clear that the courts are better at achieving justice. If the justification depends on the result, and the departure from democracy does not assure the attainment of the result, the departure from democracy may not be justified.

For Richards, the result also provides the justification, but the result is the equal liberty found within the Constitution. It is debatable whether such a principle is found within the Constitution, and the question still remains as to what branch should determine which of the two basic principles controls the case at issue. Once again, even accepting the importance of the principle of equal liberty, the step to justifying judicial activism at the expense of democracy is a difficult one.

The best route to a successful justification of activist, nontextual judicial review in the privacy cases may be through a non-result-based approach. The strength of the argument from democracy is that it is a process-oriented argument. Proponents of democracy do not choose results with which they agree and try to show that vesting final authority in the legislature is the best way to reach such results. Where the results are as controversial as they have been in the privacy cases, such an approach is doomed to failure.\textsuperscript{240} Rather, the approach of the argument from democracy is to rest on the value of democracy itself. The value is, in a sense, procedural, and the results are justified because proper procedure was followed in reaching those results.\textsuperscript{241}

The best approach to justifying judicial activism in privacy cases is to identify a countervailing value that is also not result-oriented. If democracy dictates that choices should be made by the legislature, what is required is a value that commands that choices, in these cases, be made by the judiciary. The choice is in the courts not because they are more likely to be right, but because the value itself dictates that the choice be there.

\textbf{III. CONSENT AND SOCIAL CONTRACT}

The ideas of consent and social contract are linked. In the social contract, the individual contracts with the sovereign or other individuals\textsuperscript{242} to be

\textsuperscript{238} See supra notes 76-80 and accompanying text.

\textsuperscript{239} See supra note 73 and accompanying text.

\textsuperscript{240} While a result-based argument might be offered for democracy, it would be subject to the same sort of rebuttal Judge Bork has offered for Professor Perry’s argument. See infra note 321 and accompanying text.

\textsuperscript{241} Even adherents to the argument from democracy do not take a pure democracy approach. In a Madisonian system, the will of the majority is limited by constitutional strictures. See supra note 155 and accompanying text and infra note 253 and accompanying text.

\textsuperscript{242} See infra notes 262-76 and accompanying text.
governed by the sovereign. The individual thus consents to the government’s placement of restrictions on his or her rights, but the individual need not consent to all restrictions the sovereign might wish to impose. Indeed, the idea of natural, inalienable rights is a limitation on the ability to consent to the relinquishment of rights and hence a limit to the powers the sovereign may possess under the contract.

The historical and present-day strength of belief in social contract and natural rights has already been examined. The consent aspect of social contract has a similar historic and present strength. Thomas Paine wrote that the "authority of the people [is] the only authority on which government has a right to exist in any country." And while the Federalists may have been weak on commitment to democracy, Alexander Hamilton wrote: "The fabric of the American Empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE." "As a nation, we are committed to the idea that government, to be ethically defensible, requires the consent of the governed."

While we, as a people, may be committed to the requirement that government be by consent, it is difficult to establish any such consent. If there were a historical social contract, actual consent would have existed, but even in that case, the consent would be only that of the founding generation. Where there is no assertion of the historical existence of a social contract but only a commitment to the ideals of social contract theory, there is no actual consent at any point.

The usual approach to establishing consent, where actual consent is lacking, is to search for tacit consent. The individual may be argued to consent to be governed by voting, by continuing to reside in the territory governed, or by accepting the benefits that flow from the consent of the people to be governed. Professor Philip Soper has argued that these attempts to find consent fail, and tacit consent theory is insufficient to establish a moral obligation on the part of the individual to obey the law.

While the attempt to find actual or tacit consent may fail, our society still seems to place great value in that consent and the social contract setting out the bounds of government authority to which the individual consents. The difficulty is in reconciling the value placed on social contract and consent without

243. See supra notes 63-94 and accompanying text.
245. See supra notes 171-72 and accompanying text.
246. A. Hamilton, The Federalist No. 22, at 58 (P. Fairfield 2d ed. 1981) (capitalization in original). For Madison’s view, see J. Madison, The Federalist No. 39, at 115 (P. Fairfield 2d ed. 1981) ("[W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people...").
247. Sandalow, Judicial Protection of Minorities, 75 Mich. L. Rev. 1162, 1177-78 (1977). Dean Sandalow then goes on to take a position contrary to that espoused here. He argues that consent is central to democracy and so consent, like democracy, would lead to the position that it is the legislature that is empowered by the ideal. Id. at 1178-79. Consent, however, might be to a government that was not, or was at least not purely, democratic. See infra notes 262-67 & 325 and accompanying text.
248. See P. Soper, supra note 67, at 65-67. Soper instead finds the individual’s obligation to obey the law in the good faith effort by the sovereign to take into account the best interests of the individuals governed.
being able to establish the existence of either. The value must rest on the use of both concepts as hypothetical, explanatory devices.

For Rawls, the social contract is a hypothetical, explanatory device. He calls for the examination of the conditions individuals would agree to under the veil of ignorance as to the roles they will fill in the resulting society. Those conditions serve to define a just society.

The requirement of consent to which our society seems so committed must be of a similar nature. If there is no actual consent to be governed, and if attempts to find tacit consent fail, consent must be a hypothetical consent. The consent is that of the rational individual, under the veil of ignorance, to agree to subsume his or her will to that of the sovereign. While that consent might be to the unbound will of the sovereign, our society's strong commitment to natural law concepts and our realization that the sovereign might possibly do wrong, indicate consent only to the will of a sovereign that is somehow bound. The real debate, within our society, is not over the existence of these bounds, but over what the bounds are and how they are to be identified.

Even accepting the importance of social contract and consent values in our political culture, the question remains as to how those values are to interact with other important political values. The major competing value appears to be the value placed in democracy. While that value is admittedly strongly held in our society, it may not be sufficient to override all other values.

Even Judge Bork, a strong spokesman for democracy, allows democracy to be overcome by another value. For Bork, our commitment is not to a pure (representative) democracy but rather to a Madisonian system in which the outcome of the democratic process controls only when the Constitution does not deny such control. Thus, for Bork the commitment to democracy is not as strong as commitment to the Constitution.

The commitment to the Constitution is widely shared in our political culture. When the Constitution and democracy conflict, most often people accept the Constitution as overriding their will. Attacks on Supreme Court decisions and amendments to the Constitution in response to some of those decisions show that this is not always true. But, even these attacks are usually phrased as attacks on the Supreme Court's erroneous reading of the

249. See J. RAWLS, supra note 63, at 136-42.
250. Id. at 12-13.
251. Any consent that might be found in the constitutional ratifying conventions would only be the consent of the founding generation. Presumably, the value we place in the consent of the governed requires that "governed" denote those who are now governed, rather than those governed at some point in the past. Even with regard to the founding generation, the consent of a majority might not be viewed as establishing "the consent of the governed." Rousseau, for example, appears to have required the unanimous consent of the citizens governed, although his requirement may have been limited by his views on citizenship. See Rosenfeld, Rousseau's Unanimous Contract and the Doctrine of Popular Sovereignty, 8 HIST. POL. THOUGHT 83 (Spring 1987).
252. This is not the Founders' idea of consent, but no other form of consent exists. If consent is to occupy the central place that it does in our political philosophy, it must be hypothetical consent that fills the role.
253. See Bork, supra note 155, at 2-3.
254. See, e.g., U.S. CONST. amend. XVI (the income tax amendment in response to Pollock v. Farmers Loan & Trust Co., 157 U.S. 429 (1895)).
Constitution, rather than on the Constitution itself, further showing the strength of our commitment to the value of constitutional limitations on the exercise of democratic processes. Furthermore, the Constitution provides for the amendment process, so it is not clear that such an amendment indicates any lack of commitment to constitutional values.

The advantage that Judge Bork enjoys over Professor Perry is that Bork’s commitment is to another procedural value, while Perry appeals to the substantive value of justice. Even given the difficulties of constitutional textual interpretation, the Constitution’s setting forth of procedural limitations is a model of clarity compared to any delineation of the scope of justice. More importantly, to agree with Bork does not require agreement with the Court’s views on the issues. We can agree on the procedural value embodied in the Constitution, that the legislature is to make certain decisions and the individual others, on a result-neutral basis. That is not possible under Perry’s approach.

The value suggested here to counter the value of democracy, that of consent and government under a social contract, has strength similar to Judge Bork’s value of constitutional limitation. Indeed, both primarily focus on avoiding tyranny. Bork, in describing the Madisonian system, discusses tyranny of the majority and tyranny of the minority. Each is defined as the faction, the majority or the minority, governing outside of its proper arena.\(^{255}\) Once again, for Bork, the Constitution defines those proper arenas and the democratic assumption that, where authority is not denied by the Constitution, the majority may rule. The values of consent and social contract simply provide an alternative method for determining the proper arena in which the majority may govern.

Tyranny may be viewed simply as an excess of government.\(^{256}\) Such a view comports, at least, with Judge Bork’s tyranny of the majority.\(^{257}\) The difference between Bork’s approach and that taken here is in how one determines when there is an excess. More expansively than Bork would allow, and admittedly with less definitiveness, excessive government might be defined as government beyond that consented to by the people. The fact that it is a majority that rules beyond its warrant does not keep that rule from being tyranny.\(^{258}\)

The avoidance of tyranny, limiting the sovereign’s power to that which the people have consented to under the social contract, may even be a more basic value than the commitment to democracy. It is possible that a people might consent to a form of government that is not purely democratic.\(^{259}\)

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257. Judge Bork’s tyranny of the minority would appear to be an excess of limitation on majority rule.
258. As the Court said in *Citizens’ Sav. & Loan Ass’n v. Topeka*, 87 U.S. (20 Wall.) 655, 662 (1875):
   It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of majority, if you choose to call it so, but it is none the less a despotism.
259. See Rosenfeld, *supra* note 251, at 83.
Indeed, Rousseau, while viewed as espousing strongly democratic values, actually favored an elective aristocracy,\textsuperscript{260} and both Hamilton and some Antifederalists favored a monarchy over a pure democracy for the United States.\textsuperscript{261} But, whether or not the avoidance of tyranny is a more basic value than adherence to democracy, it is at least a value that stands alongside our commitment to democracy and might serve to limit the majority's implementation of it.

What remains to be examined is how a commitment to government by consent, the exercise of sovereign authority only as granted under the social contract, and the avoidance of the tyranny that government beyond that range would entail, lead to the conclusion that the courts are the proper institution to determine the scope of consent and the powers of the sovereign under the contract. The examination of that question must be preceded by a discussion of the contract itself, the parties to the contract, and the location of sovereignty in our form of government. These structural considerations, rather than any superiority in moral reasoning, justify the active role for the courts in the privacy arena.

\section*{IV. Parties to the Social Contract}

If any conclusions are to be based on a consideration of the social contract, the parties to that contract must first be identified. Once again, it must be remembered that it is not the parties to any historical contract that are sought. Rather, the parties sought are the hypothetical parties to the hypothetical contract containing the consent of the individual to be governed. There are several possible choices regarding the parties to the social contract. The contract might be a multilateral contract amongst all the individuals forming a society. The social contract theory of Thomas Hobbes is of this variety.\textsuperscript{262} The individual contracts with each other individual that each will give up his own right to self-governance and accept rule by the sovereign in exchange for the others doing likewise.\textsuperscript{263} In that way, each hopes to escape the "solitary, poor, nasty, brutish, and short" life characteristic of the pre-contract state of nature.\textsuperscript{264}

Under this variety of contract, the sovereign would not be a party to the contract. The sovereign would have no duties to the contracting individuals and, in Hobbes' view, would have authority that is practically, and perhaps totally, unrestrained.\textsuperscript{265} Even though the sovereign is not a party to the contract, the individual has a contractual duty to the other contractors to obey the sovereign. It is argued that, for Hobbes, this lack of any right to disobey the sovereign even extends to there being no right to criticize the sovereign.\textsuperscript{266} Hobbes, furthermore, extends these duties and lack of right beyond any original

\begin{thebibliography}{9}
\bibitem{260} Id.
\bibitem{261} Miller, \textit{supra} note 12, at 110.
\bibitem{263} Id. at 142.
\bibitem{264} Id. at 97.
\bibitem{265} Id. at 151-52.
\bibitem{266} M. Lessnoff, \textit{supra} note 55, at 55.
\end{thebibliography}
contracting parties to later generations — there is no option but to accept the authority of the existing sovereign.\textsuperscript{267}

A Hobbesian contract is certainly not of the variety that has support in the contemporary political culture. We are not committed to a sovereign of unlimited power beyond even the criticism of the citizenry. That, however, does not require the rejection of the possibility that the contract should be viewed as between individuals without the sovereign being a party. The social contract envisioned by John Locke was also among individuals without the sovereign being a party,\textsuperscript{268} and Locke's contract views may be seen as the theoretical basis for the American Revolution and large parts of our political theory.\textsuperscript{269}

While the sovereign may not have been a party to Locke's social contract, and may then not have had any duties under the contract, that does not imply that the sovereign enjoys unlimited rights. What rights the sovereign may have as the result of the contract among the individuals are limited, and exercising power beyond those limits Locke called tyranny.\textsuperscript{270} Thus, one may hypothesize a social contract to which the parties are the individuals and not the sovereign and which does comport with our political tradition of limited sovereignty.

An alternative view of the social contract does include the sovereign as a party to a contract between the people collectively and the sovereign. Such a contract exists, for example, in the approach taken by Pufendorf.\textsuperscript{271} This approach, however, requires some action to turn individual people into a collective people capable of then contracting with the sovereign. Since the exercise is admittedly hypothetical, one may be willing to hypothesize an additional agreement among individuals. However, that contract among individuals might then be better viewed as the social contract under which each gives up rights and agrees to be governed by a sovereign. The contract with the sovereign simply sets the form and identity of the sovereignty. Since the sovereign must become a party to that second contract in order to enjoy any rights, the sovereign might also be limited to exercising only those rights granted and may have contractual duties.

A third possible view of the social contract is that of a series of contracts, each between an individual and the sovereign. Advantageously, consent to be governed would be given directly by the individual to the sovereign. Of course, any claim of historical existence for this sort of social contract raises great difficulties. In addition to the problem of finding consent or establishing tacit consent as sufficient consent,\textsuperscript{272} there is the possibility that the individual contracts might differ. Where the contract is hypothetical, the issue is what the individual may be presumed to have consented to,\textsuperscript{273} and problems of actual or tacit consent and differing contracts do not arise.

\textsuperscript{267} Id. at 57-58.
\textsuperscript{268} See J. Locke, supra note 95, at ch. VII, §§ 77-94.
\textsuperscript{269} See supra notes 77-79 and accompanying text.
\textsuperscript{270} J. Locke, supra note 95, at ch. XVIII, §§ 199-210.
\textsuperscript{272} See infra notes 294 & 315 and accompanying text.
\textsuperscript{273} See infra notes 294 & 315 and accompanying text.
The Supreme Court has spoken, in dictum, on the parties to the social contract. In *Munn v. Illinois*, Chief Justice Waite, writing for the Court said:

> When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. “A body politic,” as aptly defined in the preamble of the Constitution of Massachusetts, “is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.” This does not confer power upon the whole people to control rights which are purely and exclusively private, ... but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property as not unnecessarily to injure another.

Justice Waite’s approach differs from Hobbes’ and Locke’s in that the individual contracts with the whole people rather than with other individuals. Depending on where sovereignty is located in our form of government, this approach may be an example of the third presented. If the sovereignty lies in the people as a whole, Justice Waite’s social contract is a series of contracts between the individual and the sovereign, giving the sovereign a limited right to govern.

Whatever social contract approach is adopted, the sovereign has a strong interest in the social contract. If the contract is between the people collectively and the sovereign, the sovereign is a party to the social contract. If the contract is viewed as being between individuals, with each agreeing to be governed by the sovereign, the sovereign stands as a sort of third-party beneficiary to the contract.

The discussion of the role of the sovereign in the social contract has, thus far, not required the identification of the sovereign. Before proceeding, however, the location of sovereignty under our form of government must be examined.

Sovereignty is a somewhat elusive concept, particularly in the modern representative state, and that makes its identification difficult. The older, traditional view of sovereignty provided a rather straightforward definition. The sovereign was the political community’s final and absolute authority. Where a community was ruled by an absolute monarch or despot, sovereignty was easy to determine. As the age of absolute monarchy came to an end, a new location for sovereignty was required. In the British system, in the era of the American colonies, there had been a shift in sovereignty from the monarch to the Crown in Parliament. The transition of sovereignty to Parliament continued to the point where, in 1850, Blackstone could say: “Sovereignty and legislature are indeed controvertible terms....”

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274. 94 U.S. 113.
275. *Id.* at 124 (citing Thorpe v. Rutland & Burlington R.R., 27 Vt. 143 (1854)).
276. *See infra* notes 294 & 315-20 and accompanying text.
278. *See F. MCDONALD, NOVUS ORDO SECLORUM 39 (1985).*
279. I W. BLACKSTONE, COMMENTARIES *46.
While one might still argue that British sovereignty is found in Parliament, the situation in the United States is less clear. With the Court's authority to declare acts of the legislative and executive branches unconstitutional, and with the legislature's ability, at least in some situations, to override the rule of the Court through legislation, none of the three branches of federal government would appear to have final authority to declare law. If such final authority is located anywhere in our system, it can only be found in the combination of the two-thirds of both houses of Congress and the three-quarters of the state legislatures necessary to amend the Constitution. Such an amendment, where it clearly applies, would bind all branches of government and serve as the supreme law of the land.

The amending organs of government, while capable of issuing authoritative statements of law, are sufficiently cumbersome and rarely used that there might be some objection to locating sovereignty there. Certainly, there would be no day-to-day exercise of the sovereign power, but such power could certainly reside with an individual or entity that chooses not to exercise it with any regularity. It may be that the "[s]overeign is he who decides on the exception," that is, the entity that exercises authority when extraordinary measures are required. Amending the Constitution would be such an extraordinary measure.

If one is willing to allow sovereignty to be shared by those entities that comprise the amending organs, perhaps sovereignty might more profitably be thought of as shared even more widely. Professor Corwin finds in the establishment of our government under the Constitution the recognition of the people as sovereign, and Professor Berger notes the position of the Framers that sovereignty resided in the people. The increasing complexity of society, since the demise of monarchies, has led to changes in the view of sovereignty either toward the position that sovereignty is in the people or the position that the concept of sovereignty is no longer necessary. Where governmental power is fragmented among the Congress, the executive and the judiciary, with the amending role of the state legislatures thrown in for good measure, finding sovereignty in the body politic preserves at least some of the concept.

The adoption of a theory of popular sovereignty leads to the question of

280. See U.S. CONST. art. V. There is, of course, also the alternative exercise of sovereignty by the state legislatures and the constitutional convention. Id.

281. Viewing the amendment as binding all branches of government might lead to a view of the Constitution itself as sovereign. However, the Constitution seems better viewed as declared law, rather than the declarer of law traditionally viewed as the sovereign. The binding power of the Constitution is in its status either as the declaration of the Framers or as embodying a tradition still strongly adhered to by the people. Its authority comes from the Framers or the people, and to find sovereignty in the Constitution itself would be to stretch the concept beyond recognition.


283. Corwin, supra note 76, at 409.


285. F. HINSLEY, supra note 277, at 222.

286. See id. at 223.
the role of the legislature. The legislature might be viewed as itself being sovereign, with the attribution of "popular" being due to its members having been elected by the population. While such a location of sovereignty might make some sense in the British system, in the American system the people, speaking through the state legislatures, may call a constitutional convention to amend the Constitution and undo the federal legislative will. Certainly, the will of the federal legislature is not final. A sufficiently disapproving population may, theoretically, counter its enactments.287

Perhaps the best location of sovereignty is in accord with the common usage of "popular." The people as a whole are the sovereign. Admittedly, the power of the sovereign is not directly exercised with great regularity. The people themselves speak formally only in the electoral process, though less formally in expressions of public reaction to the acts of the legislature or the other branches of government. The less formal reaction has its effect on the legislators and certainly the formal act of the people may change the membership of the legislature, but the body politic does not directly exercise its will in the traditional sovereign role of dictating the law. The body politic exercises its power to make law through the agency of the legislature.288 This is at least in part the strength of the argument from democracy.289 The elected legislature is assumed to do the will of the people, and the laws enacted, unless the populace objects strongly enough to have the law repealed or changed by amendment, may be taken as expressing the will of the sovereign.

Even with popular sovereignty, the question remains as to the rights of the individual who disagrees with a particular exercise of the sovereign power. Even one who objects to Hobbes' view that one may not even criticize the sovereign, where the sovereign is a monarch or dictator, might agree that the sovereign is, indeed, unbound in a system based on popular sovereignty. However, unrestrained popular sovereignty was not accepted by, or in the era of, the Framers. Popular sovereignty was seen as presenting dangers and as being in as much need of constraint and limitation as should be imposed on a sovereign monarch.290 Furthermore, even strong proponents of the argument from democracy recognize the possibility of a tyranny of the majority and allow at least constitutional limitations to bind the exercise of popular sovereignty.291

In summary, the political philosophy on which our system is built seems to include requirements that government be by the consent of the governed, that sovereignty reside in the body politic, and that that sovereignty be somehow constrained. The consent to be governed is found in the concept of a hypothetical social contract between the individual and the sovereign or the people col-

287. The referendum process in state governments may serve the same role with regard to state legislatures.
288. Even the most direct participation of the body politic in the amendment process is through the state legislatures calling for a constitutional convention and ratifying its output. Even here the body politic must speak through a representative organ.
289. See supra notes 138-40 and accompanying text.
291. See supra note 155 and accompanying text.
lectively. Since the sovereign is the body politic, the question of whether the contract is with the sovereign or with the people collectively becomes moot.

The Constitution, in the ninth amendment, recognizes constraints on the sovereign, as does our society’s general recognition of rights against the government. Those limitations might best be viewed as setting out areas in which the individual in the hypothetical contract does not consent to be governed. If there are areas of our lives in which we do not agree to give up our individual freedom of action and subsume our will to that of the sovereign, then any exercise of sovereignty in those areas is illegitimate as being in excess of the authority granted the sovereign under the social contract. The greatest difficulty with this position still remains. Who should identify those areas in which individual freedom of action is not ceded under the hypothetical contract?

V. WHO DECIDES?

The argument from democracy enjoys an advantage over Perry’s appeal to justice in determining which branch of government is to decide the bounds of legislative power. The argument from democracy appeals to procedure,\textsuperscript{292} while the argument from justice appeals to result. While there may be disagreement over which branch has best promoted, and will best promote, justice, it is clear that democratic values favor decision by the legislature. The procedure of legislative determination itself promotes democracy. The best counter to this conclusion is not an appeal to better results but rather to another value, consent and social contract, that is procedural. If the process of judicial determination of legislative power promotes the values of consent and social contract, a value has been identified to counter the admittedly forceful argument from democracy.

The difficulty in allowing the legislature to define the scope of its own power is, as Professor Dworkin says, that “decisions about rights against the majority are not issues that in fairness ought to be left to the majority.”\textsuperscript{293} Dworkin’s view is contained within a discussion of constitutionalism and suggests that the legislature has no special charge to make constitutional decisions. However, the same point may be made against the claim that the legislature should be the entity to determine the scope of its own power, even when that power is not expressly limited by the Constitution.

The position argued for here has been that in raising the issue of decisional privacy, the individual is claiming that the legislature has exercised power beyond that granted under the hypothetical social contract. If the hypothetical individual has not consented to be governed in all aspects of his or her life, then the power of the legislature is bound by the terms of that hypothetical consent. The bounds expressed in the Constitution certainly place some limits on that power, but to hold that those textual limitations are the only limitations ignores both the ninth amendment and our society’s long commitment to natural rights beyond those expressed in the Constitution.

Since the legislature’s bounds are to be determined by the terms of a hypothetical consent, those bounds will not be well defined. While the argu-
ment from democracy uses this fact to argue for legislative supremacy, that fact may be seen, instead, to argue for judicial determination. The argument is, after all, one between the individual and the legislature, where the legislature is presumed to speak for the sovereign body politic. If the argument is one in which the individual contests the rights of the sovereign under the social contract, it must be noted that the sovereign is either a party to that contract or a third-party beneficiary to the contract. The adherent to the argument from democracy, then, is arguing for the position that one of the parties to the contract ought to be allowed to determine its powers under the contract.

Placing the sovereign, or its agent, the legislature, in such a position—that is allowing a party to be the judge of its own case—cuts against the grain of American justice. As the Supreme Court said in *Penman v. Wayne* one of its earliest cases, "surely the legislature could not mean to make a man the judge both of fact and law in his own cause, and that without appeal." Shortly thereafter, Justice Chase, in *Calder v. Bull*, opined that with regard to "a law that makes a man a judge in his own cause...: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it."

The position was shared by the philosophical forefathers of our system of government. John Locke argued that one of the problems in the state of nature is that "the inconveniences... must certainly be great where men may be judges in their own case, since it is to be imagined that he who was so unjust as to do his brother an injury will scarcely be so just as to condemn himself for it." The Federalists stated the same proposition even in the context of legislation:

> No man is allowed to be a judge in his own cause: because his interest would certainly bias his judgment and, not improbably, corrupt his integrity. With equal, nay, with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens?

The principle that a man should not be the judge of his own cause is clearly fundamental. Rawls may even be seen to have taken the principle as

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294. As seen, supra note 291 and accompanying text, the distinction between the sovereign as party and the sovereign as third-party beneficiary may not be relevant where there is popular sovereignty.

295. 1 U.S. 261 (1788).

296. *Id.* at 263.

297. 3 U.S. (3 Dall.) 388 (1798).

298. *Id.* at 383 (emphasis and capitalization in original).


301. In addition to cases quoted in text, see, e.g., *Arnett v. Kennedy*, 416 U.S. 134, 197 (1974) (White, J., dissenting) (quoting Bonham's Case, 8 Co. 114a, 118a, 77 Eng. Rep. 646, 652 (1610)) ("We might start with a first principle: 'No man shall be a judge in his own cause."); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 n.17 (1951) (Frankfurter, J., concurring) (quoting Report on Committee on Ministers' Powers, Cmd. 4060,
the very definition of justice. The purpose of the veil of ignorance is to keep those in the initial position from knowing the roles they will fill. They will then establish a just system because they are unable to identify and judge their own causes. Yet, the proponent of the argument from democracy would place the legislature in the position of judging its own cause with regard to the definition of its own powers under the social contract.

If the legislature should not be placed in the position of defining its own powers, the question remains as to who or what should. The individual cannot be left to make the determination. The individual raising the issue is no longer the hypothetical individual, but an actual person. If each such person is allowed to define the legislative power with regard to the areas in which he or she consents to be governed, the obvious result would be anarchy. It is the hypothetical social contract and the consent of the hypothetical individual party to that contract that limit the scope of legislative authority. The view of any particular individual should not be dispositive, especially where that individual is also a party to the suit and would become the judge of his or her own cause.

To avoid anarchy, the entity to make decisions with regard to the scope of the social contract must be some recognized, officially constituted body, and its decisions taken as binding on all. Its decisions as to the areas in which the hypothetical individual agrees to be governed must override the contrary views of any individuals who would further limit legislative authority. The official status is required for the population to know what view is to control.

If the officially constituted body to make these social contract decisions is to be a branch of government, it should be that branch that is least a party to the social contract. The decision must be made by that branch most removed from the sovereignty. If the sovereignty is popular, the branch to define social contract rights should be that branch most insulated from the popular will. The insulation of the courts from the popular will, that the adherents to the argument from democracy see as making the courts the inappropriate body to make such determinations, actually is what puts the courts in the best position to determine the terms of the social contract.\textsuperscript{302} If either of the political branches

\textsuperscript{75-80} ("Three principles of 'natural justice' were stated to be that 'a man may not be a judge in his own cause' ..."; Spencer v. Lapsley, 61 U.S. (20 How.) 264, 266 (1857) ("The act of Congress proceeds upon an acknowledgment of the maxim, 'that a man should not be the judge in his own cause' ..."); American General Ins. Co. v. FTC, 589 F.2d 462, 464 (9th Cir. 1979) (quoting Day v. Savadge, Hob. 84 (K.B. 1614)) ("even an Act of Parliament made against Natural Equity, as to make a Man Judge in his own Cause, is void in itself...")); NLRB v. Riverside Mfg. Co., 119 F.2d 302, 305 n.2 (5th Cir. 1941) (noting "principles, at once of natural right and of constitutional law, that no man may be a judge in his own cause...")); Magnolia Petroleum Co. v. NLRB, 112 F.2d 545, 547 (5th Cir. 1940) (same language); American Creosote Works, Inc. v. Powell, 298 F. 417, 422 (1924) ("Courts have been ever jealous to assert and enforce the principle that no man can be a judge in his own cause...")); Hodgson v. District No. Five, United Mine Workers of Am., 353 F. Supp. 108, 115 (W.D. Pa. 1973) ("It is fundamental in our law that a man cannot judge his own cause...").

\textsuperscript{302} While no distinction has been made between state and federal courts thus far in the argument, at this point there may be an important distinction. If state supreme court justices are elected, and must stand for re-election, they may not be sufficiently insulated from the popular sovereignty. The decision should then rest in the federal courts. However, even where state supreme court justices must stand for re-election, they are in no worse a position than the legislature insofar as being removed from the sovereignty. In fact, the length of justices' terms and, perhaps, their statewide constituencies may provide better insulation than the legislator has.
makes the decision, the decision may be taken as that of the sovereign, the populace, with regard to its own cause. Only the judiciary is sufficiently insulated for its decision not to be taken as that of the sovereign populace.\textsuperscript{303}

The argument is very similar to that made by Professor Ely. While rejecting the application of his views to the privacy arena, he argued for a strong role for the courts in the protection of procedural values. In looking at situations in which there was argued to be a breakdown in the representational aspects of our government, Ely said:

Obviously our elected representatives are the last persons we should trust with identification of ... these situations. Appointed judges, however, are comparative outsiders in our governmental system.... This does not give them some special pipeline to the genuine values of the American people: in fact it goes far to ensure that they won't have one. It does, however, put them in a position objectively to assess claims — though no one could suppose the evaluation won't be full of judgment calls — that either by clogging the channels of change or by acting as accessories to majority tyranny, our elected representatives in fact are not representing the interests of those whom the system presupposes they are.\textsuperscript{304}

Here, too, elected representatives are the last persons we should trust to identify the situations in which legislation goes beyond the authority granted by the contract. We should instead turn to the comparative outsider — the judge.\textsuperscript{305} That judge may not have a special insight into the social contract and certainly judgment calls will be required. But, the judge is in a position objectively to assess the claim that the legislature has imposed a tyranny of the majority by legislating where the sovereign is not given the authority to rule.\textsuperscript{306}

The argument presented, though weakened, may still favor decision by state supreme courts rather than state legislators, with the United States Supreme Court as final arbiter.

\textsuperscript{303} Professor Perry has used this political insularity to suggest that the courts are in the position to make the best (the most prophetic or just) decision. See Perry, supra note 135, at 1195. The position taken here is not that insularity makes it more likely that the courts will find the just result, but rather that, because of that insularity, the just procedure puts the decision in the courts.

\textsuperscript{304} J. ELY, supra note 197, at 103.

\textsuperscript{305} It may be argued that the judge is not an outsider to the government and, thus, is in a sense called on to judge the cause of an entity of which he or she is a part. But, the government need not be treated as monolithic. It is the sovereign that must not be allowed to define its own powers. The sovereignty resides in, or is exercised through, the political branches of the government. The judge is a relative outsider to sovereignty and is in the best position to judge the limits of sovereignty.

\textsuperscript{306} Professor McConnell has argued that the judge has no better charge to "improv[e] upon the Constitution" than the Army Chief of Staff. McConnell, supra note 101, at 96. Indeed, the Chief of Staff might be seen as even more removed from the sovereignty than the federal judge. The Chief of Staff does, however, serve at the pleasure of the popularly elected President and, in that sense, does serve the sovereign populace. Of course, the Chief of Staff might refuse to continue to recognize the authority of the political branches and isolate himself or herself from the body politic. Since some would argue a usurpation by the courts in the privacy arena, the usurping Chief of Staff might seem the proper analogy. However, the usurping Chief of Staff may better be seen as having assumed sovereignty rather than as having isolated himself or herself from the sovereignty. Some might say the same of the courts, when the courts take
The argument, as presented thus far, speaks to the role of the federal courts with regard to Congress and, to only a slightly lesser degree, the role of state courts with regard to state legislatures. Many of the more controversial decisions of the Supreme Court of the United States have, however, involved the federal Supreme Court striking down state legislation. Some additional explanation is required to show why the federal courts should play such a role in defining the limits of state sovereignty.

The best established source for the power of the federal judiciary to strike down state laws would be constitutional. It has been argued that the ninth amendment applies to the states and that the retained natural rights the amendment recognizes are retained against the states as well as against the federal government. Even if the ninth amendment did not, when ratified, apply to the states, the fourteenth amendment might be viewed as protecting against state interference those rights recognized by the ninth amendment as retained against the federal government. Such protection might most naturally be found in the fourteenth amendment privileges and immunities clause, but that route would seem foreclosed by the Slaughterhouse Cases. The constitutional source relied on, however, has been the fourteenth amendment due process clause, perhaps in combination with the claim that that clause may protect the nontextual retained rights recognized by the ninth amendment.

The problem with asserting a constitutional source for the federal judiciary in invalidating state statutes on privacy grounds is the weakness of the claim to a constitutional basis. The approach taken here has been to admit that there is no textual constitutional grant of such power to the courts. Rather, the approach has been to recognize the existence of certain rights and values and then to argue that those values dictate that it be the courts that define the bounds of those areas open to legislation. If it is not the Constitution that gives the federal courts their power over Congress in this area, the Constitution will not give the federal courts such power over state legislatures. Rather, the factors that make the judiciary the better branch of government to define privacy interests must be shown also to apply in comparing the federal courts to the state legislatures.

over and operate a school system or a prison system, though clearly there is not the assumption of sovereignty that might be asserted by a Chief of Staff.

Perhaps more importantly, the role argued for the courts here is that of striking down statutory law. The effect is to limit rather than expand sovereignty. The Chief of Staff might take an analogous role by refusing to use the military to enforce a particular statute. While such a refusal might lead to public disapproval, as have some court decisions, the specter is not as grim as McConnell's vision of the Chief of Staff making positive law.

307. The political theory should carry over to a consideration of the states. Any references to the Constitution have been to the federal Constitution rather than state constitutions. However, none of the argument has actually been constitutional. Instead, the Constitution has been used to illustrate the strength of certain values within our society. Those values should serve as limitations on state sovereignty as well as on federal sovereignty.


309. See, e.g., Levinson, supra note 308, at 145-47.

310. 83 U.S. (16 Wall.) 36.

311. See supra notes 23-54 and accompanying text.

312. See, e.g., Griswold, 381 U.S. at 493 (Goldberg, J., concurring).
The argument with regard to the judiciary and the legislature was based on a claim that the decision with regard to the areas in which the individual consents to be governed by the popular sovereign should be made by the branch most removed from that sovereignty. When comparing the state legislatures with the federal judiciary, it should be clear that the federal judiciary is further removed from the sovereignty. Indeed, the argument is even more convincing than the comparison of the federal judiciary and Congress. The state legislatures may be closer to the popular sovereignty of the states than the Congress is to the popular sovereignty of the nation; that is, the smaller constituencies of state legislators may make them more responsive to the popular will. Furthermore, the state judiciaries may not be sufficiently removed from the popular sovereignty to make the state courts proper decisionmakers. They may not have the independence necessary to be considered a non-party to the issue of consent to be governed.

The areas in which the individual agrees to be governed under the hypothetical social contract may vary with changes in the concept of the hypothetical individual. If principles with regard to retained or natural rights vary from state to state, then the social contract and the legislative powers of the popular sovereign might also vary from state to state. However, the hypothetical social contract is not simply the dominant view of the powers the sovereign should have. The terms of the hypothetical contract are philosophical, rather than sociological or historical, issues. The resolution of these issues is of national, or broader, scope and not to be left to the states.

VI. CONCLUSION

The argument presented leads to the conclusion that when an individual claims that a statute violates his or her right to privacy, the courts, especially the federal courts, are in a better position than the legislatures to delimit that right to privacy. The privacy claim is best seen as a statement about the social contract and the rights granted the sovereign therein. The sovereign, as a beneficiary under, or party to, the social contract, is not the entity that should have the authority to interpret the social contract. Since sovereignty in our system is in the people, the legislature, speaking for the majority, is the organ generally exercising sovereignty. The legislature, then, should not have the authority to determine the scope of authority given the sovereign. Instead, that branch of government most removed from the sovereign, the courts, should make such decisions.

313. See J. MADISON, supra note 300, at 22-23.
314. See, e.g., Mitchell, supra note 121, at 1740.
315. Were that the case, the popular sovereign would be the judge of its own cause.
316. An international court of human rights would be even further removed from the popular sovereignty and might be the better judge of the areas in which the citizens of a country have consented to be ruled by their national sovereign. It may be that the answer should not vary from country to country. If there is variance, it would be due to variations in initial conditions that would lead hypothetical, rational individuals to give differing powers to the sovereigns.
318. See supra notes 287-89 and accompanying text.
The argument has not been result-oriented and has, in fact, given no direction to a court embarking on the effort suggested here. Some general conclusions with regard to direction might, however, be suggested by the argument for the courts' authority. Since the claims that justify the court in exercising this nontextual review are claims that an exercise of sovereignty is not consented to under the social contract, resolution of the claims would seem to depend on an examination of the social contract. As Professor Laycock has noted, claims to autonomy or the right to privacy are strongest when the individual is acting alone and have only slightly less strength in the context of small, voluntary associations, such as those consisting of adult sexual partners.\(^3\) Since, at bottom, the utility of the social contract is the governance of interactions between people that may lead to violence or exploitation,\(^3\) acts that solely or primarily affect the individual actor or a small group of voluntarily interacting equals are the most suspect.

Certainly, the courts will have to exercise judgment in these determinations. While the courts may not have clear guidance in interpreting the scope of textual rights, the task of determining the areas in which the individual has not consented to be governed under the hypothetical social contract is even more difficult. It is, however, a decision that must be made by some entity. If the courts refuse to make such determinations, the decisions will rest with the legislature as representative of the stronger party to the contract and having the capacity to force the individual to adhere to its interpretation of the contract.

Where judges and justices are called on to make such philosophical determinations, there is bound to be disagreement over the conclusions they reach. Professor Bork suggests that possibility puts one who argues for judicial activism in privacy cases in an untenable philosophical position.\(^3\) Bork may be correct if the basis for the courts' authority is based on agreement with the courts' decisions. Bork's argument is limited to one who argues for the supremacy of the judiciary because their decisions are correct, and assumes that correctness is nothing more than agreement with the moral views of the speaker. In that case, if a decision is handed down with which the speaker disagrees, the speaker must then deny the authority of the court.

The argument addressed by Professor Bork is not the basis for the courts' authority argued for here. Here, authority is found in the institutional position of the courts as most removed from the popular sovereignty. That argument is not affected by a court reaching a decision with which an adherent to the argument disagrees. Such an adherent is in the same position an adherent to the argument from democracy finds himself or herself in when the legislature passes a statute with which he or she disagrees.\(^3\) To believe that the court

\(^3\) Laycock, supra note 109, at 374-76.

\(^3\) See, e.g., T. HOBBS, DE CIVE ch. 1, at 24 ("The origin of all great and lasting societies consisted not in the mutual good will men had toward each other, but in the mutual fear they had of each other.").

\(^3\) Bork, supra note 155, at 6.

\(^3\) The nature of the disagreement will differ. One who disagrees with the legislature may disagree with policy or the balance struck between competing policies. One who disagrees with the courts in the arena of privacy has a philosophical disagreement over the scope of the hypothetical social contract.
or the legislature is wrong does not require one to believe that it is not the proper body to have made the decision.

If it is not clear from the presentation, it should be stated that this has not been, nor was it intended to have been, an historical argument. Any references to the Framers were not to show the actual inclusion of any particular view within the Constitution, as Professor Richards would have it. Rather, only the acceptance of the notions of natural rights and social contract were noted. Even if those views had not been accepted by the Framers, the philosophical and current popular strength of the view that government is justified by consent would be a sufficient basis for the remainder of the argument.

What has been presented here is a third value to stand alongside, and compete with, constitutionalism and democracy. Constitutionalism, democracy and privacy are independent values that may at times agree and at other times conflict. Just as the continued acceptance of constitutionalism justifies the overriding of democratic action, the acceptance of government by consent and the possibility that the sovereign might try to govern in an area not consented to in the hypothetical social contract justify judicial activism in the privacy cases. In the privacy cases the values behind privacy and the value of democracy do conflict. Where the courts step in and come down on the side of individual rights, they have thwarted the democratic process, but they have done so in the protection of other values that are at least as basic as that of democracy. Were the courts always to refuse to do so, they would be sacrificing government by consent on the altar of democracy.

323. Professor Berger would seem to require that all arguments in this area be historically based. He says: "As becomes 'philosophers,' activists make virtually no mention of the constitutional history, a confession that it reads against them." Berger, supra note 284, at 15. History does not, however, by itself justify a government. If the founding generation had installed an absolute monarchy, and present-day society chaffed under that rule, the historical status of that monarchy and the decision imposing it would not justify its rule over a society that no longer consented to such rule. Constitutional history does play a strong role in judicial and legislative decisionmaking, as well as in the public acceptance of those decisions. However, that role is justified by the continued acceptance of our constitutional values, and of the Constitution itself, rather than simply because the values were held by certain individuals in a particular past era.

324. See supra notes 69-71 and accompanying text. See also Berger, supra note 284, at 38 (commenting on Richards' deficiency as an historian).

325. Cf. A. VINCENT, supra note 290, at 81 ("Constitutionalism has no intrinsic connection with liberalism or democracy.... Similarly, popular sovereignty ideas have no necessary connection with constitutionalism or in fact democracy.")