

## FOREWORD

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The judicial enforcement of unenumerated rights has dominated constitutional discourse for much of the last century. Today, the practice is both figure and ground. It is an object of attention: public debate rages over the practice, and the Court may soon remake the jurisprudence. It is also the background against which other events take their form, influencing judicial confirmations and presidential elections and arguably driving most theories of constitutional interpretation.<sup>1</sup>

Rather than exhausting the field, the historical persistence and present intensity of the debate over unenumerated rights create an opportunity to generate thoughtful dialogue. With this goal in mind, on February 10, 2006, the *University of Pennsylvania Journal of Constitutional Law* convened its Ninth Annual Symposium, entitled “The Future of Unenumerated Rights.”<sup>2</sup>

A century after *Lochner’s*<sup>3</sup> protection of liberty of contract and a generation after *Roe*,<sup>4</sup> the Symposium asked broad questions about unenumerated rights and their future from a diverse group of distin-

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<sup>1</sup> It would be too much of a digression to support this last claim about theories of interpretation properly, but theories of interpretation are not formed in a vacuum: they must respond to canonical cases, and they may be designed as mechanisms for producing substantive changes in the law. Cf. Samuel Issacharoff, *The Elusive Search for Constitutional Integrity: A Memorial for John Hart Ely*, 57 STAN. L. REV. 727, 728–29 (2004) (explaining John Hart Ely’s theory of representation-reinforcing judicial review in DEMOCRACY AND DISTRUST as a response both to Bickel’s concerns regarding *Brown v. Board of Education* and Ely’s own discomfort with *Roe v. Wade*); Lawrence B. Solum, *Judicial Selection: Ideology Versus Character*, 26 CARDOZO L. REV. 659, 668 n.30 (2005) (noting the unexceptional proposition that originalism is frequently associated with the political right on issues like substantive due process and that the idea of the “living constitution” is associated with the political left).

<sup>2</sup> The title itself deserves explanation. The phrase “unenumerated rights” is at once ambiguous, as it could be interpreted to refer solely to the Ninth Amendment, and a misnomer, as proponents believe the rights are based on textual provisions like the Fourteenth Amendment, the Ninth Amendment, or the penumbras of the Bill of Rights. However, the Symposium was intended, not to examine specific areas of substantive due process doctrine, but instead the broader question of the nature of rights considered less grounded in the Constitution or at least less defensible. For this reason, we considered the title “The Future of Unenumerated Rights” more appropriate than the title “The Future of Substantive Due Process.”

<sup>3</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>4</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

guished scholars. Participants were divided into four panels: Enumerated Rights and Democracy, The Doctrine and Its Future, The "Problem" of Unenumerated Rights, and Property and Natural Rights. We invited participants to consider foundational questions: Why are unenumerated rights considered problematic, and what vision of democracy is needed to justify the judicial protection of unenumerated rights? Are there other, perhaps more defensible ways to produce similar constraints on government power? How would a conservative vision of unenumerated rights look, and what guidance can constitutional protection of property rights and natural rights provide?

It was an honor to organize this Symposium, which would have been impossible without a great deal of help. I am indebted to the 2005-2006 *Journal of Constitutional Law* Board of Editors and Associate Editors, especially to Teresa Bechtold, the *Journal's* Managing Editor, who saved me from ruin, and Tina Jung, the *Journal's* Research & Internet Editor, who produced our elegant website. I am also indebted to Professors Frank Goodman, Seth Kreimer, and Kermit Roosevelt for their guidance.

This is the first of three Symposium issues. The issues here include the fifteen papers prepared for presentation at the Symposium, as well as commentaries on the papers and topic by four other scholars. I hope that these issues prove to be a useful addition to an intriguing, enduring discourse.