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An Honest Proposal — A Candid Admission

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Dan Savage, writing in today's edition of *The New York Times*, suggests that liberals should work to amend the U.S. Constitution in order to add "privacy" to the enumerated rights explicitly included in our governing document.

His proposal: If the Republicans can propose a constitutional amendment banning gay marriage, why can't the Democrats propose a right to privacy amendment? Making this implicit right explicit would forever end the debate about whether there is a right to privacy. And the debate over the bill would force Republicans who opposed it to explain why they don't think Americans deserve a right to privacy - which would alienate not only moderates, but also those libertarian, small-government conservatives who survive only in isolated pockets on the Eastern Seaboard and the American West.

Savage's proposal at least meets the requirement of honesty — he wants to embed an explicit right to privacy within the Constitution. He is certainly correct in his assessment that social liberals love this "right" while social conservatives understand that this claim undermines any ability of the society to protect the lives of the unborn and the integrity of marriage.

There is more to Savage's column. Consider his candid admission that the Constitution nowhere mentions a right to privacy:

In 1961, [Estelle] Griswold, the executive director of the Planned Parenthood League of Connecticut, opened a birth-control clinic in New Haven. She was promptly arrested for dispensing contraceptives to a married couple and was eventually convicted and fined \$100. She appealed, and when her case reached the Supreme Court in 1965, seven of nine justices voted to overturn the conviction, striking down Connecticut's law against selling birth control (effectively overturning similar laws in other states). Americans, the court ruled, had a fundamental right to privacy.

Much of American jurisprudence since then flows from Griswold - including Roe v. Wade, which found that women had a right to abortion, and Lawrence v. Texas of 2003, which found that the right to privacy prevents the government from banning sodomy, gay and straight.

Problematically, however, a right to privacy is not explicitly mentioned in the Constitution. The majority in Griswold held that it was among the unenumerated rights implied by the Constitution's "penumbras" (which sound like something a sodomy law might keep you away from). The Griswold case didn't settle the matter, and the right to privacy quickly became the Tinkerbell of constitutional rights: clap your hands if you believe.

We should welcome Mr. Savage's admission that the Constitution never mentions a "right to privacy." Beyond this, his proposal would at least have the merit of returning the issue to the legislative branch of the federal government and, eventually, to the legislatures of the states.

