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Dangerous Attacks on Freedom

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In the give and take at the Senate Judiciary Committee hearings on President Joseph R. Biden's nomination of Judge Ketanji Brown Jackson to the Supreme Court, and in commentary about that give and take, a dangerous line of argument emerged from some senators over the role of the court in our lives.

One senator suggested that the lawfulness of interracial marriage should be left up to the states. Another questioned whether privacy is protected by the Constitution. And a third, himself a former state supreme court justice, professed difficulty accepting the court's protection of certain fundamental rights from government regulation.

None of this had anything to do with Judge Jackson and whether she is qualified to sit on the court. All of it had to do with senators playing to their political bases back home. Some of this play — though, of course, constitutionally protected speech — is dangerous to personal liberty.

Here is the backstory.

In the early 1960s, a gynecologist at Yale Medical School challenged a Connecticut statute that prohibited the distribution of contraceptives to married couples. He gave them to anyone of age who sought them. He was convicted in a state court, and when his conviction was upheld by Connecticut's highest court, he appealed to the U.S. Supreme Court.

In a landmark ruling, the court recognized the right to privacy of all persons in America when making decisions about bodily intimacy and thereby invalidated state laws that purported to tell people how to engage in sexual intercourse.

The 1965 case is called Griswold v. Connecticut, and it is the progenitor of the concept of substantive due process. The court found that the framers of the Constitution guaranteed the right to be left alone by their employment of various phrases in various clauses in the Constitution.

Griswold itself overruled a Depression-era case, U.S. v. Olmstead, in which the Supreme Court had declined to recognize the right to privacy. Effectively, the dissent in Olmstead — famous for its articulation by Justice Louis Brandeis that the "most comprehensive of rights and the right most valued by civilized men" is the right to be left alone — became the majority opinion in Griswold.

The Griswold case — without using the phrase — began the judicial recognition and employment of the concept of substantive due process

The phrase "due process" connotes two lanes of constitutional protection. The first is procedural due process. This is required of the federal government by the Fifth Amendment and of the states by the Fourteenth Amendment. It is implicated whenever the government wants to take or impair the life, liberty or property of any person. It requires a jury trial at which the government, relying upon principles of law that existed at the time of the behavior in question, must prove fault.

Thus, if the feds or any state wants to restrain a person, take or prevent him from using his property, or take his life, they can only do so after a fair jury trial and the ratification of a guilty verdict on appeal.

Substantive due process protects the exercise of intimate fundamental rights from government intrusion, surveillance or regulation. Thus, the freedom of thought, the use of contraceptives, the choice of a sexual partner and the choice of a mate are all protected by substantive due process because the choices are so substantially integral to human life, personal freedom and individual fulfillment that no amount of procedural due process can justify government interference with them.

Stated differently, substantive due process keeps all government out of the business of regulating intimate voluntary personal choices. Judges and lawyers are supposed to know this.

Now back to the hearings on Judge Jackson's nomination. For reasons best known to themselves, a few Republican senators offered questions to Judge Jackson as if substantive due process were novel. The implications of their questions were that state government officials can be trusted to regulate personal intimate choices.

But such a view — that personal liberty is subject to regulation by the majority — is contrary to the essence of the Bill of Rights.

That essence, articulated in numerous clauses, is that our rights come from our humanity, not from the government. Thus, their exercise is not subject to the approval of bureaucrats or the majority of voters.

But because elected officials in all states and in the federal government have rejected this Natural Law principle, it was necessary for the courts — the essence of whose job is to protect all rights — to do so, which they did by crafting the concept of substantive due process.

No legislature would craft this protection because legislatures are interested in power and control, not in personal liberty.

All freedom-loving persons should welcome this protection, for without it, one would need the government's consent to engage in intimate personal activity. When the Supreme Court used substantive due process in 1967 to invalidate state laws prohibiting interracial marriage, 37 states were still enforcing some form of those laws. The same can be said, though the numbers vary, for same-sex marriage and use of contraceptives.

Most troubling at these hearings, and the senatorial statements afterward, was the willingness of some senators to attack the doctrine that keeps the government's eyes, ears and hands off intimate voluntary choices.

These are areas of human behavior that are none of the government's business — and they would not have been protected but for a life-tenured judiciary upholding the natural rights of the minority from destruction by the majority.

That's the whole purpose of an independent judiciary — to be anti-democratic; to protect the rights of the minority from the tyranny of the majority, which can be worse than the tyranny of a madman.

Without an independent judiciary, and without a doctrine that says to the government "hands off," we will be spilling the blood of patriots in every generation.

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