Mark R. Levin
NRO Contributing Editor

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Death by Privacy

Emanations, penumbras, and bad law.

EDITOR'S NOTE: This article is an excerpt from *Men in Black: How the Supreme Court Is Destroying America*. (Citations and other notes appear in the book, though not in this excerpt.)

"Our nationwide policy of abortion-on-demand through all nine months of pregnancy was neither voted for by our people nor enacted by our legislators — not a single state had such unrestricted abortion before the Supreme Court decreed it to be national policy in 1973." — Ronald Reagan, 1983

Today, legalized abortion is the law of the land because the Supreme Court decided in 1973 that its recently created

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constitutional right to privacy also included a new constitutional right to abortion. If you look in the Constitution, however, you will find no general "right to privacy" any more than you will find a right to abortion — and for good reason: It's not there. The framers assumed no general right to privacy because, to state the obvious, criminal and evil acts can be committed in privacy. Criminal codes are full of such examples — from murder to incest to rape and other crimes.

HOW JUDGES MAKE LAW

The modern argument for a right to privacy began in 1961 in Justice John Marshall Harlan's dissent in *Poe* v. *Ullman*. The case was brought by Planned Parenthood on behalf of a carefully selected group of people: a married couple, a single woman, and a Planned Parenthood obstetrician, C. Lee Buxton. Planned Parenthood's suit was directed against a Connecticut law that prohibited the sale and use of contraceptives. The Supreme Court dismissed the case because the law had not been enforced against the people in Planned Parenthood's case. It is a basic judicial principle that there has to be an actual legal dispute to be adjudicated. But Justice Harlan issued a dissent, writing, "I believe that a statute making it a criminal offense for married couples to use contraceptives is an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life."

Harlan provided an extensive rationale for his position, which became the theoretical cornerstone for the right to privacy. Where did Harlan derive his notions about privacy rights? Melvin L. Wulf, a lawyer for the American Civil Liberties Union, claims credit for first raising the idea with Harlan in the ACLU's friend-of-the court brief in *Poe* v. *Ullman*. Wulf later explained his strategy for getting the Court

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Kurtz: The Princeton Way 04/11 8:31 a.m.
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to adopt the privacy rights approach:

> Judges dislike breaking entirely new ground. If they are considering adopting a novel principle, they prefer to rest their decision on earlier law if they can, and to show that the present case involves merely an incremental change, not a wholesale break with the past. Constitutional litigators are forever trying to persuade courts that the result they are seeking would be just a short step from some other case whose decision rests soundly on ancient precedent.
>
> Since the issue of sexual privacy had not been raised in any earlier case, we employed the familiar technique of argument by analogy: If there is no exact counterpart to the particular case before the Court, there are others that resemble it in a general sort of way, and the principles applied in the similar cases should also be applied — *perhaps even extended a little bit* — to the new case. [Emphasis added.]

In other words, Wulf understood that the Court would be open to rewriting the Constitution by pretending to uphold it. Although Harlan's was a minority opinion, and had no immediate legal effect, its impact would soon become clear. After *Poe* was decided, Planned Parenthood officials found a way to get arrested so they could mount another challenge to Connecticut law. In 1965, Justice William O. Douglas adopted Harlan's reasoning in the majority opinion in the case of *Griswold* v. *Connecticut*, and the right to privacy became constitutional law. Douglas, who was appointed by President Franklin Roosevelt in 1939, is most famous for being the longest-serving justice and, to conservatives, for writing one of the most parodied phrases in Supreme Court history. In order to strike down the Connecticut law prohibiting the sale of contraceptives, Douglas wrote that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."

Don't be embarrassed if you don't know what emanations from penumbras are. Young lawyers across America had to pull out their dictionaries when reading *Griswold* for the first time. A penumbra is an astronomical term describing the partial shadow in an

eclipse or the edge of a sunspot — and it is another way to describe something unclear or uncertain. "Emanation" is a scientific term for gas made from radioactive decay — it also means "an emission."

Douglas's decision not only found a right to privacy in a penumbra of an emanation, it manipulated the facts of the case: Estelle Griswold, the executive director of the Planned Parenthood League of Connecticut, and Dr. C. Lee Buxton, the group's medical director, gave information and prescribed birth control to a married couple. Griswold and Buxton, not the married couple, were later convicted and fined $100 each. The relationship at issue, then, was doctor-patient, not husband-wife. Yet Douglas framed his opinion around a presumed right to *marital* privacy. He expounded at length about the sanctity of marriage but used vague phrasing to describe the rights at issue, never explicitly stating that married couples have a right to use contraceptives. He even raised the ugly specter of sex police, though no police had intruded into anyone's bedroom. "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?" This little phrase has been used as holy writ by judicial activists ever since to further expand the right to privacy in a variety of areas, including abortion and sodomy, as we'll see.

Justice Hugo Black, in his dissent, was not impressed. He attacked the way Douglas had turned constitutional law into semantics by replacing the language of actual rights with the phrase "right to privacy." He wrote, "The Court talks about a constitutional 'right of privacy' as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy' of individuals. But there is not. There are, of

course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities."

Black, normally an ally of Douglas, feared that using such a phrase as "right to privacy" could be a double-edged sword. "One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning.... 'Privacy' is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures." Black concluded by saying, "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision."

Seven years after the issue of married couples and contraceptives was decided in *Griswold*, the Court considered contraceptives and unmarried couples in 1972 in *Eisenstadt* v. *Baird*. Although he quoted *Griswold* frequently in the majority opinion, Justice William Brennan nonetheless found that Massachusetts law could be overturned on Fourteenth Amendment equal protection grounds without having to rely on the marital privacy rights created by *Griswold*. While Connecticut's law in Griswold prohibited the use of contraceptives, Massachusetts had laws restricting their distribution. Married people could obtain contraceptives only from doctors or pharmacists by prescription, while single people could obtain them only to prevent the spread of disease. Massachusetts law was challenged when William

Baird gave a speech at Boston University about birth control and overpopulation. He exhibited contraceptives and gave "Emko vaginal foam" to a young woman in the audience, both of which actions were illegal, and Baird was convicted. His conviction for showing contraceptives was overturned by the Massachusetts Supreme Judicial Court on First Amendment grounds, so distribution was the sole issue before the U.S. Supreme Court.

Brennan found that the statute was a prohibition on contraception per se and ruled that "whatever the rights of the individual to access contraceptives may be, the rights must be the same for the unmarried and the married alike." Yet again, a major Supreme Court decision rested on a naked assertion of opinion instead of legal reasoning. Nowhere does the Constitution require that married couples and single people be treated the same where contraception is involved.

Brennan then argued for expanding the right to privacy: "If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."

In other words, Douglas's rhetoric about the sanctity of marriage was essentially irrelevant. The right to privacy belonged to individuals, not the couple.

Brennan continued, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a

person as the decision whether to bear or beget a child."

So the right to privacy means everything and nothing. It has no constitutional basis and no tangible form. But what is clear is that the Supreme Court, by usurping the legislature's authority to set social policy, has seized from the people the power to make such determinations. A mere five justices are now able to substitute their personal judgments for those of Congress and every state government in the name of privacy rights. This quiet revolution against representative government has gone largely unnoticed. The exception is the occasional Court decision on "hot button" issues in which the attention is mostly on the Court[1]s ruling, not on its abuse of power.

Also notice how Brennan inserted the phrase to "bear or beget a child" in the opinion. The case was about contraceptives, which affect only the begetting of children. Yet Brennan explicitly added the concept of bearing a child as well. He was subtly laying the foundation to extend the right of privacy to encompass the right to abortion. This occurred at a time when *Roe* v. *Wade* — a case involving abortion — had twice been argued before the Court but had not yet been decided. Notice how the judicial activists work — inserting a word in a majority opinion here and there, inserting a phrase in a dissenting opinion, all the while biding their time until five justices can be convinced to join the cause.

The facts of *Roe* are straightforward. "Roe" (the pseudonym for Norma McCorvey, a pregnant woman from Texas) could not legally obtain an abortion in Texas, where it was a crime to procure an abortion or to attempt to perform an abortion, except "by medical advice for the purpose of saving the life of the

mother." The central issue was whether Roe had a right to abort her baby although her life was not at risk.

Roe provides an opportunity to explore how external influences, as well as a justice's personal foibles and prejudices, contribute to judicial activism. Justice Harry Blackmun, who wrote the majority opinion, was nominated by President Richard Nixon in 1970 as a judicial conservative. Indeed, one of Nixon's campaign issues in 1968 was the liberalism of the Supreme Court under Chief Justice Earl Warren. What particularly annoyed Nixon and other Republicans was that some of the Court's staunchest liberals, Justices Earl Warren and William Brennan among them, had been nominated by President Dwight Eisenhower, a Republican. Nixon thought the Court was a "disaster," filled with "senile old bastards" and "fools." He was disgusted at how Justice Potter Stewart, another Eisenhower appointee, had been "overwhelmed by the Washington Georgetown social set" and had turned out to be "weak" and "dumb." Nixon wanted to make sure he appointed justices to the Supreme Court who believed in following the original intent of the Constitution. He replaced the retiring Earl Warren with Warren Burger of Minnesota.

Filling Justice Abe Fortas's seat was more difficult. The Senate rejected Nixon's first two nominees, Clement Haynsworth of South Carolina and Harrold Carswell of Florida. Nixon abandoned his attempts to name a southerner to the Court and considered Blackmun, another Minnesotan, who was a judge on the Eighth Circuit Court of Appeals and former counsel to the prestigious Mayo Clinic. As Nixon's third choice, Blackmun later called himself "Old Number 3." Assistant Attorney General William

Rehnquist vetted Blackmun and found him competent but not exceptional. Blackmun was called to Washington and met with Nixon by the Rose Garden window. "So I went over and we looked out and he asked a couple of questions, among which — I'll never forget this — he said, 'What kind of a woman is Mrs. Blackmun?' And I said, 'What do you mean?' He said, 'She will be wooed by the Georgetown crowd. Can she withstand that kind of wooing?' I said I thought she could."

Blackmun and others sneered at Nixon for asking questions about his wife. Yet Nixon was quite insightful about how conservatives are continually seduced by the liberal establishment once they move inside the Beltway. They "grow" or "evolve" in office, meaning they become receptive to the liberal elitism of the establishment. (Nixon was soon able to put two more justices on the Court after Blackmun: William Rehnquist and Democrat Lewis Powell.)

During his first full term on the Court, Blackmun voted with Burger 89 percent of the time. Blackmun and Burger, who had been close friends in childhood, were called the Minnesota Twins. Blackmun resented the nickname, believing it unfairly implied he was dominated by Burger. Soon after he was on the Court, Burger assigned Blackmun to write the opinion in *Roe*. It was a major opportunity for Blackmun to prove his intellectual heft and display his constitutional prowess.

According to Bob Woodward's book *The Brethren*, Blackmun suffered from a profound sense of insecurity:

> From his first day at the Court, Blackmun had felt unworthy, unqualified, unable to perform up to standard. He felt he could equal the Chief and [Thurgood] Marshall, but not the others. He became increasingly withdrawn and professorial. He did not enjoy charting new paths for the law. He was still learning. The issues

> were too grave, the information too sparse. Each new answer was barely answered, even tentatively, when two more questions appeared on the horizon. Blackmun knew that his colleagues were concerned about what they perceived as his indecisiveness.

Blackmun also brought enormous respect for doctors to the Court from his many years as counsel for the Mayo Clinic. He saw abortion laws as state meddling with a doctor's professional judgment.

In *Roe*, Blackmun plunged himself into the history of abortion and even returned to the libraries of the Mayo Clinic to research the medical opinion. Blackmun had other influences working on him — most notably his wife. Nixon had been quite prescient about the effect of Blackmun's wife on his judicial role. While Blackmun was dithering over the opinion, Dorothy Blackmun told one of his pro-abortion rights clerks "that she was doing everything she could to encourage her husband in that direction. 'You and I are working on the same thing,' she said. 'Me at home and you at work.'" Blackmun later claimed that she (and his three daughters) never tried to influence his decision.

Other justices were also predisposed to dismantle the nation's abortion laws, including another Nixon appointee, Lewis Powell. As Bob Woodward noted: "Powell came quickly to the conclusion that the Constitution did not provide meaningful guidance. The right to privacy was tenuous; at best it was implied. If there was no way to find an answer in the Constitution, Powell felt he would just have to vote his 'gut.'...When he returned to Washington, he took one of his law clerks to lunch....The abortion laws, Powell confided, were 'atrocious.' His would be a strong and unshakable vote to strike them. He needed only a rationale for his vote."

Powell's vote, in other words, was not dictated by a

serious effort to interpret the Constitution. Instead, he made a policy decision and then set out to justify it.

Justice Potter Stewart was also in favor of striking down abortion laws. Although he had some misgivings, Stewart thought abortion reform was necessary for various policy reasons.

> As Stewart saw it, abortion was becoming one reasonable solution to population control. Poor people, in particular, were consistently victims of archaic and artificially complicated laws.... Still, these were issues of the very sort that made Stewart uncomfortable. Precisely because of their political nature, the Court should avoid them. But the state legislatures were always so far behind. Few seemed likely to amend their abortion laws. Much as Stewart disliked the Court's being involved in this kind of controversy, this was perhaps an instance where it had to be involved.

Blackmun acknowledged some of the policy issues at stake in the abortion debate, like overpopulation, in the introduction of his opinion:

> We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions on abortion.
>
> In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

ANYTHING BUT LEGAL REASON

Nice speech, but it had nothing to do with a constitutional analysis of *Roe*. From this inauspicious beginning, Blackmun began a comprehensive, multi-page review of the history of abortion from the beginning of time to the present day. He led with the attitudes of the Persian Empire, the ancient Greeks, and the ancient Romans and tried to divine the real meaning behind the Hippocratic Oath. He moved on to the old common law of England, and examined Christian theology and the works of Catholic theologian Thomas Aquinas. From Europe, he

proceeded to the history of abortion law in the individual states. Not stopping there, he outlined the positions of the American Medical Association since the 1800s, as well as the position of the American Public Health Association and the American Bar Association as expressed in the ABA House of Delegates. Once the history lesson was completed, Blackmun sought to refute the various policy reasons given for America's abortion laws.

Finally, Blackmun focused on his legal rationale in *Roe*. He began with a review of the right to privacy, writing, in part:

> The Constitution does not explicitly mention any right of privacy. In a line of decisions, however...the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment...in the Fourth and Fifth Amendments...in the penumbras of the Bill of Rights...in the Ninth Amendment...or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment....These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty"...are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage... procreation...contraception...family relationships...and child rearing and education....

Blackmun *felt* that the right of privacy, wherever it comes from, includes the right to abortion. Do not look any further for legal argument amidst the voluminous opinion, because it does not exist. Perhaps the extensive historical analysis was included to compensate for the lack of legal analysis.

But Blackmun went further, and the Court followed. Not satisfied to strike down the Texas law, Blackmun began to write what seemed to be a new federal statute. According to Blackmun's opinion, a woman's right to abortion could only be abridged by a compelling state interest. In effect, Blackmun argued that there was an inverse relationship between a woman's interest and the state's interest that ranged

across a spectrum from conception to birth. Therefore, the state's interest at conception was minimal but increased as the pregnancy progressed, reaching its peak at the end of the pregnancy. A woman's interest, paramount at conception, began to give some ground to the state's interest in protecting the fetus as it matured toward being able to live outside of the mother. But Blackmun specifically declared that the unborn child was not a "person" under the Fourteenth Amendment, and thus had no equal protection rights.

Blackmun wrote that what really mattered was the unborn baby's viability outside the womb. A fetus capable of life outside the womb, Blackmun believed, was more deserving of protection than one in its earliest stages of development. He also shot down Texas's attempt to define life as beginning at conception, which "by adopting one theory of life," would have then allowed Texas to extend its interest to the earliest stage of pregnancy. Blackmun wrote, "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."

Blackmun gave deference to medicine, philosophy, and theology (from his own perspective), but not to the Constitution, the people, the states, or the other branches of the federal government. In truth, Blackmun did establish, at least for constitutional purposes, when life begins by recognizing abortion as a constitutionally protected right to privacy. He did precisely what he lectured should not be done.

Blackmun constructed a hyper-technical trimester analysis to break down the rights of the mother and the state. In the first trimester, the decision to abort

must be left to the woman's physician. In the second trimester, the state may regulate abortion procedures to promote its interest in the mother's health. In the third trimester, in the interest of protecting the unborn child, the state can regulate and even ban abortion, except where, by medical judgment, it is necessary to preserve the mother's life or health.

The trade-offs inherent in the trimester system smack of the bargaining and dealing that legislators engage in to pass a highway construction bill. It is no wonder that activists justify *Roe* on policy and not legal grounds. But since this policy decision was disguised as a constitutional pronouncement by the Court, American law has been prevented from keeping up with rapid improvements in medical technology. Repeatedly, the Court has shown no willingness to recognize an earlier concept of viability to limit the reach of the abortion right.

Of course, from an analytical and logical point of view, a ban on abortion could have been upheld regardless of whether a fetus is protected by the Fourteenth Amendment as a "person." Americans are fined or imprisoned for destroying endangered wildlife or even wetlands, and these laws have been ruled constitutional.

In any event, Blackmun's stated deference to medicine, in which a doctor can authorize or perform an abortion for the health of the mother, belies his third-trimester framework. This point was driven home in 2000, in *Stenberg* v. *Carhart*, when the Supreme Court struck down a Nebraska law prohibiting partial-birth abortion. Justice Stephen Breyer, in writing the majority opinion, stated, "We conclude [that the law banning partial-birth abortions violates the Constitution] for two independent reasons. First, the law lacks any exception 'for the

preservation of the...health of the mother.' Second, it 'imposes undue burden on a woman's ability' to choose." Consequently, the Supreme Court upheld a particularly vicious method of performing an abortion.

A Court historian believes Blackmun's leftward drift from moderate to liberal jurist was a result of *Roe*. "It was not just the criticism and the hate mail he received, but also thank-you letters he received from women. Over time, he came to think he had done a great thing for women, and it made him much more attuned to the cause of protecting individual rights." Another way to describe Blackmun's shift is less charitable: He was moved and thereby seduced by public opinion in much the same way a politician is. There is evidence that Blackmun was particularly vulnerable to this type of lobbying. Chai Feldblum clerked for Blackmun during the term after he had issued his dissent in *Bowers* v. *Hardwick* (1986), in which he argued that the right to privacy protected homosexual sodomy. His office was once again flooded with letters from across the country.

> "I believe he was radicalized by the response to the case," says Feldblum, now a professor of disability law at the Georgetown University Law Center in Washington, D.C. "The hate mail told him that prejudice existed and sodomy laws were part of the problem. The fan mail came from gay people who said things like, 'I am gay, and your dissent meant so much to me.' I'll never forget how much that meant to him."

There is something truly absurd and, frankly, repugnant, about a judge being swayed by fan mail.

After *Roe*, Blackmun saw his role as championing a cause, not interpreting the Constitution. At the end of his career, he dramatically announced, without a trace of irony, that he was morally opposed to the death penalty. "From this day forward, I no longer shall tinker with the machinery of death," said the author of *Roe*, as if his ruling in *Roe* did not constitute a tinkering with the machinery of death. Blackmun

continued to issue self-congratulatory, pompous, and maudlin statements about *Roe*'s importance and vulnerability. "If it goes down the drain, I'd still like to regard Roe v. Wade as a landmark in the progress of the emancipation of women," he said. In 1992, with a presidential election looming, Blackmun made a dramatic call — *within a Supreme Court opinion* — to the supporters of abortion. He piously intoned, "And I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light!"

ROE LIVES

Yet *Roe* has survived, despite attempts to overturn it. Blackmun's personal papers reveal that Justice Anthony Kennedy made a last-moment switch and abandoned one such attempt in *Planned Parenthood* v. *Casey*, decided in 1992, thereby providing the crucial fifth vote to uphold *Roe*.

There are some interesting parallels between Kennedy and Blackmun. Both were their presidents' third choice for the Supreme Court and were considered competent but not exceptional when vetted by the White House. And, like Blackmun, Kennedy is going through a leftward evolution on the Court.

Kennedy, Justice Sandra Day O'Connor, and Justice David Souter issued jointly the majority opinion of the Court in *Casey* — a very unusual move. The Court allowed certain restrictions on abortion, but left the essential holding in *Roe* intact.

The three justices began by stating the Court's obligations: "Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. *Our obligation is to define the liberty of all, not to mandate our own moral code.* The underlying constitutional issue is whether the State can resolve these philosophic questions in

such a definitive way that a woman lacks all choice in the matter, except perhaps in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest."(Emphasis added.)

Of course, defining and establishing parameters for liberty (and life) do involve moral questions. Justice Kennedy, like Justices Douglas, Brennan, and Blackmun before him, delivered his own speech on the right to privacy: "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."

These words have been ridiculed by many, including Justice Antonin Scalia, as the "sweet-mystery-of-life" passage. Scalia later wrote, in a different case, "I have never heard of a law that attempted to restrict one's 'right to define' certain concepts; and if the passage calls into question the government's power to regulate actions based on one's self-defined 'concept of existence, etc.,' it is the passage that ate the rule of law."

The "right to define one's concept of the universe" is the modern incarnation of the emanations from penumbras that allegedly provided a right to privacy. It is just another meaningless, pseudo-sophisticated phrase by which justices evade our constitutional framework and impose their personal views on the rest of us. Almost ten years later, Kennedy, in concluding that homosexual sodomy is a

constitutional right in *Lawrence* v. *Texas*, declared, "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." Liberty also presumes, indeed requires, something our courts lack: fidelity to the rule of law and respect for the legislative branch of government, where controversial issues can be resolved through the elected representatives of the people, rather than a handful of unelected justices.

There are no more emotional and controversial moral and societal issues than those related to privacy, personal behavior, and liberty. And it's for this reason that public influence on government policy, exercised through the respective branches of government, is so crucial to ensuring the legitimate and proper functioning of a constitutional republic. To be true to its constitutional role, the Supreme Court should refuse to be drawn into making public policy, and it should strike down legislation only when a clear constitutional violation exists. When judicial activists resort to various inventions and theories to impose their personal views on privacy and liberty, they jeopardize the legitimacy of the judiciary as an institution and undermine the role of the other branches of government.

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