

**TESTIMONY OF MELISSA MURRAY
FREDERICK I. AND GRACE STOKES PROFESSOR OF LAW,
NEW YORK UNIVERSITY SCHOOL OF LAW**

**BEFORE THE HOUSE COMMITTEE ON THE
JUDICIARY**

**HEARING ON WHAT'S NEXT: THE THREAT TO INDIVIDUAL
FREEDOMS IN A POST-ROE WORLD**

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Thank you very much for the opportunity to appear before you in these hearings on the implications of *Dobbs v. Jackson Women's Health Organization*. I am here today to explain how a line of precedents concerning privacy rights is imperiled as a result of this decision, and why there has never been a more urgent need to protect access to these rights.

My name is Melissa Murray. I am the Frederick I. and Grace Stokes Professor of Law at New York University School of Law, where I teach constitutional law, family law, and reproductive rights and justice and serve as a faculty director of the Birnbaum Women's Leadership Network. Prior to my appointment at New York University, I was the Alexander F. and May T. Morrison Professor of Law at the University of California, Berkeley, where I taught for twelve years and served as Faculty Director of the Berkeley Center on Reproductive Rights and Justice and as the Interim Dean of the law school.

In 1973's *Roe v. Wade*, the United States Supreme Court recognized that the Fourteenth Amendment's guarantee of liberty protects an individual's right to determine whether to bear or beget a child.¹ Since 1973, the Supreme Court has consistently affirmed the right to abortion as an essential aspect of the Constitution's guarantees of liberty and equality, including in 1992's *Planned Parenthood v. Casey*, which reaffirmed a woman's right to abortion. Despite these long-standing precedents, on June 24, 2022, the United States Supreme Court announced its decision in *Dobbs v. Jackson Women's Health Organization*, upholding Mississippi's 15-week abortion ban and overruling *Roe v. Wade* and *Planned Parenthood v. Casey*.² In the *Dobbs* decision, the Court declared that the U.S. Constitution no longer protects the right to abortion, marking the first time that the Supreme Court has withdrawn a fundamental constitutional right—a right that has been relied on for nearly 50 years.

The impact of the Court's decision in *Dobbs* has been immediate—and has disproportionately affected individuals who already face barriers to health care and economic security, including communities of color, rural families, and LGBTQ individuals. I urge this Committee to keep these communities in mind as you consider ways to restore the right to abortion and support those seeking abortion care now that *Roe* has been overturned.

The *Dobbs* decision has fundamentally disrupted access to abortion in this country—but its impact will extend beyond abortion. *Roe v. Wade* did far more than establish the constitutionally protected right to abortion; it solidified and expanded the constitutional “right to privacy,” as part of the liberty interests protected under the Fifth and Fourteenth Amendments, which state that no person shall be deprived of “life, liberty or property, without due process of law.”³ Accordingly, the

Constitution's protection of liberty and privacy is not confined to abortion, but also underlies the Supreme Court's recognition of various fundamental rights, including the rights to contraception and procreation, marriage, family relations, child rearing, and sexual intimacy.⁴ Although the Supreme Court's recognition of the right to privacy predates *Roe*, *Roe* was an important affirmation of, and foundation for, a broad array of privacy and liberty rights.⁵

To be sure, the Supreme Court understood the links between *Roe* and the other rights that proceed from the Constitution's grant of liberty. Indeed, in the majority opinion, Justice Alito attempted to distinguish the abortion right from these other rights by explaining that, unlike these other rights, "[a]bortion destroys . . . 'potential life.'" But despite Justice Alito's insistence that overruling *Roe* "does not undermine [these other rights] in any way," the majority opinion's logic applies with equal force to these other rights. Justice Clarence Thomas said as much in his concurring opinion. There, he argued that "the Due Process Clause does not secure *any* substantive rights," and, on that ground, encouraged his colleagues to "reconsider all of this Court's substantive due process precedents," including those that recognize a right to contraception, sexual intimacy, and same-sex marriage.

The writing is on the wall. Because the Supreme Court has overturned *Roe*, these other rights of heart and home are now in jeopardy. I am here today to explain the imminent risk to these fundamental rights and to advocate for the protection of the right to abortion and all of these fundamental rights.

I. The Constitution's Protection of Personal Liberty, Including Access to Contraception and the Right to Abortion, is Central to Individual Dignity and Equality and to Other Important Rights.

The Fourteenth Amendment guarantees all of us liberty and equality. To understand the full extent of the Amendment's protections, it is necessary to appreciate the concerns that animated its drafting and ratification. Proposed in the wake of the Civil War, the Reconstruction Amendments were consciously drafted and ratified for the express purpose of abolishing and repudiating slavery and its indicia. Accordingly, the Thirteenth Amendment formally abolished slavery, while the Fifteenth Amendment enfranchised Black men, introducing them into the political community as equals. In keeping with this abolitionist ethic, the Fourteenth Amendment was intended to repudiate the legal and cultural conditions that distinguished slavery from freedom. These conditions of enslavement were manifold, but they included a lack of bodily autonomy and control over procreation, the absence of family integrity and parental rights over children, ineligibility for civil marriage, and inability to contract. In drafting the Reconstruction Amendments, the framers were intent on eradicating both slavery and these repugnant features of that "peculiar institution." On this account, the Fourteenth Amendment did more than insist on the equality and citizenship of the formerly enslaved; implicit in its understanding of "liberty" was the repudiation and eradication of these hallmark conditions of slavery.

As such, the Due Process Clause's vision of liberty necessarily protected as fundamental rights of bodily autonomy, rights of family integrity, marriage rights, and parental rights. Indeed, as early as 1923, the Court acknowledged this aspect of the Due Process Clause's grant of liberty, concluding in *Meyer v. Nebraska* that the Fourteenth Amendment protects "the right of the individual to contract; to engage in any of the common occupations of life; to acquire useful knowledge; to marry, establish a

home and bring up children; to worship God according to the dictates of his own conscience; and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”⁶

The Supreme Court’s recognition of a right to privacy proceeds from this understanding of the Fourteenth Amendment’s guarantee of liberty. In 1965’s *Griswold v. Connecticut*, the Court announced a right to privacy that emanated from the penumbras of various guarantees of the Bill of Rights.⁷ In doing so, the *Griswold* Court reiterated that the Constitution protects an individual’s right to make certain personal decisions about intimacy, marriage, and procreation.

The Court’s recognition of a right to choose an abortion proceeds from this tradition of liberty and autonomy in intimate life.⁸ Indeed, according to the Court, “[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy than a woman’s decision . . . whether to end her pregnancy.”⁹ The exercise of this right without undue hindrance from the State is essential to dignity as an individual and status as an equal citizen.

Reproductive autonomy is rooted in the deeply personal nature of decisions about bearing children and expanding a family. However, the decision of “whether to bear or beget a child” has ramifications beyond the home and family. As the Court has recognized, women’s ability “to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”¹⁰

The Supreme Court’s decision in *Roe v. Wade* recognizing the right to abortion, does not stand on its own; reflecting the anti-slavery origins of the Fourteenth Amendment, it is part of a long line of cases that recognize the constitutional right to privacy and liberty, including personal decisions essential to an individual’s autonomy. These decisions include the right to contraception—first recognized in *Griswold v. Connecticut* (1965)¹¹—and the right to procreate—first recognized in *Skinner v. Oklahoma* (1942).¹² The Court relied on these core precedents in deciding *Roe v. Wade* (1973), and in *Carey v. Population Services* (1977),¹³ it relied on *Roe* in turn for its central holding that “the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.”¹⁴

Critically, the right to personal liberty is not limited to reproductive rights. It includes the right to marry, first recognized in *Skinner v. Oklahoma* (1942),¹⁵ and reaffirmed in 1967’s *Loving v. Virginia* (1967)¹⁶ and 2015’s *Obergefell v. Hodges* (2015).¹⁷ It includes the right of parents to direct the upbringing of their children, first recognized in the 1920s in *Meyer v. Nebraska* (1923)¹⁸ and *Pierce v. Society of Sisters* (1925).¹⁹ It includes the right to maintain family relationships, including relationships that go beyond the traditional nuclear family.²⁰ And *Roe* has also influenced the Supreme Court’s decision to recognize the right to form intimate relationships,²¹ and the right to personal control of medical treatment.²²

Roe is inextricably bound to this constellation of privacy and personal liberty rights. Now that *Roe* has been overturned, these other rights are similarly threatened.

II. The analytical framework used by the majority in *Dobbs* lays out a roadmap for revisiting and taking away other fundamental privacy and liberty rights.

The majority opinion lays out a roadmap for eviscerating other important rights—including the rights to contraception and same-sex marriage. According to the *Dobbs* majority, *Roe* was “egregiously wrong” because the right to choose an abortion is not explicit in the text of the Constitution and is not “deeply rooted” in the traditions and history of this country. As the foregoing sections make clear, this account fundamentally misunderstands the Fourteenth Amendment’s anti-slavery origins and the Framers’ understanding of “liberty.” But assuming *arguendo* that the majority’s assessment is correct, its logic cannot be confined to the abortion right. Despite the majority’s assurances that the *Dobbs* opinion implicates only the right to choose an abortion and does not cast doubt on other precedents, its analytical framework clearly implicates the other liberty rights that the Court has recognized in its substantive due process jurisprudence. As the dissent points out, “[t]he lone rationale for what the majority does today is that the right to elect an abortion is not ‘deeply rooted in history.’”²³ But “[t]he same could be said, though, of most of the rights the majority claims it is not tampering with.”²⁴ This means that “[e]ither the mass of the majority’s opinion is hypocrisy,” or “all rights that have no history stretching back to the mid-19th century are insecure.”²⁵

Just as “the Constitution makes no reference to abortion,” it similarly does not make reference to contraception, marriage, parental rights, or LGBTQ rights. Accordingly, the *Dobbs* decision invites reconsideration of *Griswold v. Connecticut* (right to contraception), *Obergefell v. Hodges* (right to same-sex marriage), *Lawrence v. Texas* (right to private, consensual sexual relations), and many other decisions in the Court’s long line of substantive due process cases. The right to contraception is exemplary of this concern. Nowhere does the Constitution speak of a right to contraception — in fact, the Constitution does not even explicitly mention women. And as many conservatives have noted, the American legal landscape was littered with prohibitions on contraception right up until the court invalidated Connecticut’s ban on contraception in 1965’s *Griswold v. Connecticut*. Despite these obvious similarities, the majority insists that its decision in *Dobbs* has no bearing on the future of contraceptive access.

And yet, it is impossible to “neatly extract” the right to abortion from the “constitutional edifice without affecting any associated rights.”²⁶ For this reason, the dissent likens the majority’s assurances to “someone telling you that the Jenga tower simply will not collapse.”²⁷

And in a post-*Roe* America, it is easy to see how the right to contraception could be gutted. It has already begun, with abortion opponents recasting some forms of contraception as abortifacients. For the last 10 years, this has been a standard move among abortion opponents. To be clear, contraception prevents pregnancy, but this has not stopped anti-abortion groups and lawmakers from attempting to recast emergency contraception and intrauterine devices (IUDs) as abortions.

In 2021, Idaho banned emergency contraception at public school health centers, including public universities, as part of a bill banning abortion. Also in 2021, Missouri nearly failed to pass a critical funding bill for its state Medicaid program over an amendment claiming emergency contraceptives and IUDs should not be covered. After the draft *Dobbs* opinion was leaked, the Louisiana legislature flirted with a bill that would classify abortion as a homicide, prompting concern that the legislation could have criminalized IUDs and emergency contraception.

Even members of this chamber have promoted this falsehood. In debate last June over the Equal Access to Contraception for Veterans Act, a bill that would allow veterans access to no-cost contraception, members made statements to this effect on the House floor. In September 2021, when the House Armed Services Committee considered the National Defense Authorization Act (NDAA), Representative Jackie Speier introduced an amendment that would provide no-cost access to birth control for military servicemembers and military families. In opposition to this amendment, some members of Congress claimed that emergency contraception caused an abortion. This happened just a few weeks ago when Representative Speier offered her amendment again in the House Armed Services Committee.

III. Justice Thomas’s concurrence makes clear that these associated privacy rights are not safe, despite the majority’s efforts to cordon off abortion from other privacy rights.

It is not just that the logic of the majority’s analysis easily applies to other privacy rights. In a separate concurrence, Justice Thomas makes clear the imminent threat to these other rights, encouraging the Court to reconsider *all* of the Court’s precedents recognizing fundamental rights under the Fourteenth Amendments’ right to liberty, including substantive due process rights established in *Griswold*, *Lawrence*, and *Obergefell*.²⁸ As he explains, every one of these decisions is “demonstrably erroneous,” and the newly constituted Court has not only the power but a “duty” to overturn them.

Justice Thomas goes on to state that the entire idea of substantive due process rights is a “demonstrably incorrect reading of the Due Process Clause, [and] the ‘legal fiction’ of substantive due process is ‘particularly dangerous.’”²⁹ Justice Thomas offers three reasons for his objections to substantive due process rights. First, he claims that substantive due process rights give judges too much power in identifying what rights are fundamental, and that this power constitutes policy-making rather than neutral legal analysis.³⁰ Second, Justice Thomas argues that substantive due process rights “distort[] other areas of constitutional law” and have become the “core inspiration for many of the Court’s constitutionally unmoored policy judgments.”³¹ Third, Justice Thomas argues that substantive due process analysis is “often wielded to ‘disastrous ends.’” As evidence of these “disastrous ends,” he cites the Court’s infamous decision in *Dred Scott v. Sandford*.³² Justice Thomas’s invocation of a decision holding that those of “African descent” were ineligible for citizenship in an opinion that calls into question a line of jurisprudence that reflects and embodies the Fourteenth Amendment’s aspirations for abolishing slavery and eradicating the residue of enslavement in the United States is profoundly disturbing. It is doubly offensive—and morbidly uncanny—in the historical context of racial reproductive coercion of Black women.

a. Thomas is directing his words at the extremist federal judges, right-wing political candidates, and anti-abortion legislators looking to him for how to eliminate the right to contraception moving forward.

Although no other justice joined his concurrence, it would be a mistake to dismiss Justice Thomas’s rant against substantive due process rights as an irrelevant aside. Thomas’s concurrence furnishes a blueprint to extremist federal judges, hostile congressional candidates, and anti-abortion legislators seeking a rationale for challenging the right to contraception and other fundamental rights going forward. Like many of his past opinions advocating for the destruction of fundamental liberty and

privacy rights, Justice Thomas is signaling that the goal posts have moved, and extremist litigators, judges, and lawmakers are sure to adjust their game plan in response.

The prospect of assaults on the right to contraception is hardly hyperbolic or hypothetical. In March, Tennessee Senator Marsha Blackburn dismissed *Griswold v. Connecticut*, the longstanding Supreme Court decision legalizing contraceptive use by married couples, as “constitutionally unsound.”³³ This past February in Michigan, two Republican candidates for attorney general criticized *Griswold* during a public debate.³⁴ In May 2022, Blake Masters, an Arizona Republican candidate for U.S. Senate, declared on his website that he will only vote to confirm federal judges who “understand that. . . *Griswold*. . . was wrongly decided.”³⁵ Justice Thomas’s declaration of war against substantive due process rights, including the right to contraception established in *Griswold*, not only greenlights extremist state legislators and politicians, but makes clear that such measures will have his support—and his vote—if these questions come before the Court.

In the few weeks since *Roe* was overturned, those of us who have maintained that the decision imperils other fundamental rights have been accused of hyperbolic “catastrophizing” and baseless fearmongering. For instance, the Wall Street Journal’s editorial page insisted that our fears about overruling rights to contraception and same-sex marriage are little more than an “implausible parade of horrors.” Such high-level minimizing is not surprising considering that only a few years ago, many of us were dismissed when we insisted that *Roe* was at risk of being overturned. To be clear, I take no joy in correctly predicting what has come to pass. I only ask that this committee heed these new warnings and take swift action to protect our most basic privacy and liberty rights that are now clearly threatened.

b. The *Dobbs* majority has signaled endorsement of Justice Thomas’s harmfully inaccurate depiction of the modern birth control movement as progeny of the anti-Black eugenics movement.

To understand whether and how the right to contraception, like the right to abortion, could be overturned, one need only read the tea leaves of the *Dobbs* decision. In footnote 41, Justice Alito highlights an argument linking abortion with eugenics, referencing Justice Thomas’s 2019 concurrence in *Box v. Planned Parenthood of Indiana and Kentucky*.³⁶ In that concurrence, Justice Thomas argued that abortion restrictions were the state’s attempt to prevent abortion from becoming “a tool of eugenic manipulation.”³⁷ Justice Thomas’s argument hinged, in part, on the relationship between Margaret Sanger, the founder of Planned Parenthood and the modern birth control movement, and the eugenics movement.³⁸

Justice Alito’s decision to include the footnote in the majority opinion³⁹ is puzzling—by the opinion’s logic, overruling *Roe* is a function of textualism and originalism, not eugenics. It might be explained as a gesture of collegiality to Justice Thomas, who has diligently husbanded the eugenics argument and seen it flourish in lower court rulings on abortion. Or, more ominously, the footnote may be an effort to preserve — in the most important Supreme Court decision in a generation—the view that the modern birth control movement is irrevocably tainted by its past associations with eugenics and racial injustice.

Linking the right to contraception to racism and the prospect of racial genocide may have profound consequences. After all, the court has overruled past precedents in order to remedy racial injustice. As the *Dobbs* opinion acknowledges, the court in *Brown v. Board of Education* overruled *Plessy v. Ferguson* in

order to correct the injustices of Jim Crow.⁴⁰ What better way to destabilize, and lay a foundation for overruling the right to contraception than to foster and cultivate the notion that it originated in a racist effort to stamp out Black reproduction? Never mind the 400-year long history of federal and state regulations that have controlled, exploited, criminalized, brutalized, and surveilled the reproductive autonomy of Black people, people of color, and Black women in particular. These assertions, and the effort to destabilize reproductive rights that they underwrite, are not only egregious, but make clear that racial justice is secondary to those who parrot these narratives. Instead, their invocation of eugenics underwrites a deep-seated effort to undercut reproductive health services and freedom for our most marginalized communities.

As the dissent states, “the majority promises that the decision to overturn *Roe* does not undermine any associated rights (i.e., rights to “marriage, procreation, contraception, [and] family relationships”), but these promises cannot be trusted and communities affected by these decisions should not be satisfied with these baseless claims.⁴¹ I, for one, am not satisfied with the majority’s hollow assurances, and call on this committee to protect these associated rights in a manner that is swift and absolute.

Thank you.

¹ *Roe v. Wade*, 410 U.S. 113, 169–70 (1973)

² *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392, slip op. at 1 (June 24, 2022) (hereafter “*Dobbs* Majority”), https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf.

³ U.S. Const., amend. V; *Id.* at amend. XIV, § 1.

⁴ *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 573-74 (2003); George Blum et al., *Right to Privacy*, 16B Am. Jur. 2d Constitutional Law § 652 (2012).

⁵ While not originally understood as arising primarily from the Due Process Clause, the right to privacy has been recognized since at least 1891, when the Supreme Court proclaimed “[n]o right is held more sacred . . . than the right of individual to the possession and control of his own person, free from all restraint or interference of others.” *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891); *see Roe v. Wade*, 410 U.S. 113, 153 (1973) (citing *Botsford* as recognizing right to privacy rooted in the Constitution).

⁶ 262 U.S. 390, 399 (1923).

⁷ 381 U.S. 479, 484 (1965).

⁸ *See Roe v. Wade*, 410 U.S. 113 (1973).

⁹ *Thornburgh v. Am. College Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986).

¹⁰ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 556 (1992).

¹¹ 381 U.S. 479 (1965).

¹² 316 U.S. 535 (1942).

¹³ 431 U.S. 678 (1977).

¹⁴ 431 U.S. 678, 687 (1977).

¹⁵ 316 U.S. 535 (1942).

¹⁶ 388 U.S. 1, 12 (1967).

¹⁷ 135 S. Ct. 2584, 2604–05 (2015).

¹⁸ 262 U.S. 390 (1923).

¹⁹ 268 U.S. 510 (1925).

²⁰ *See, e.g., Moore v. East Cleveland*, 431 U.S. 494, 500–06 (1977).

²¹ *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

²² *See, e.g., Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 342 (1990) (Stevens, J., dissenting); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 71 (1976) (invalidating a requirement that a married woman obtain her husband’s consent for an abortion).

²³ *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392, slip op. at 5 (June 24, 2022) (Breyer, Sotomayor, and Kagan, J., dissenting) (hereafter “*Dobbs* Dissent”).

²⁴ *Dobbs* Dissent, slip op. at 5.

²⁵ *Dobbs* Dissent, slip op. at 5.

²⁶ *Dobbs* Dissent, slip op. at 25.

²⁷ *Dobbs* Dissent, slip op. at 25.

²⁸ *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op. at 3 (June 24, 2022) (Thomas, J., concurring) (hereafter "*Dobbs* Justice Thomas Concurrence").

²⁹ *Dobbs* Justice Thomas Concurrence, slip op. at 4.

³⁰ *Dobbs* Justice Thomas Concurrence, slip op. at 4.

³¹ *Dobbs* Justice Thomas Concurrence, slip op. at 5.

³² *Dobbs* Justice Thomas Concurrence, slip op. at 5.

³³ Dean Obeidallah, *Why Republicans want to roll back Americans' 'right to privacy'*, MSNBC (March 23, 2022), <https://www.msnbc.com/opinion/msnbc-opinion/senator-blackburn-used-scotus-birth-control-case-make-alarming-point-n1292771>.

³⁴ Craig Mauger, *Republican AG candidates criticize 1965 ruling against contraceptive ban*, THE DETROIT NEWS (Feb. 21, 2022), <https://www.detroitnews.com/story/news/politics/2022/02/21/michigan-gop-ag-candidates-criticize-1965-ruling-against-contraceptive-ban/6879175001/>.

³⁵ Dillon Rosenblatt, *GOP Senate candidate Blake Masters wants to allow states to ban contraception use*, AZ MIRROR (May 6, 2022), <https://www.azmirror.com/blog/gop-senate-candidate-blake-masters-wants-to-allow-states-to-ban-contraception-use/>.

³⁶ 139 S. Ct. 1780, 1782–93 (2019) (Thomas, J., concurring).

³⁷ *Box*, 139 S. Ct. 1780, 1784.

³⁸ *Box*, 139 S. Ct. 1780, 1783–84.

³⁹ *Dobbs Majority*, slip op. at 30, n. 41 (citing *Box* concurrence and referencing “arguments about the motives of proponents of liberal access to abortion...[to include] a desire to suppress the size of the African American population”).

⁴⁰ *Dobbs Majority*, slip op. at 40.

⁴¹ *Dobbs* Dissent, slip op. at 25.