Clarence Thomas Signals Same-Sex Marriage and Contraception Rights at Risk After Overturning *Roe v. Wade*

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In his opinion concurring with the Supreme Court's decision to overturn the constitutional right to abortion established in *Roe v. Wade*, Justice Clarence Thomas wrote that the high court should revisit all cases built on similar legal footing—including cases that guarantee the right to contraception, same-sex consensual sexual relations, and same-sex marriage.

All three cases—and numerous other landmark decisions—are built upon the right to substantive due process found in the Fifth and Fourteenth Amendments of the Constitution, which prohibit the government from depriving "any person of life, liberty, or property, without due process of law."

In 1973, the Supreme Court held it was the Due Process Clause of the Fourteenth Amendment that protected a woman's right to an abortion before fetal viability—the point around 24 weeks of pregnancy where a fetus can survive outside the womb. Since a leaked draft opinion previewed the overturn of *Roe* in May, progressives have been sounding the alarm that other rights rooted in substantive due process could be similarly under threat.

In his majority opinion released Friday, Justice Samuel Alito attempted to assuage those concerns, writing that the Supreme Court "stated unequivocally that '[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion.'" Thomas signed on to the majority opinion, but wrote a separate concurrence in which he argued all other decisions rooted in the Due Process Clause should be reconsidered by the Supreme Court, hinting that he'd like *Dobbs v. Jackson Women's Health Organization* to be the first in a wave of cases overturning significant precedents. (A concurrence explains a Justice's reasoning, but is not legally binding.).

"I write separately to emphasize a second, more fundamental reason why there is no abortion guarantee lurking in the Due Process Clause," Thomas wrote. "As I have previously explained, 'substantive due process' is an oxymoron that 'lack[s] any basis in the Constitution.'" Thomas argues that the Constitution's guarantee of due process before someone is denied the right to "life, liberty or property" has no bearing on what those rights actually encompass. The text of the Due Process Clause itself, he says, therefore "does not secure any substantive rights," including a right to abortion. For that reason, he argues, the Supreme Court should "reconsider all of this Court's substantive due process precedents."

The argument—which Thomas has made in previous writings—is a seismic departure from how the Supreme Court has historically approached the right to due process. For a century and a half the court has interpreted the Fifth and Fourteenth Amendments to protect people's substantive rights, and has built a growing list of liberties entitled to protection. Those rights include the rights to contraception (*Griswold v. Connecticut,* 1965*)*, same-sex consensual relations (*Lawrence v. Texas,* 2003*)* and same-sex marriage

(*Obergefell v. Hodges,* 2015)—all of which Thomas explicitly named in his opinion as worth revisiting.

Thomas' concurrence is "an ominous preview of how far the Supreme Court may go to undermine existing constitutionally protected rights," argues Katherine L. Kraschel, a reproductive justice lecturer at Yale Law School. "There are things that we may take for granted that will no longer be guaranteed."

But Sarah Parshall Perry, a senior legal fellow at the conservative think tank the Heritage Foundation, urges caution. She says that since Thomas' concurring opinion is not binding, and because no other justice joined him on it, it is fair to conclude the majority of Justices are committed to substantive due process and believe that it does protect against certain fundamental rights.

What those rights actually are could still be up for debate, other legal experts say. While Alito wrote in *Dobbs* that the decision should not necessarily impact other precedent, the opinion still adopts a methodology that implies cases like *Griswold* and *Obergefell* were wrongly decided, says Kermit Roosevelt, a professor of law at the University of Pennsylvania. Alito argues the right to abortion is not deeply rooted in U.S. history and tradition, and one could potentially make the same argument about the right to access contraception or to same-sex marriage, he explains.

Dobbs is the first time the Supreme Court has overruled a protection rooted in substantive due process since the 1930s, and in so doing it has opened the door to overturning other rights rooted in similar legal principles, argues Bertrall Ross, a professor at the University of Virginia School of Law. Prior to *Dobbs*, the court was responsive to social movements and shifts in

public opinion, among other factors, when deciding whether a right was protected by the Due Process Clause, explains Ross. Since the Constitution is open-ended, the argument went, the high court can read rights into the Constitution that are not explicitly stated—such as the right to marry, or the right to privacy.

But the *Dobbs* decision shows that "the majority of the current court is much more interested in history and what the Constitution and its provisions meant when they were ratified," says Ross. "Furthermore, the majority of this Court does not appear to see itself as being bound by precedent. As a result, every case that protected substantive rights under the Due Process Clause would appear to be fair game for the Supreme Court to revisit and undo."

"The court is on a devastating path," argues Laurence Tribe, Professor of Constitutional Law emeritus at Harvard, "that is likely to jeopardize literally all of the basic bodily integrity rights that people have come to rely on."