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Hearing of the House Committee on the Judiciary  
“What’s Next: The Threat to Individual Freedoms in a Post-Roe World”

July 14, 2022, 9:00 AM  
Rayburn House Office Building, Room 2141

Dear Chair Nadler, Ranking Member Jordan, and Members of the Committee:

I am privileged to testify before this Committee on *Dobbs v. Jackson Women's Health Organization* and how the case does not impact substantive due process doctrine. I serve as President & CEO of Americans United for Life (AUL), America's original and most active pro-life legal advocacy organization. Founded in 1971, two years before the Supreme Court's decision in *Roe v. Wade*, AUL has dedicated over 50 years to advocating for comprehensive legal protections for human life from fertilization to natural death. AUL attorneys are highly regarded experts on the Constitution and legal issues touching on abortion and are often consulted on various bills, amendments, and ongoing litigation across the country. For five decades, Americans United for Life's staff, supporters, and partners have worked tirelessly to advance the human right to life in culture, law, and policy.

Thank you for the opportunity to refute the fallacy that *Dobbs* threatens substantive due process rights. Abortion is intrinsically different from recognized privacy rights. The practice ends the life of a separate, unique human being. For this reason, as *Roe* itself recognized, "[t]he situation therefore is inherently different from [cases involving] marital intimacy . . . or marriage, or procreation, or education."<sup>1</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey* affirmed that "[a]bortion is a unique act" because of its repercussions upon the woman, her family, and her preborn child.<sup>2</sup> Recognizing abortion's uniqueness, the *Dobbs* majority explicitly limited its holding to abortion, confirming the decision had no impact upon existing privacy rights protected by substantive due process.

*Dobbs* does not threaten individual freedoms in the United States. Rather, constitutional interpretation that is unmoored from our nation's legal history, tradition, and constitutional text threatens liberty, sullies judicial integrity, and wounds our democratic process. The Supreme Court correctly overruled *Roe* and cast it into the graveyard of pernicious decisions that include *Lochner v. New York*<sup>3</sup> and *Dred Scott v. Sandford*.<sup>4</sup>

### **The Constitution Protects Unenumerated Fundamental Rights That Have Passed the Glucksberg Test**

America is the land of the free. For 234 years, "[w]e the People . . . [have] secure[d] the Blessings of Liberty to ourselves and our Posterity" through the United States Constitution.<sup>5</sup> Yet, "liberty" is an undefined term and has invoked vigorous debate. As Lincoln once said: "We all declare for Liberty; but in using the same word we do not all mean the same thing."<sup>6</sup>

Under the Due Process Clause of the 14th Amendment, "nor shall any State deprive any person of life, liberty, or property, without due process of law." The Supreme Court has interpreted a substantive component to this provision, recognizing:

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<sup>1</sup> *Roe v. Wade*, 410 U.S. 113, 159 (1973), overruled by *Dobbs v. Jackson Women's Health Org.*, 597 U.S. \_\_\_\_ (2022).

<sup>2</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992), overruled by *Dobbs*, 597 U.S. \_\_\_\_.

<sup>3</sup> 198 U.S. 45 (1905) (invalidating basic legal protections for workers' rights under a substantive right to contract theory).

<sup>4</sup> 60 U.S. 393 (1856) (holding that people of African descent were not citizens of the United States and had no constitutional protection).

<sup>5</sup> U.S. Const. pmbl.

<sup>6</sup> *Dobbs*, slip op. at 13 (citing Address at Sanitary Fair at Baltimore, Md. (Apr. 18, 1864), reprinted in 7 The Collected Works of Abraham Lincoln 301 (R. Basler ed. 1953)).

Without doubt, [the Due Process Clause] denotes not merely freedom from bodily restraint but also 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.<sup>7</sup>

These “fundamental rights and liberty interests” receive “heightened protection against government interference.”<sup>8</sup>

To receive protection under substantive due process, fundamental rights and liberties must pass the *Glucksberg* test, which analyzes whether the right is “‘deeply rooted in this Nation’s history and tradition’ . . . and implicit in the concept of ordered liberty, such that ‘neither liberty nor justice would exist if they were sacrificed’ . . . .”<sup>9</sup> As part of this analysis, there must be a “‘careful description’ of the asserted fundamental liberty interest” and “[o]ur Nation’s history, legal traditions, and practices thus provide crucial ‘guideposts for responsible decisionmaking.’”<sup>10</sup>

### **Roe and Casey Were Egregiously Wrong and Devalued Congress and the States’ Interests in Prenatal Life**

*Roe* and *Casey* failed the Supreme Court’s five-factored *stare decisis* analysis. (1) Comparing abortion jurisprudence to *Plessy v. Ferguson*,<sup>11</sup> in which the Supreme Court instituted the racist “separate but equal” doctrine,” the *Dobbs* Court found “*Roe* was also egregiously wrong and deeply damaging. . . . *Roe*’s constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed.”<sup>12</sup> (2) As the Court recognized, “[*Roe*] was more than just wrong. It stood on exceptionally weak grounds [in its legal reasoning].”<sup>13</sup> (3) Abortion jurisprudence was unworkable and led to conflict in the Supreme Court and Federal Courts of Appeals in how to interpret *Casey*’s undue burden standard. (4) The cases created an “abortion distortion,” in that “*Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines.”<sup>14</sup> (5) Abortion does not implicate traditional reliance interests which “arise ‘where advance planning of great precision is most obviously a necessity.’”<sup>15</sup>

According to the Court, “[o]rdered liberty sets limits and defines the boundary between competing interests.”<sup>16</sup> *Roe* and *Casey* had arbitrarily drawn a line between the interests of a woman seeking an abortion and the interests in prenatal human life. States may seek to draw different lines between these interests. Accordingly, *Dobbs* returned the abortion issue to the

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<sup>7</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>8</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citations omitted).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* (citations omitted).

<sup>11</sup> 163 U.S. 537 (1896).

<sup>12</sup> *Dobbs*, slip op. at 44.

<sup>13</sup> *Id.* at 45.

<sup>14</sup> *Id.* at 62.

<sup>15</sup> *Id.* at 64 (citing *Casey*, 505 U.S. at 856 (joint opinion)).

<sup>16</sup> *Id.* at 31.

democratic process, but particularly noted that Congress and the States have a legitimate interest that “include[s] respect for and preservation of prenatal life at all stages of development.”<sup>17</sup>

Although the *Dobbs* dissent urged the Court to affirm *Roe* and *Casey*, it superficially glanced at how abortion ends the lives of preborn children. As the *Dobbs* majority recognized, “[t]he most striking feature of the dissent is the absence of any serious discussion of the legitimacy of the States’ interest in protecting fetal life.”<sup>18</sup> According to the majority, “[t]he dissent . . . would impose on the people a particular theory about when the rights of personhood begin” without a reasoned view of the abortion issue.<sup>19</sup>

### **Dobbs Explicitly Held the Decision Does Not Impact Non-Abortion Rights Protected Under Substantive Due Process Doctrine**

In overruling *Roe*, the Court stated, “[n]or does the right to obtain an abortion have a sound basis in precedent.”<sup>20</sup> Cases involving marriage, contraception, and child-rearing are inherently different from abortion. “Abortion destroys what [*Roe* and *Casey*] call ‘potential life’ and what the law at issue in this case regards as the life of an ‘unborn human being.’”<sup>21</sup> Although “[b]oth sides make important policy arguments,” abortion proponents have failed to show how the Supreme Court has authority to weigh those arguments.<sup>22</sup> In response to the dissent’s concern, the Court repeated that *Dobbs* does not call *Griswold v. Connecticut*,<sup>23</sup> *Eisenstadt v. Baird*,<sup>24</sup> *Lawrence v. Texas*,<sup>25</sup> or *Obergefell v. Hodges*<sup>26</sup> into question.

### **Justice Thomas Would Reexamine Substantive Due Process Doctrine, But Also Analyze Whether the Privileges and Immunities Clause Protects Privacy Rights**

Concurring in the opinion, Justice Thomas agreed with the majority that “there is no constitutional right to abortion,” but wrote separately to highlight the flaws of substantive due process.<sup>27</sup> The Justice described substantive due process as “an oxymoron that ‘lack[s] any basis in the Constitution.’”<sup>28</sup> As he explained, “the Due Process Clause at most guarantees *process*. . . . The resolution of this case is thus straightforward. Because the Due Process Clause does not secure *any* substantive rights, it does not secure a right to abortion.”<sup>29</sup>

Justice Thomas agrees that abortion is unique and does not implicate other substantive due process jurisprudence,<sup>30</sup> such as *Griswold*,<sup>31</sup> *Lawrence*,<sup>32</sup> and *Obergefell*.<sup>33</sup> Accordingly,

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<sup>17</sup> *Id.* at 78 (citing *Gonzales v. Carhart*, 550 U.S. 124, 157–158 (2007)).

<sup>18</sup> *Id.* at 37.

<sup>19</sup> *Id.* at 38.

<sup>20</sup> *Id.* at 31.

<sup>21</sup> *Id.* at 32.

<sup>22</sup> *Id.* at 35.

<sup>23</sup> 381 U.S. 479 (1965) (recognizing a right of married persons to obtain contraception).

<sup>24</sup> 405 U.S. 438 (1972) (recognizing a right of unmarried persons to access contraception).

<sup>25</sup> 539 U.S. 558 (2003) (recognizing a right to engage in private, consensual sexual acts).

<sup>26</sup> 576 U.S. 644 (2015) (recognizing a right to same-sex marriage).

<sup>27</sup> *Dobbs*, slip op. at 1 (Thomas, J., concurring).

<sup>28</sup> *Id.* at 2 (citations omitted) (alteration in original).

<sup>29</sup> *Id.* (emphasis in original).

<sup>30</sup> *Id.* at 3 (citing majority opinion at 31–32, 66, 71–72).

<sup>31</sup> 381 U.S. 479.

<sup>32</sup> 539 U.S. 558.

<sup>33</sup> 576 U.S. 644.

“[n]othing in [the Court’s] opinion should be understood to cast doubt on precedents that do not concern abortion.”<sup>34</sup> However, the Justice urges the Court “in future cases [to] reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.”<sup>35</sup> Justice Thomas notes the Court should consider whether those rights have textual support elsewhere in the Constitution, such as in the Privileges or Immunities Clause, but the Court would also need to establish “whether the Privileges or Immunities Clause protects *any* rights that are not enumerated in the Constitution and, if so, how to identify those rights.”<sup>36</sup> Regardless, “abortion is not [a right] under any plausible interpretive approach [of the Constitution.]”<sup>37</sup>

Substantive due process has “[a]t least three dangers [that] favor jettisoning the doctrine entirely.”<sup>38</sup> First, the doctrine involves policymaking and “exalts judges at the expense of the People from whom they derive their authority.”<sup>39</sup> Abortion jurisprudence highlights this issue as “50 years have passed since *Roe* and abortion advocates still cannot coherently articulate the right (or rights) at stake proves the obvious: The right to abortion is ultimately a policy goal in desperate search of a constitutional justification.”<sup>40</sup> Second, “substantive due process distorts other areas of constitutional law,” such as the Equal Protection Clause, vagueness, and overbreadth doctrines.<sup>41</sup> As the Justice decried, “[s]ubstantive due process is the core inspiration for many of the Court’s constitutionally unmoored policy judgments.”<sup>42</sup> Third, the doctrine “is often wielded to ‘disastrous ends,’”<sup>43</sup> such as in *Dred Scott*.<sup>44</sup> Justice Thomas concluded, “the Court rightly overrules *Roe* and *Casey*—two of this Court’s ‘most notoriously incorrect’ substantive due process decisions . . . after more than 63 million abortions have been performed . . . . The harm caused by this Court’s forays into substantive due process remains immeasurable.”<sup>45</sup>

### **Substantive Due Process Has Had a Conflicting History**

Under substantive due process theory, the Supreme Court has handed down egregiously wrong decisions that have damaged American democracy and freedom. In *Lochner*, the Supreme Court held unconstitutional New York’s labor law that protected bakery workers from working more than sixty hours per week.<sup>46</sup> The Court found the labor law infringed on a substantive right to contract, and “[t]here is no reasonable ground, on the score of health, for interfering with the liberty of the person or the right of free contract, by determining the hours of labor, in the occupation of a baker.”<sup>47</sup> Dissenting, Justices Harlan, White, and Day detailed the dangers of prolonged bakery work:

The constant inhaling of flour dust causes inflammation of the lungs and of the bronchial tubes. The eyes also suffer through this dust, which is responsible for

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<sup>34</sup> *Dobbs*, slip op. at 3 (Thomas, J., concurring) (citing majority opinion at 66) (alterations in original).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 3–4 (emphasis in original).

<sup>37</sup> *Id.* at 4.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* (citation omitted).

<sup>40</sup> *Id.* at 5.

<sup>41</sup> *Id.* at 5–6.

<sup>42</sup> *Id.* at 6.

<sup>43</sup> *Id.* (citation omitted).

<sup>44</sup> 60 U.S. 393.

<sup>45</sup> *Id.* at 6–7.

<sup>46</sup> 198 U.S. 45.

<sup>47</sup> *Id.* at 45.

the many cases of running eyes among the bakers. The long hours of toil to which all bakers are subjected produce rheumatism, cramps and swollen legs. . . . The average age of a baker is below that of other workmen; they seldom live over their fiftieth year; most of them dying between the ages of forty and fifty. . . .<sup>48</sup>

The Supreme also failed Black Americans in *Dred Scott*, holding they were not citizens and not entitled to constitutional protections.<sup>49</sup> In the case, Dred and Harriet Scott sued for their freedom after residing as enslaved persons in free territory. Under a substantive due process theory, the Supreme Court handed down its egregiously wrong decision that denied constitutional protection and the humanity of a class of Americans. As Justice Thomas wrote in *Dobbs*, “[w]hile *Dred Scott* ‘was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox,’ . . . that overruling was ‘[p]urchased at the price of immeasurable human suffering’ . . . .”<sup>50</sup>

### **Even if the Supreme Court Reexamines Substantive Due Process, the Court May Uphold Recognized Privacy Rights Under Alternative Constitutional Theories**

Abortion has remained radically unsettled for the past half century, unaccepted by the American people. Yet unlike abortion, substantive due process rights relating to marriage, family, and contraception have not “enflamed debate and deepened division.”<sup>51</sup> As Justice Thomas recognized in his *Dobbs* concurrence, even if the Supreme Court overruled *Griswold*, *Lawrence*, and *Obergefell*, it would need to examine “whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated.”<sup>52</sup> Justice Thomas particularly is interested in exploring whether the Privileges or Immunities Clause protects these substantive due process rights. Under the Privileges or Immunities Clause, “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”<sup>53</sup>

Even if the Supreme Court reexamines substantive due process, it is unlikely the Court will uniformly reject familial and marital privacy rights. Substantive due process has protected traditional American liberties, such as parental rights. In *Meyer v. Nebraska*, the Supreme Court held unconstitutional a state law that forbid teaching school children in a foreign language because substantive due process protects the “power of parents to control the education of their own [children].”<sup>54</sup> In *Pierce v. Society of Sisters*, the Court held unconstitutional a state compulsory education law that mandated students solely attend public school as a substantive due process violation that “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>55</sup>

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<sup>48</sup> *Id.* at 70–71 (Harlan, J., dissenting) (quotation marks omitted).

<sup>49</sup> 60 U.S. 393.

<sup>50</sup> *Dobbs*, slip op. at 6 (Thomas, J., concurring) (brackets in original).

<sup>51</sup> *Cf. id.* at 6 (majority opinion) (discussing the “damaging consequences” abortion jurisprudence has brought upon our country for half a century).

<sup>52</sup> *Id.* at 3 (Thomas, J., concurring).

<sup>53</sup> U.S. Const. amend. XIV.

<sup>54</sup> 262 U.S. 390, 401 (1923).

<sup>55</sup> 268 U.S. 510, 534–535 (1925).

The Supreme Court may uphold substantive due process cases on alternative grounds. In *Obergefell*, for example, the Supreme Court held that “same-sex couples may exercise the fundamental right to marry in all States. . . . [and] there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.”<sup>56</sup> In reaching this conclusion, the Supreme Court rested not only on a substantive due process analysis, but also on equal protection grounds. “The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles.”<sup>57</sup> As the Court held:

Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. . . . And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.<sup>58</sup>

Again, Justice Thomas recommended the Court revisit substantive due process, not equal protection doctrine. Even without its substantive due process reasoning, the *Obergefell* decision would remain binding law under the Equal Protection Clause.

If you recognize the most fundamental human right—the right to life—then *Dobbs* poses no threat to American freedom. Abortion is unique because it takes the life of an unborn child. No other recognized privacy right implicates a State’s legitimate interest in protecting an unborn child. *Dobbs* correctly overturned *Roe* and returned the abortion issue to the democratic process. The abortion issue now is in the hands of Congress and the States, and legislators should boldly move forward to protect all human life, from conception until natural death.

Sincerely,



Catherine Glenn Foster  
President and CEO  
Americans United for Life

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<sup>56</sup> *Obergefell*, 576 U.S. at 681.

<sup>57</sup> *Id.* at 672.

<sup>58</sup> *Id.* at 675.