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Democrats' Codification Efforts Based on Justice Thomas' Concurring Opinion in Dobbs Are Misguided

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Since the day the Supreme Court released its decision in *Dobbs v. Jackson Women's Health Organization*, many Democrats, including virtually all congressional Democrats, have called to codify certain issues in addition to abortion that were not at issue in *Dobbs*. These calls for codification stemmed primarily from a concurring opinion written by Justice Clarence Thomas in the *Dobbs* case. There, many Democrats allege, Thomas threatened to do away with many of the other protections/rights afforded by the High Court in its prior decisions, such as same-sex marriage or the use of contraceptives. This interpretation is incorrect, and Democrats' reliance on Thomas' opinion for their codification efforts reflects an either intentional or unintentional misreading/misinterpretation of his opinion.

Dobbs

By now, many are familiar with the Court's ruling in *Dobbs*. There, the Supreme Court ruled that the issue of abortion is one for the individual states and/or state legislatures to decide. In rendering its decision, the Court, in part, rejected arguments that abortion was protected under the Equal Protection or Due Process Clauses of the Constitution. Specifically, the Court held that the rights afforded under substantive due process, including the "court-created" right to privacy (the Court held in *Roe* that the Fourteenth Amendment's concept of personal liberty included a right to "privacy"), do not include abortion. The Court's decision did not give or take away any rights and merely left the decision regarding abortion to the states. It was also strictly limited to the issue of abortion.

Justice Thomas' Concurrence

In his concurring opinion, Justice Thomas agreed with the majority, but took things a step further. According to Thomas, "substantive due process" is an oxymoron that "lack[s] any basis in the Constitution." Throughout his concurring opinion, Thomas provided various problems associated with substantive due process and explained why he felt it should be eliminated. Furthermore, he noted, since substantive due process should be eliminated, the Court should revisit those cases that relied on it. Specifically, Thomas stated:

> For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is "demonstrably erroneous," *Ramos v. Louisiana*, 590 U. S. ___, ___

> (2020) (THOMAS, J., concurring in judgment) (slip op., at 7), we have a duty to "correct the error" established in those precedents, *Gamble v. United States*, 587 U. S. ___, ___ (2019) (THOMAS, J., concurring) (slip op., at 9). After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated.

Following the decision, various Democrats attacked Thomas for his remarks. For example, President Joe Biden stated that the right to contraception was at risk and could be overruled. According to a White House transcript:

> Justice Thomas himself said that under the reasoning of this decision — this is what Justice Thomas said in his concurring opinion — that the Court … should reconsider the constitutional right to contraception — to use contraception even among married couples.

As reported by Salon, Rep. Jerry Nadler (D-N.Y.) tweeted:

> "If you think the Dobbs decision doesn't affect you, think again. Justice Thomas says the quiet part out loud: he thinks the Court should revoke protections for contraceptive care, sexual intimacy, and marriage equality. This radical Court can't be trusted to protect your rights."

Additionally, Rep. Bonnie Watson Coleman (D-N.Y.) tweeted, "This is the first time in our nation's history that the Supreme Court has ruled to eliminate a right that it had previously protected. As Justice Thomas states in his concurring opinion, other rights could follow." Others also interpreted Thomas' concurring opinion as a call to "revisit" rights such as interracial marriage, same-sex marriage, and contraception.

The Interpretations Miss the Mark

These interpretations miss the mark entirely. At no point did Thomas opine one way or the other about these "other" rights, nor did he call to eliminate them. Rather, Thomas' entire point was that, in his opinion, these other "rights" cannot find a home under substantive due process. Therefore, when evaluating these other "rights," the Court must evaluate whether they can find support elsewhere in the Constitution. Specifically, Thomas noted:

> After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated. For example, we could consider whether any of the rights announced in this Court's substantive due process cases are "privileges or immunities of citizens of the United States" protected by the Fourteenth Amendment. Amdt. 14, §1; see McDonald, 561 U. S., at 806 (opinion of THOMAS, J.). To answer that question, we would need to decide important antecedent questions, including whether the Privileges or Immunities Clause protects any rights that are not enumerated in the Constitution and, if so, how to identify those rights. See id., at 854. That said, even if the Clause does protect unenumerated rights, the Court conclusively demonstrates that abortion is not one of them under any plausible interpretive approach.

Thomas' concurring opinion was very deliberate and carefully worded. It did not call to end/eliminate any rights, but only called to reevaluate whether they can find support under a constitutional provision other than substantive due process.

Any claims to the contrary simply miss the mark. Furthermore, efforts at codification based on such claims lack merit.