

Involuntary Reproductive Servitude: Forced Pregnancy, Abortion, and the Thirteenth Amendment

Michele Goodwin[†]

I. INTRODUCTION: THE POST *DOBBS* LANDSCAPE

In its 2021–22 term, the United States Supreme Court delivered a stunning blow to decades of stare decisis when it overturned *Roe v. Wade*¹ and *Planned Parenthood v. Casey*,² unleashing a flood of uncertainty and fear about future protections of women’s health and their right to life and safety.³ Understandably so. The United States holds the troubling distinction as “deadliest nation” in the industrialized or “developed world” to be pregnant.⁴ As reported by Nina Martin and

[†] Michele Goodwin is Chancellor’s Professor of Law & Founding Director, Center for Biotechnology & Global Health Policy at the University of California, Irvine. Much appreciation to the Chicago Legal Forum editors and staff for their thoughtful editorial contributions. My gratitude to the research librarians at Georgetown University Law Center who assisted in my data collection. My appreciation to Dorothy Brown, David Cruz, Victoria Nourse, Dorothy Roberts, Gregory Shaffer, Allison Whelan, Mary Ziegler.

¹ 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women’s Health*, 142 S.Ct. 2228 (2022).

² 505 U.S. 833 (1992), *overruled by* *Dobbs*.

³ Jacqueline Howard, *U.S. Sees Continued Rise In Maternal Deaths—And Ongoing Inequities CDC Report Shows*, CNN (Feb. 23, 2022), <https://www.cnn.com/2022/02/23/health/maternal-deaths-increase-us-report/index.html> [<https://perma.cc/HG6B-KZ73>] (“The overall number of women identified as having died of maternal causes in the United States climbed from 658 in 2018 to 754 in 2019 and 861 in 2020, according to the new National Center for Health Statistics report, released Wednesday by the US Centers for Disease Control and Prevention.”); Nina Martin & Renee Montagne, *U.S. Has The Worst Rate of Maternal Deaths In The Developed World*, NPR (May 12, 2017), <https://www.npr.org/2017/05/12/528098789/u-s-has-the-worst-rate-of-maternal-deaths-in-the-developed-world> [<https://perma.cc/E7ED-8DKM>]; Ariana Figueroa, *Jewish Congregations Mount Legal Challenges to State Abortion Bans*, TENNESSEE LOOKOUT (Aug. 26, 2022), <https://tennesseelookout.com/2022/08/26/jewish-congregations-mount-legal-challenges-to-state-abortion-bans/> [<https://perma.cc/33K2-KWNG>].

⁴ *World Factbook: Country Comparisons – Maternal Mortality Ratio*, CENT. INTEL. AGENCY, <https://www.cia.gov/the-world-factbook/field/maternal-mortality-ratio/country-comparison> [<https://perma.cc/J43F-MFMN>]; *2019 Health of Women and Children Report – Public Health Impact: Maternal Mortality*, UNITED HEALTH FOUND., https://www.americashealthrankings.org/explore/health-of-women-and-children/measure/maternal_mortality_a/state/ALL?edition-year=2019 [<https://perma.cc/2ENY-PUUY>].

Renee Montagne, “[m]ore American women are dying of pregnancy-related complications than any other developed country.”⁵ In fact, “[o]nly in the U.S. has the rate of women who die been rising.”⁶ As prior scholarship explains, this trend overlaps with aggressive antiabortion legislating and rollbacks of historic reproductive protections such as Title X at the state-levels, taking shape during the decade preceding *Dobbs*.⁷

Within weeks of the *Dobbs* decision, new abortion bans went into effect, prohibiting or significantly constraining abortion rights.⁸ Even prior to the Court issuing the opinion, “more than a dozen states had so-called “trigger bans” in place – laws written to prohibit abortion as soon as *Roe v. Wade* . . . was overturned,” including laws without any exceptions for rape or incest.⁹ The Guttmacher Institute, the leading policy group analyzing reproductive health trends and data, predicted that “26 States Are Certain Or Likely To Ban Abortion Without *Roe*.”¹⁰ In a groundswell of opinion editorials taking aim at the Court’s legitimacy following the ruling, commentators made four consistent observations.

As to the first category of criticism, which could be framed as “rule of law concerns,” commentators took notice that for the first time in the Court’s history, the Justices stripped away a right rather than expand women’s freedoms and protections in response to harsh and harmful laws.¹¹ Second, they noted the alarming elements of Mississippi’s peti-

⁵ Martin & Montagne, *supra* note 3.

⁶ Martin & Montagne, *supra* note 3.

⁷ See e.g., MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD (2020); Sophie Novack, *Texas’ Maternal Mortality Rate: Worst in Developed World, Shrugged Off By Lawmakers*, TEX. OBSERVER (June 5, 2017), <https://www.texasobserver.org/texas-worst-maternal-mortality-rate-developed-world-lawmakers-priorities/> [<https://perma.cc/E72V-F8LD>]; Amanda J. Stevenson et al., *Effect of Removal of Planned Parenthood From the Texas Women’s Health Program*, 374 NEW ENG. J. MED. 853 (2016).

⁸ See, e.g., Larissa Jimenez, *60 Days After Dobbs: State Legal Developments on Abortion*, BRENNAN CTR. (Aug. 24, 2022), <https://www.brennancenter.org/our-work/research-reports/60-days-after-dobbs-state-legal-developments-abortion> [<https://perma.cc/NT7J-K5LE>].

⁹ Sarah McCammon, *Two Months After the Dobbs Ruling, New Abortion Bans Are Taking Hold*, NPR (Aug. 23, 2022), <https://www.npr.org/2022/08/23/1118846811/two-months-after-the-dobbs-ruling-new-abortion-bans-are-taking-hold> [<https://perma.cc/MG62-MF57>].

¹⁰ Lauren Cross, *26 States Are Certain or Likely to Ban Abortion Without Roe: Here’s Which Ones and Why*, GUTTMACHER INSTITUTE (Oct. 28, 2021), <https://www.guttmacher.org/article/2021/10/26-states-are-certain-or-likely-ban-abortion-without-roe-heres-which-ones-and-why> [<https://perma.cc/SBF3-QURS>].

¹¹ See e.g., Jeannie Suk Gersen, *When the Supreme Court Takes Away a Long-held Constitutional Right*, NEW YORKER (June 24, 2022), <https://www.newyorker.com/news/daily-comment/when-the-supreme-court-takes-away-a-long-held-constitutional-right> [<https://perma.cc/45BC-RCEA>] (“It is hard to imagine something more like an exercise of raw judicial power than the Court’s removal of the right to abortion, which is precisely what these Justices were put on the Court to achieve. As the dissent put it, the Court is ‘rescinding an individual right

tion to overturn *Roe* and criminalize abortion, including the state's refusal to provide exemptions to protect women and girls in cases of rape and incest.¹² Third, academics, lawyers, medical providers, and activists argued that the Supreme Court dismantled nearly fifty years of precedent related to reproductive privacy without majority public support and sentiment on their side.¹³

Such robust and finely detailed arguments exposed not only the broad contempt for the Court's opinion, but also the risks that await women, girls, and people with the capacity for pregnancy in the United States. Indeed, in the first one hundred days following the Court's ruling, the harms began to materialize as draconian antiabortion provisions that ban and criminalize abortion were triggered, some dating back to the 1800s—a period before women could legally cast a vote in state or federal elections.¹⁴ For those closely studying and investigating legislative enactments to ban abortion after *Dobbs*, in over two dozen

in its entirety and conferring it on the State, an action the Court takes for the first time in history”).

¹² See e.g., Michael Scherer and Rachel Roubein, *More Republicans Push for Abortion Bans Without Rape, Incest Exceptions*, WASH. POST (July 16, 2022), <https://www.washingtonpost.com/politics/2022/07/15/abortion-exceptions-republicans/> [<https://perma.cc/4GWU-LDHY>] (“Abortion restrictions have gone into effect in roughly a dozen states since the court ruling, all of which include an exception for life of the mother. Most do not include an exception for rape or incest, with the exception of South Carolina—which includes exemptions for both—and Mississippi’s trigger law that has an exception for rape . . .”); see also, Michele Goodwin & Mary Ziegler, *Whatever Happened to the Exceptions for Rape and Incest?*, THE ATLANTIC (Nov. 29, 2021), <https://www.theatlantic.com/ideas/archive/2021/11/abortion-law-exceptions-rape-and-incest/620812/> [<https://perma.cc/NC86-9R3B>] (noting the risk of the Supreme Court overturning *Roe* and the expansion of antiabortion legislation without exceptions for rape and incest).

¹³ See, e.g., Michael Scherer, *Supreme Court Goes Against Public Opinion in Rulings on Abortion, Guns*, WASH. POST (June 24, 2022), <https://www.washingtonpost.com/politics/2022/06/24/supreme-court-goes-against-public-opinion-rulings-abortion-guns/> [<https://perma.cc/W7AN-236Y>] (noting, “[t]he court rejected *Roe v. Wade*, a 49-year-old legal precedent that guaranteed the right to an abortion, after a string of national polls showed a clear majority of Americans wanted the opposite result.”); see also, *Majority of Public Disapproves of Supreme Court’s Decision To Overturn Roe v. Wade*, PEW RSCH. CTR. (July 9 2022), <https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade/> [<https://perma.cc/VA7A-LR83>] (“Nearly six-in-ten adults (57%) disapprove of the court’s sweeping decision, including 43% who strongly disapprove. About four-in-ten (41%) approve of the court’s decision (25% strongly approve”).

¹⁴ See e.g., Eleanor Klibanoff, *Not 1925: Texas’ Law Banning Abortion Dates To Before The Civil War*, TEX. TRIB. (Aug. 17, 2022), <https://www.texastribune.org/2022/08/17/texas-abortion-law-history/> [<https://perma.cc/Y9VM-Y8UG>]; Bob Christie, *Arizona Attorney General: Pre-1901 Abortion Ban Enforceable*, AP NEWS (June 29, 2022), <https://apnews.com/article/abortion-us-supreme-court-health-arizona-doug-ducey-8f63d821a480865f1e358e436abc4cdd> [<https://perma.cc/CLK2-NVYG>]; Adam Edelman, *With Roe v. Wade Overturned, Here’s Where Things Stand with ‘Trigger’ Laws and Pre-Roe Bans*, NBC NEWS (June 24, 2022), <https://www.nbcnews.com/politics/politics-news/roe-v-wade-overturned-things-stand-trigger-laws-pre-ro-bans-rcna35282> [<https://perma.cc/T6XU-QVTM>] (“The states with pre-Roe bans on the books, some dating back more than a century, are Alabama, Arizona, Arkansas, Michigan, Mississippi, Oklahoma, Texas, West Virginia and Wisconsin . . .”).

states some variant of abortion bans would immediately or within weeks go into effect.¹⁵

Predictably, egregious harms immediately followed the *Dobbs* decision, illuminating the risks of depositing authority over abortion rights in the hands of majority-male legislatures, particularly those with enduring histories of sex and race discrimination.¹⁶ As Judge Carlton Reeves surmised in the order enjoining the Mississippi law in 2018, “legislation like H.B. 1510 is closer to the old Mississippi—the Mississippi bent on controlling women and minorities. The Mississippi that, just a few decades ago, barred women from serving on juries ‘so they may continue their service as mothers, wives, and homemakers.’”¹⁷

The scale of the harms brought about post-*Dobbs* cannot be described as anything less than significant and tragic.¹⁸ Nor would it be

¹⁵ Chelsea Whyte, *26 US States Are Likely To Ban Abortion To The Fullest Extent Possible*, NEW SCIENTIST (June 27, 2022), <https://www.newscientist.com/article/2326102-26-us-states-are-likely-to-ban-abortion-to-the-fullest-extent-possible/> [https://perma.cc/V532-4TLP]; see also, Larissa Jimenez, *60 Days After Dobbs: State Legal Developments on Abortion*, BRENNAN CTR. (Aug. 24, 2022), <https://www.brennancenter.org/our-work/research-reports/60-days-after-dobbs-state-legal-developments-abortion> [https://perma.cc/8PS7-CQ6B] (“Aside from trigger bans already on the books, over 100 bills restricting access to abortion have been introduced in 2022 alone”).

¹⁶ In the order enjoining the Mississippi law from going into effect, District Court Judge Carlton W. Reeves wrote, “this Court concludes that the Mississippi Legislature’s professed interest in ‘women’s health’ is pure gaslighting.” Reeves further explained, “in its legislative findings justifying the need for this legislation, the Legislature cites *Casey* yet defies *Casey*’s core holding.” He further noted, “[t]he State ‘ranks as the state with the most [medical] challenges for women, infants, and children but is silent on expanding Medicaid.’” *Jackson Women’s Health Org. v. Currier*, 349 F.Supp. 3d 536, 540 n.22 (S.D. Miss. 2018). As a political matter, Mississippi’s legislature stands as an anomaly to the state’s race and sex demographics. Various explanations might be offered for why white men overwhelmingly dominate and control the seats in government. According to one study, “[w]omen are vastly underrepresented in the legislature: [a]pproximately twelve point five percent of members of the Mississippi House of Representatives and about seventeen point six percent of members of the Mississippi Senate are women.” Center for Youth Political Participation, *The Mississippi State Legislature*, RUTGERS U., <https://cyp.rutgers.edu/mississippi/> [https://perma.cc/H5HN-3VHE]. One explanation that cannot be ignored and which is copiously documented is the history of white supremacy in the electoral process. Strategically designed overt and covert efforts to suppress voting rights affected Black women’s ability to be able to vote—and some of these patterns persist. See, e.g., Ashton Pittman, *‘A Wrong Never Righted’: Court Upholds Mississippi’s 1890 Jim Crow Voting Law*, MISS. FREE PRESS (Aug. 24, 2022), <https://www.mississippifreepress.org/26643/a-wrong-never-righted-court-upholds-mississippi-1890-jim-crow-voting-law> [https://perma.cc/DF6K-4C8U] (“The 5th U.S. Circuit Court of Appeals voted to uphold a Jim Crow law that Mississippi’s white-supremacist leaders adopted in 1890 in an attempt to disenfranchise Black residents for life. White lawmakers designated certain crimes that they believed Black people were more likely to commit as lifelong disenfranchising crimes.”); William A. Mabry, *Disfranchisement of The Negro in Mississippi*, 4 J. SOUTHERN HIST. 318, 318 (1938) (explaining, “Political Reconstruction came to an abrupt and violent end in Mississippi in 1875 . . . Negroes were prevented by fraud, intimidation, and occasional violence from making their influence felt in politics. A continuous succession of Democratic victories in state elections is ample proof of the effectiveness of these tactics”).

¹⁷ *Jackson Women’s Health Org.*, 349 F. Supp.3d at 540 n.22.

¹⁸ See e.g., Frances Stead Sellers and Fenit Nirappil, *Confusion Post-Roe Spurs Delays, Denials For Some Lifesaving Pregnancy Care*, WASH. POST (July 16, 2022), <https://www.washingtonpost.com/health/2022/07/16/abortion-miscarriage-ectopic-pregnancy-care/>

appropriate to describe the cases of near-death and desperation as isolated or episodic. In one case a ten-year-old girl—the survivor of rape starting when she was nine years old—fled Ohio for Indiana in order to end the pregnancy.¹⁹ In another, a woman in Louisiana was refused medical services to terminate a non-viable pregnancy where the fetus had no skull and surely would die after birth.²⁰ In Wisconsin, a woman bled to a crisis point—for over ten days—before providers would intervene to assist with her miscarriage.²¹ In that case, the physicians feared criminal and civil punishments if they intervened any sooner. Further, women that have experienced ectopic pregnancies, which can be fatal, fear not having the lifesaving care—an abortion—if they become pregnant in states that now ban the procedure.²² Sadly, threats of criminal and civil punishment for aiding or abetting in the termination of a pregnancy now shape whether and how medical providers will care for their patients.²³

The fourth line of criticism against the majority’s holding in *Dobbs* concerned the Court’s articulated methodology, namely its turn to

[<https://perma.cc/RCG4-JB89>]; Steve Benen, *With Roe Overturned, Health Care Nightmares Become Real*, MSNBC (July 19, 2022), <https://www.msnbc.com/rachel-maddow-show/maddowblog/roe-overturned-health-care-nightmares-become-real-rcna38922> [<https://perma.cc/VZU4-62TC>].

¹⁹ Elizabeth Wolfe et al., *Man Indicted in Rape of a Child Who Traveled from Ohio to Indiana for an Abortion*, CNN (July 22, 2022), <https://www.cnn.com/2022/07/22/us/gerson-fuentes-child-rape-abortion-indictment/index.html> [<https://perma.cc/4YEK-C86U>] (“the indictment says she was 9 years old when the rapes took place, allegedly by Fuentes”).

²⁰ Minyvonne Burke, *Woman Carrying Fetus Without a Skull to Seek Abortion in Another State Following Louisiana Ban*, NBC NEWS (Aug. 26, 2022), <https://www.nbcnews.com/news/us-news/louisiana-woman-carrying-fetus-skull-seek-abortion-another-state-rcna45005> [<https://perma.cc/9Y3X-5XEM>].

²¹ Sellers & Nirappil, *supra* note 18 (“And in Wisconsin, a woman bled for more than 10 days from an incomplete miscarriage after emergency room staff would not remove the fetal tissue amid a confusing legal landscape that has roiled obstetric care”).

²² See Li Cohen, “*People Will Die*”: *OB-GYNs Explain How Ectopic Pregnancy and Other Complications Threaten Lives Without Abortion Care*, CBS NEWS (July 1, 2022), <https://www.cbsnews.com/news/abortion-doctors-ectopic-pregnancy-risk/> [<https://perma.cc/2EUF-P9NX>] (quoting Sarah, a survivor of ectopic pregnancy, “if I had not been able to get [an abortion], I would have died and my children would have been left with an abusive father who, on top of that, did not know how to take care of [their] multiple special needs. I have no idea what would have happened to my kids if I died”).

²³ Lauren Coleman-Lochner, et. al, *Doctors Fearing Legal Blowback Are Denying Life-Saving Abortions*, BLOOMBERG L. (July 12, 2022), <https://news.bloomberglaw.com/health-law-and-business/doctors-fearing-legal-blowback-are-denying-life-saving-abortions> [<https://perma.cc/KT2G-7UPU>] (“In the weeks after the Supreme Court’s decision to overturn *Roe v. Wade* leaked, a pregnant woman visited Katie McHugh, a gynecologist and abortion provider in Indiana. The patient, who was between eight and 12 weeks pregnant, was bleeding and cramping. An ultrasound showed that a miscarriage was inevitable, but the woman had to cross state lines for treatment because her doctors in Kentucky refused to terminate the pregnancy”).

originalism and textualist posture.²⁴ It is this second category of concern emanating from the *Dobbs* decision that animates the present Essay. As a definitional matter, originalism relates to a theory of constitutional interpretation that suggests constitutional questions should be resolved based on the meanings and understandings of the constitution or constitutional provisions when and as they were written.²⁵ Scholars have long debated and criticized the legitimacy of adopting originalism as an interpretive tool in matters of constitutional law. Many of their concerns are legitimate and the arguments persuasive.²⁶

For example, to what extent has the Court's originalism, a species of contemporary thinking rather than a blueprint articulated or embraced by constitutional Framers, served to confirm ideological bias? Have individual Justices and now the Court's majority overstated the clarity of original documents or plain *meaning* intended by the drafters of the Constitution when in fact urgent social and legal matters were hotly debated and consensus represented deep compromise and sometimes fragile agreement?²⁷ In 1787, George Washington shed light on this, noting that it "is not, perhaps to be expected" that the Constitution "will meet the full and entire approbation of every State."²⁸ Instead, he posited that each State "will, doubtless, consider, that had her interest

²⁴ Compared to the Fourteenth Amendment, far less scholarship has been devoted to the Thirteenth Amendment. That said, scholars have urged greater attention to how the Reconstruction Amendments might be analyzed to inform contemporary thought, policy, and jurisprudence. See PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* (1998) (addressing the neglected arc of race, family, and Reconstruction); DOROTHY ROBERTS, *KILLING THE BLACK BODY* (1997); Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917 (2012); Michele Goodwin, *Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899 (2019) (noting that the very amendment that abolished slavery weaponized Southern states to reframe and rebrand the practice through the punishment clause). See also, Angie Gou, *Cherry-Picked History: Reva Siegel on "Living Originalism" in Dobbs*, SCOTUS BLOG (Aug. 11, 2022), <https://www.scotusblog.com/2022/08/cherry-picked-history-reva-siegel-on-living-originalism-in-dobbs/> [<https://perma.cc/MEG5-2HXA>].

²⁵ See Steven G. Calabresi, *On Originalism in Constitutional Interpretation*, NAT'L CONST. CTR., <https://constitutioncenter.org/the-constitution/white-papers/on-originalism-in-constitutional-interpretation#:~:text=Originalism%20is%20a%20theory%20of,time%20that%20it%20became%20law> [<https://perma.cc/Z99W-YHZZ>] (according to Calabresi, "Originalism is grounded in the two-century-long movement toward constitutionalism, and it is behind the U.S. Constitution itself").

²⁶ See William N. Eskridge, Jr. and Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government In An Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1755 (2021) (noting that "recent [Supreme Court] cases demonstrate[] that the slicing and dicing techniques generating imaginary plain meanings have now become standard practice within the Supreme Court."); ERWIN CHEMERINSKY, *WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM* 79 (2022) ("At the Philadelphia Convention, the Framers explicitly indicated that they did not want their specific intentions to control the Constitution's interpretation").

²⁷ Letter from George Washington to the President of Congress (Sept. 17, 1787) (archived at <https://founders.archives.gov/documents/Washington/04-05-02-0306> [<https://perma.cc/Y4HU-MMXC>]).

²⁸ *Id.*

alone been consulted, the consequences might have been particularly disagreeable or injurious to others.”²⁹ Matters of slavery surely come to mind as well as women’s suffrage.

The commentaries post-*Dobbs* miss important opportunities to revisit and recast originalism on two different sets of terms and principles. First, what becomes evident in the post-*Dobbs* critiques is the erasure of Black women and their concerns from the histories of sexual and political exploitation, sex trafficking in the new colonies and American South, involuntary reproduction, reproductive policing, sterilization, maternal mortality, and abortion. Second, even the most salient critiques of *Dobbs*, including criticisms related to the Court’s originalism posture, ignore the Reconstruction Amendments, including Thirteenth Amendment and its prohibition of involuntary servitude and the Fourteenth Amendment, which establishes that citizens of the United States are “born” persons—not fetuses. In other words, there are other equally glaring concerns beyond ambiguity bounded in the Court’s use of originalism in dismantling *Roe v. Wade* and *Planned Parenthood v. Casey* that deserve focus and warrant scrutiny.

The remainder of this Essay proceeds in three brief parts. In the brevity necessitated by this Essay format, Part II turns to the alarming reproductive health crises that emerged in antiabortion legislatures a decade preceding *Dobbs*, which the Court acknowledged as such in *Whole Woman’s Health v. Hellerstedt*,³⁰ as the Justices relied on the copiously detailed District Court record in that case. It makes two distinct, but interrelated points. First, the Court could not be unaware of the dramatic health harms—nor the disparate socioeconomic and racial impacts—that result from lack of access to reproductive health services as this was part of the record from which the Court shaped its 2016 holding in *Whole Woman’s Health* and to a lesser degree in its 2020 holding in *June Medical v. Russo*.³¹ Second, by implication, it suggests that the Court’s disregard of this record cannot be regarded as benign or insignificant.

The balance of this Essay describes and analyzes originalism from a different point of view, centering slavery and Reconstruction, and thus the experiences of Black women and girls. Specifically, Parts III and IV address originalism as an unmined and generally ignored legal subject of non-conservative legal scholars.

In Part III, the Essay posits that the Court shows bias in its application of originalism. Specifically, it argues that the Court’s incomplete address of history renders slavery and Jim Crow invisible, making

²⁹ *Id.*

³⁰ 136 S.Ct. 2292 (2016).

³¹ 591 U.S. 1101 (2020).

Black women unseen in the nation's archive on abortion and involuntary reproductive servitude, despite the central political battles of the nineteenth century relating to the corrosive and coercive sex-trafficking and sexual exploitation of Black women and girls. As the Essay briefly explores, Black women's involuntary sexual and reproductive servitude were central to the debates that shaped abolitionist discourse, activism, and its political movement, including the discrediting of slavery as a political, social, and economic enterprise. The centerpiece of America's reliance on slavery was Black women's reproductive labor, which, as Thomas Jefferson noted, successfully regenerated profits for slavers like himself through the birth of enslaved offspring.

Part IV then argues that the Court's selective canvassing of history exposes a serious fault in the legitimacy, integrity, and character of not only the Court's decision, but also its supposed application of originalist methodology. In other words, *Dobbs* represents not only a poor substantive outcome, but taken on its own terms, it poorly applies an originalist methodology. Notably, in ignoring the conditions that gave rise to the Civil War, namely the horrific, institutionalized patterns of sexual exploitation of Black girls and women, the Court also overlooks the specific constitutional texts that relieved this suffering and dismantled slavery—the Thirteenth and Fourteenth Amendments. That the Court ignores the original history and meaning undergirding these Amendments suggests either a lack of skill or competence on the part of the Court to understand the history and meaning of the Thirteenth and Fourteenth Amendments or a purposeful neglect of the texts.

II. WHEN CRUELTY IS PERHAPS THE POINT: A TEXAS CASE STUDY

“Nationwide, childbirth is 14 times more likely than abortion to result in death.”

Justice Breyer, *Whole Woman's Health v. Hellerstedt* (2016)

Six years preceding *Dobbs*, the most robust case against antiabortion lawmaking materialized in the Supreme Court's analysis and decision in *Whole Woman's Health v. Hellerstedt*. The Court struck down two Texas laws that unconstitutionally infringed on a woman's right to terminate a pregnancy and rather than promoting women's health and safety exposed them to grave risks, undue burdens, and substantial obstacles.³² Both laws—one requiring that abortion clinics in Texas retrofit as ambulatory surgical centers and the second that doctors who perform abortions obtain medical privileges at nearby hospitals—typified

³² *Hellerstedt*, 136 S.Ct 2292.

the post-*Casey* TRAP law strategies of antiabortion lawmakers. The former strategy served to reduce the number of clinics available to perform abortions due to the significantly high costs associated with converting existing, medically safe clinics to ambulatory surgical centers. The latter was intended to force doctors out of the profession as obtaining admitting privileges at nearby hospitals was very difficult. The Court concluded that both laws violated the core holding established in *Casey* as they not only created undue burdens on the right to have an abortion, but also harmed women in the process.

Writing for the majority, Justice Breyer addressed four principle legal flaws in the Texas enactments. First, he concluded, “neither of these provisions confers medical benefits sufficient to justify the burdens upon access that each imposes.”³³ Second, the Court noted that “each places a substantial obstacle in the path of women seeking a previability abortion.”³⁴ Third, the Court recognized that “each [law] constitutes an undue burden on abortion access,” which contravenes the holding in *Casey*.³⁵ And, fourth, each of the Texas antiabortion provisions “violates the Federal Constitution. Amdt. 14, § 1.”³⁶

Yet, the case addressed more than the constitutional law blind spots of Texas lawmakers. Drawing from the robust empirical record developed by the District Court, the Court exposed the sophistry and insincerity of antiabortion lawmaking framed as protecting women, but that dramatically limited their healthcare options, and risked their health and safety, while also undermining their constitutional rights. For example, building from the District Court record citing Elizabeth Raymond’s comparative study on the safety of legal induced abortions and childbirth in the United States,³⁷ Justice Breyer highlighted that “childbirth is 14 times more likely than abortion to result in death.”³⁸ In other words, it is far riskier to a woman’s health to be pregnant in Texas than to obtain an abortion.

Texas lawmakers’ claims that the abortion laws served to promote women’s health could only be understood as proxies for unconstitutionally dismantling abortion rights in Texas.³⁹ For example, the Court

³³ *Id.* at 2300. (“The District Court found that ‘risks are not appreciably lowered for patients who undergo abortions at ambulatory surgical centers as compared to nonsurgical-center facilities.’ . . . [the] women ‘will not obtain better care or experience more frequent positive outcomes at an ambulatory surgical center as compared to a previously licensed facility’ . . . And these findings are well supported”).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Elizabeth G. Raymond et. al., *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 *OBSTETRICS & GYNECOLOGY* 215 (2012).

³⁸ *Hellerstedt*, 136 S.Ct. at 2315.

³⁹ The Court punctuated its analysis by noting that “Texas partly or wholly grandfathers (or

noted colonoscopies, which Texas permits in non-surgical center settings, “has a mortality rate 10 times higher than an abortion.”⁴⁰ Liposuction, “another outpatient procedure, is 28 times higher than the mortality rate for abortion.”⁴¹ The facts established by the District Court, brought into the record by the Supreme Court, exposed that “the surgical-center provision imposes ‘a requirement that simply is not based on differences’ between abortion and other surgical procedures ‘that are reasonably related to’ preserving women’s health”, the asserted “purpos[e] of the Act in which it is found.”⁴²

Unfortunately, by the time the case reached the Supreme Court, too many women were already harmed, and clinics shuttered. Some of these harms were predictable. Texas stipulated that its law “would further reduce the number of abortion facilities available to seven or eight facilities,” located in its most populous cities.⁴³ That those few facilities could meet the healthcare needs of millions of women in the entire state “stretch[es] credulity.”⁴⁴

The record before the Court included briefs submitted by the American College of Obstetricians and Gynecologists among other organizations, which detailed the dramatic harms inflicted by Texas lawmakers in the wake of the state’s antiabortion lawmaking. The record included an assessment of the persistent high rates of maternal mortality in the United States.⁴⁵ It also included a detailed analysis of the herculean effort necessary to overcome the geographic barriers to an abortion.⁴⁶ And, part of that record established that the women most impacted by the pre-*Dobbs* gerrymandering of abortion rights were poor and of color

waives in whole or in part the surgical-center requirement for) about two-thirds of the facilities to which the surgical-center standards apply. But it neither grandfathered nor provides waivers for any of the facilities that perform abortions.” *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 2316

⁴⁴ *Id.* at 2300

⁴⁵ According to the Centers for Disease Control and Prevention (CDC), “[s]ince the Pregnancy Mortality Surveillance System was implemented, the number of reported pregnancy-related deaths in the United States steadily increased . . . ,” doubling between 1987 and 2018. See *Pregnancy Mortality Surveillance System*, CTRS. FOR DISEASE CONTROL AND PREVENTION (June 22, 2022), <https://www.cdc.gov/reproductivehealth/maternal-mortality/pregnancy-mortality-surveillance-system.htm> [<https://perma.cc/2N65-5XY7>].

⁴⁶ *Hellerstedt*, 136 S.Ct. at 2303 (quoting *Whole Women’s Health v. Lakey*, 46 F.Supp.3d 673, 681–82 (W.D.Tex. 2014)) (“After September 2014, should the surgical-center requirement go into effect, the number of women of reproductive age living significant distances from an abortion provider will increase as follows: 2 million women of reproductive age will live more than 50 miles from an abortion provider; 1.3 million will live more than 100 miles from an abortion provider; 900,000 will live more than 150 miles from an abortion provider; and 750,000 more than 200 miles from an abortion provider”).

who would have to travel hundreds of miles to obtain reproductive healthcare in the wake of clinics closing.⁴⁷

In Texas, as abortion clinics closed in the wake of targeted regulations of abortion providers (TRAP laws) and the defunding of Planned Parenthood, a major provider of Title X reproductive health services,⁴⁸ various negative externalities even beyond maternal deaths manifested leading to *Whole Woman's Health* and the record before the Court.⁴⁹ These included decreased access to contraception,⁵⁰ the “cut back [of] access to primary care providers for a significant number of women,”⁵¹ increased unintended pregnancies and births,⁵² and an “increase in the rate of childbirth covered by Medicaid.”⁵³

In Texas as throughout the United States, poor women were and continue to be particularly hard hit by the reduction in available clinics that provide reproductive healthcare.⁵⁴ In 2013, three years before the Supreme Court struck down the two Texas laws that unconstitutionally

⁴⁷ *Id.* (“The “two requirements erect a particularly high barrier for poor, rural, or disadvantaged women”).

⁴⁸ Ten years before the Texas law SB8 went into effect, banning most abortions after six weeks of pregnancy, and eleven years prior to *Dobbs*, Texas lawmakers instructed its Women’s Health Program, which received ninety percent of its funding from the federal government to bar Planned Parenthood and its affiliates from participating in the program. That same year, in a different family planning program, Texas lawmakers “cut family-planning grants (a separate funding stream) by sixty-six percent and redistributed the remaining grant funding away from dedicated family-planning providers.” Amanda J. Stevenson et. al., *Effect of Removal of Planned Parenthood from the Texas Women’s Health Program*, 374 NEW ENG. J. MED. 853, 854–56 (2016). See also, Alexa Ura, *Texas Officially Kicking Planned Parenthood Out of Medicaid*, TEXAS TRIB. (Dec. 20, 2016), <https://www.texastribune.org/2016/12/20/texas-kicks-planned-parenthood-out-medicaid/> [<https://perma.cc/TPZ8-3A9Q>].

⁴⁹ See, e.g., Joseph E. Potter & Kari White, *Defunding Planned Parenthood Was a Disaster in Texas. Congress Shouldn’t Do It Nationally*, WASH. POST (Feb. 7, 2017), <https://www.washingtonpost.com/posteverything/wp/2017/02/07/defunding-planned-parenthood-was-a-disaster-in-texas-congress-shouldnt-do-it-nationally/> [<https://perma.cc/MR7Z-J58Z>] (“After these cuts, 82 Texas family planning clinics—one out of every four in the state—closed or stopped providing family planning services. An unintended consequence of the law was that two-thirds of the clinics that closed were not even Planned Parenthood clinics. Organizations that remained open, many with reduced hours, were often unable to offer the most effective methods of contraception, such as IUDs and contraceptive implants, to women who wanted them”).

⁵⁰ Amanda J. Stevenson et al., *Effect of Removal of Planned Parenthood From the Texas Women’s Health Program*, 374 NEW ENG. J. MED. 853 (2016) (“the exclusion of Planned Parenthood affiliates from a state-funded replacement for a Medicaid fee-for-service program in Texas was associated with adverse changes in the provision of contraception”).

⁵¹ See e.g., Potter & White, *supra* note 49.

⁵² Deborah Netburn, *After Texas Stopped Funding Planned Parenthood, Low-Income Women Had More Babies*, L.A. TIMES (February 3, 2016), <https://www.latimes.com/science/sciencenow/la-sci-sn-planned-parenthood-texas-births-20160203-story.html> [<https://perma.cc/G5N5-4ZCB>] (reporting, although “only 23 of the 254 counties in Texas had a Planned Parenthood clinic before 2013, they served sixty percent of the state’s low-income women of childbearing age,” and after Texas denied funding to Planned Parenthood, unintended pregnancy rates increased).

⁵³ Stevenson et. al., *supra* note 50.

⁵⁴ Stevenson et. al., *supra* note 50, at 854.

burdened abortion rights,⁵⁵ the Texas Women’s Health Program began excluding *all* clinics that provided abortions, including those that provide other healthcare services—such as breast cancer screenings, contraception, STI screenings, pap smears—from receiving state funds to provide care for poor women.⁵⁶ As a result, “82 family-planning clinics, about a third of which were affiliated with Planned Parenthood” closed and another 50 clinics not affiliated with Planned Parenthood, but which serviced women’s vital reproductive health needs also closed, leaving behind a reproductive healthcare desert.⁵⁷

The Texas case study reveals the significant and material harms that result from the closure of facilities that provide abortions and reproductive health services. It also provides a clear lens into the institutional memory or record of the Court on the gerrymandering of abortion rights. As such it cannot be reasonably claimed that harms inflicted on women denied abortion access and rights are immaterial or insignificant, but rather major and severe. Finally, and most troublingly, the Court’s disregard of this record, which includes searing analysis of high rates of domestic maternal mortality and morbidity, unintended pregnancies, lack of access to birth control, cannot be disregarded as insignificant. These serious concerns and others are predicted to magnify in what commentators compellingly describe as the post-*Dobbs* dystopia for women that want to be pregnant as well as for those who do not.⁵⁸

III. THE ERASURE OF BLACK WOMEN FROM REPRODUCTIVE FREEDOM ANALYSIS

In much of American history and legal history, Black women and girls have been rendered invisible, stripped from the record, and cast as

⁵⁵ *Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582 (2016).

⁵⁶ *Stevenson et. al.*, *supra* note 50, at 854.

⁵⁷ *Stevenson et. al.*, *supra* note 50, at 854–56.

⁵⁸ *See, e.g.*, William D. Zabel, *Dobbs Case Ruling Creates Nightmare Scenario in U.S.*, FIN. TIMES (July 3, 2022), <https://www.ft.com/content/1495dba0-095a-4878-b751-9b837a8c4d21> [<https://perma.cc/BP4G-PQN2>] (Zabel, the lead lawyer for the American Civil Liberties Union (ACLU) in *Loving v. Virginia*, writes “[t]he nightmare scenario that Thomas seems pleased to envision is a more divided country where in one state you can legally enter into a same-sex or interracial marriage, both of which have become illegal in a neighbouring state. It is mind boggling!”); Jack Gillum, *Post-Dobbs America is a Digital Privacy Nightmare*, BLOOMBERG (Aug. 4, 2022), <https://www.bloomberg.com/news/articles/2022-08-04/period-tracking-apps-among-common-post-dobbs-privacy-risks> [<https://perma.cc/7LYX-GM5B>]. Notably, in Texas, the nightmare began months before *Dobbs* when the Supreme Court allowed the Texas antiabortion law, SB8, law to stand. *See* Carrie Feibel, *Because of Texas Abortion Law, Her Wanted Pregnancy Became a Medical Nightmare*, NPR (July 26, 2022), <https://www.npr.org/sections/health-shots/2022/07/26/1111280165/because-of-texas-abortion-law-her-wanted-pregnancy-became-a-medical-nightmare> [<https://perma.cc/SD8S-G4L5>] (describing the trauma of a Texas woman whose life was placed at risk following an incomplete miscarriage for which she could not obtain an abortion based on Texas law).

“unseen” and unimportant in the American judicial narrative about their lives. This is the case despite their centrality to the American story, including its slave labor-based economy and early capitalism. The prosperity of both the American South and North relied on their physical labor and involuntary sexual reproduction.⁵⁹

Nevertheless, the scholarship of white historians has rarely centered the lives of Black women. Consider Professor Elizabeth Fox-Genovese’s important scholarship on women in the American South, which examines slavery and the plantation household. In *Within the Plantation Household: Black and White Women of the Old South*, she dismisses or overlooks key aspects of the American slavery experiences: sexual coercion, assault, violence, and rape inflicted against Black girls and women.⁶⁰ She writes that while “[t]he white men were not saints . . . slave women who worked in the fields were clothed scantily, with skirts hitched above their knees.”⁶¹ As my prior work argues, by adopting this lens, Fox-Genovese casts Black women and girls as responsible and blameworthy co-conspirators in the conditions of their enslavement. Through this lens, Black women and girls are somehow complicit in their working conditions, including, it seems, the insufferably hot and musty cotton fields.

Or consider the writings of Anne Firor Scott, *The Southern Lady: From Pedestal to Politics 1830–1930*. The book combs through countless diaries and diary-entries, letters and other communications. It details white women’s direct involvement with owning and managing enslaved Black people. To be clear, the book does not purport to engage the concerns of Black women as it canvasses slavery, the Civil War, suffrage, and family life throughout those periods. Perhaps this makes her account of Black women even more troubling and difficult to comprehend other than recognizing the uses of stereotypes and problematic tropes. For example, her account of Black enslaved women might leave one to perceive them as sexually promiscuous and deviant.⁶² Firor Scott’s descriptive account of enslaved Black women leaves the impression that they were sexual interlopers, “prostitutes,” and members of “a hideous black harem” rather than disempowered victims of both the

⁵⁹ See e.g., SLAVERY’S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT (Sven Beckert & Seth Rockman eds., 2016); ROBERT WILLIAM FOGEL & STANLEY L. ENGERMAN, TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY (1974); WILLIAM H. HARRIS, THE HARDER WE RUN: BLACK WORKERS SINCE THE CIVIL WAR (1982); JOHN W. BLASSINGAME, THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH (1979) (chronicling the myriad hardships and abuses enslaved Blacks encountered in the Antebellum South).

⁶⁰ See, e.g., ELIZABETH FOX-GENOVESE, WITHIN THE PLANTATION HOUSEHOLD: BLACK AND WHITE WOMEN OF THE OLD SOUTH 49 (1988) (further stating “Slave women knew what they were dealing with”).

⁶¹ *Id.* at 189.

⁶² ANNE FIROR SCOTT, THE SOUTHERN LADY xii (1970).

white women and men who claimed ownership of them.⁶³ She theorized that the contributing factor to white women's discontent and frustrations during the Antebellum period had to do with the complicated plantation relations to the enslaved Black people.⁶⁴

However, there was little debate or confusion in the Antebellum period about the existence of the involuntary sexual and physical labors imposed on Black women and girls, even if historians ignored writing about those matters from the point of view of Black women and girls.⁶⁵ Forced reproduction and involuntary reproductive servitude were well-settled concepts and practices woven into the legal and social fabric of slavery. The existence and persistence of such was beyond debate and publicly embraced. Slavers commented on forced reproduction in letters and manuscripts, analyzing their profits, explaining the personal benefits of slavery for themselves and their families, and boasting about the profits that could be extracted from the exploitation of Black girls and women.

Six years prior to his death, in a letter to John Wayles Eppes on June 30, 1820, Thomas Jefferson wrote, "I know no error more consuming to an estate than that of stocking farms with men almost exclusively. I consider a woman who brings a child every two years as more profitable than the best man of the farm. [W]hat she produces is an addition to the capital, while his labors disappear in mere consumption."⁶⁶ Notably, Eppes was a man of the state. At the time of Jefferson's letter observing the profits to be wrought from exploiting Black women's reproductive labor and servitude, Eppes had already served in the Virginia House of Delegates, as well as the U.S. House of Representatives and the Senate. He was also Thomas Jefferson's nephew and an owner of enslaved people. Thus, while this was an epistolary exchange anchored by intimate family ties, it was also a communication among politicians who shaped state and federal law.

⁶³ *Id.* at 52 ("Under slavery we live surrounded by prostitutes . . . like patriarchs of old, our men live in one house with their wives and concubines . . . Any lady is ready to tell you who is the father of all the mulatto children in everybody's household but her own." (quoting Mary Chestnut)).

⁶⁴ *Id.* at 46 ("For women . . . slaves were a troublesome property.").

⁶⁵ Firor Scott writes about white women and "miserable" marriages, filled with "grief and regret," including disappointments related to lacking emotional commitment from their husbands, unhappiness, and sexual discomforts. *Id.* at 62.

⁶⁶ Letter from Thomas Jefferson to John Wayles Eppes (June 30, 1820) (archived at <https://tjrs.monticello.org/letter/380#:~:text=Jefferson%20Quotes%20%26%20Family%20Letters,-Monticello&text=I%20consider%20a%20woman%20who,ViU%3A%20Thomas%20Jefferson%20Collection>) [<https://perma.cc/8SYP-DTAX>].

Like his uncle, Eppes also sexually exploited at least one enslaved Black woman.⁶⁷ According to records archived at Monticello—the plantation owned by Jefferson—Eppes “took his slave,” named Elizabeth Hemings “as his ‘concubine.’”⁶⁸ It is reported that at least six children were born from this fraught union, including three girls who were themselves born into slavery: Critta, Sally, and Thenia Hemings.⁶⁹

The story of American law and its early economy is inextricably linked to the political economies and histories of Black women’s lives in the thirteen colonies and later what became states. The questions of reproductive freedom and freedom itself is bound to the legislative debates and histories affecting Black women’s lives. Indeed, sexual violence against Black women and girls was so common that state legislatures like Virginia sought to resolve parentage and legal status with unquestionable clarity. *Was the offspring of a white man and an enslaved Black woman free or enslaved?* According to the earliest laws of Virginia:

Whereas some doubts have arrisen whether children got by any Englishman upon a negro woman should be slave or free, *Be it therefore enacted and declared by this present grand assembly,* that all children borne in this country shalbe held bond or free only according to the condition of the mother, *And* that if any christian shall committ fornication with a negro man or woman, hee or shee soe offending shall pay double the fines imposed by the former act.⁷⁰

That offspring were relegated by state law to adopt the status of their enslaved mothers further wed capitalism to sexual violence and rape, further lodging an odious practice into the culture of the Southern economy.⁷¹ Questions regarding rape also raise questions regarding resistance. To this end, whether Black women and girls could by law defend themselves against the sexual predations of the white men who claimed ownership of them also became questions of law resolved by courts. The notorious 1855 murder trial, *State of Missouri v. Celia, A Slave* comes to mind.⁷² The case reverberated throughout the country.⁷³

⁶⁷ John Wayles, *Archives of Monticello*, <https://www.monticello.org/research-education/thomas-jefferson-encyclopedia/john-wayles/> [<https://perma.cc/9RK6-YJVM>].

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ William Waller Hening, *Statutes at Large; Being a Collection of All the Laws of Virginia* 170 (1823), <https://archive.org/details/statutesatlarge02virg/page/260/mode/2up> [<https://perma.cc/JV7X-L3FJ>] (emphasis in original); See also *id.* at 260, 266, 270.

⁷¹ *Id.*

⁷² MELTON A. MCLAURIN, *CELIA: A SLAVE* (1991).

⁷³ *Id.*

Robert Newsom, a widower in his 70s purchased Celia when she was fourteen years old.⁷⁴ Newsom's sexual violence resulted in two children by the time Celia was nineteen. In Missouri in 1855, "it was a crime 'to take any woman unlawfully against her will and by force, menace or duress, compel her to be defiled.'"⁷⁵ Celia's defense sought to answer whether the protections found in the law extended to Black women. John Jameson, Celia's defense lawyer, had served in the Missouri legislature. He was joined by two court appointed lawyers, Nathan Chapman Kouns, who hailed from a slave-owning family and a young, inexperienced lawyer, Isaac M. Boulware.

Jameson argued that the Missouri rape law extended to Black girls like Celia. He urged that such protections of bodily autonomy and integrity apply to girls like Celia who defended themselves—as she had—by killing her rapist in self-defense. He asked Circuit Court Judge William Hall, himself a slave owner, to instruct the jury that Newsom's undisputed rapes of Celia were unlawful and that as such her killing him was a matter of self-defense.

Rejecting the defendant's motion, Judge Hall gave an instruction that sealed Celia's fate:

If Newsom was in the habit of having intercourse with the defendant who was his slave and went to her cabin on the night he was killed to have intercourse with her or for any other purpose and while he was standing in the floor talking to her she struck him with a stick which was a dangerous weapon and knocked him down, and struck him again after he fell, and killed him by either blow, it is murder in the first degree.⁷⁶

The twelve-member, all white male jury—comprised largely of slave owners or sympathizers—on November 1, 1855, found Celia guilty "in Callaway County Circuit Court of murder in the first degree. . .for the murder of her master."⁷⁷ On appeal, the Missouri Supreme Court upheld her conviction. The Court delayed her hanging until the birth of her third child, which was stillborn. She was hanged on December 21, 1855, "until she died."⁷⁸

⁷⁴ See DeNeen L. Brown, *Missouri v. Celia, A Slave: She Killed the White Master Raping Her, Then Claimed Self-Defense*, WASH. POST (Oct. 19, 2017), <https://www.washingtonpost.com/news/retropolis/wp/2017/10/19/missouri-v-celia-a-slave-she-killed-the-white-master-raping-h.er-then-claimed-self-defense/> [<https://perma.cc/D8VY-65B8>].

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

The infliction of sexual indignities on Black girls and women were well-known, debated in Congress, and reported in papers of record, and increasingly condemned in the period preceding the Civil War. An 1860 New York Times article stated,

The man who holds his fellow-man in slavery, treats him as a chattel, breeds from him with as little regard for marriage ties as if he were an animal, is a moral outlaw; society may find, or fancy it finds, its interest in protecting his life and his 'property' but it does so at its own peril. Before long a certain retribution overtakes it. In all ages of the world men have acknowledged rights which are older than civil society, and immutable.⁷⁹

Sexual violence was an acknowledged part of the character of American slavery. It was normalized and baked into law by the policies that designated offspring to the indefinite status of "slave" despite white parentage. Black women wrote about the sexual debasements and horrors they endured, and their essays and books are well-known even today. In 1851, in her compelling speech known as *Ain't I A Woman*, Sojourner Truth implored the crowd of men and women gathered at the Women's Rights Convention in Akron, Ohio to understand the gravity and depravity of American slavery on Black women's reproductive autonomy and privacy. Reported by newspapers and recorded through history, Ms. Truth stated that she had borne 13 children and seen nearly each one ripped from her arms, with no appeal to law or courts. Wasn't she a woman too?

Similarly, over 160 years ago, Harriet Jacobs wrote of the devastating sexual predations experienced by Black girls. She chronicled her personal efforts to escape the terroristic sexual reaches of her captor. She wrote, "I saw a man forty years my senior daily violating the most sacred commandments of nature. He told me I was his property; that I must be subject to his will in all things."⁸⁰ Jacobs revealed the horrors of sexual coercion and exploitation from which even Black girls could not escape, describing it as a "sad epoch in the life of a slave girl."⁸¹ She explained, "there is no shadow of law to protect [Black girls] from insult, from violence, or even from death; all these are inflicted by fiends who bear the shape of men."⁸² For Black girls who would soon be rescued by

⁷⁹ *The Issue in the United States—The North and Slavery*, N.Y. TIMES (Jan. 18, 1860), <https://www.nytimes.com/1860/01/18/archives/the-issue-in-the-united-states-the-north-and-slavery.html> [<https://perma.cc/YRN2-KHH4>].

⁸⁰ HARRIET JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL 27 (1861).

⁸¹ *Id.*

⁸² *Id.*

the Thirteenth and Fourteenth Amendments, they “become prematurely knowing in evil things. Soon she will learn to tremble when she hears her master’s footfall.”⁸³

Sadly, the assaults inflicted on Black girls and women during slavery, especially sexual violations and forced pregnancies, have largely been wiped from cultural and legal memory. Yet they remain relevant today. Substantively, this erasure by the Supreme Court disserves all women and is an urgent reminder why the Reconstruction Amendments were ratified.

Thus, what the Supreme Court majority in *Dobbs* strategically overlooks, legal history reminds us with stunning clarity, specifically the terrifying practices of American slavery, including the stalking, kidnapping, confinement, coercion, rape and torture of Black women and girls. Sexual violence and pregnancy were common markers of Black women’s enslavement throughout the United States, especially associated with the American South as reported in newspapers and autobiographies, including those written by slaveholders.⁸⁴ In other words, within reach of the Supreme Court were the various tools to unpack history, examine the debates and the constitutional origins of protecting women from involuntary reproductive servitude.

IV. RECONSTRUCTION AS ORIGINALISM

Can *Dobbs* be trusted as a reliable originalist opinion given the majority’s negligent reading of history and selective if not outcome determinative or opportunistic application of historical texts? What Justice Alito overlooks in *Dobbs*, a robust record by the abolitionists in Congress fills in. Framers of the Reconstruction were not silent on their observations of the involuntary sexual exploitation and violence experienced by Black women. Their writings build a more accurate record of the debates and thinking of members of Congress who would go on to draft and defend the Reconstruction Amendments.⁸⁵

⁸³ *Id.* at 28

⁸⁴ See, e.g., Thomas Jefferson, *supra* note 66.

⁸⁵ Ronald G. Walters, *The Erotic South: Civilization and Sexuality in American Abolitionism*, in *AFFECT AND POWER: ESSAYS ON SEX, SLAVERY, RACE AND RELIGION* 3 (D.J. Libby, P. Spickard & S. Ditto, eds., 2005).

A. Sex, Intimacy, and Paradox

The Founders' thinking on the most critical concerns of their day, including equality, slavery, and the status of women, were wildly inconsistent between word and practice.⁸⁶ Their personal lives reflected unsettling paradoxes: the ownership of enslaved individuals, interracial sex with Black women they and their family members enslaved, and enslavement of their Black children and grandchildren borne from those sexual assaults.⁸⁷ In other words, the Founders and Framers involvement with forced reproduction and involuntary reproductive servitude imposed on the enslaved Black women in their lives was far from passive, benign, or distant, but rather intimate and up close.

These glaring paradoxes are not accounted for by the majority in *Dobbs* and generally overlooked originalism advocacy. To this point, consider Thomas Jefferson, a Framers and Founder, a proud Virginia slave-owner and plantation owner, and father of enslaved children. On one hand, President Jefferson wrote "I advance it therefore as a suspicion only, that the blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites in the endowments both of body and mind . . . This unfortunate difference of colour, and perhaps of faculty, is a powerful obstacle to the emancipation of these people."⁸⁸ On the other, a deeper examination of Jefferson's practice, reveals that he literally brought to bed, confined and held captive a Black teenaged girl, Sally Hemings, and rendered her into reproductive and sexual servitude.⁸⁹ This resulted in the births of at least six

⁸⁶ See, e.g., Stephen E. Ambrose, *Founding Fathers and Slaveholders*, SMITHSONIAN MAGAZINE (Nov. 2002), <https://www.smithsonianmag.com/history/founding-fathers-and-slaveholders-72262393/> (<https://perma.cc/2V9M-B6FD>) ("Thomas Jefferson did not achieve greatness in his personal life. He had a slave as mistress. He lied about it. He once tried to bribe a hostile reporter. His war record was not good. He spent much of his life in intellectual pursuits in which he excelled and not enough in leading his fellow Americans toward great goals by example. Jefferson surely knew slavery was wrong, but he didn't have the courage to lead the way to emancipation. If you hate slavery and the terrible things it did to human beings, it is difficult to regard Jefferson as great . . . Thus the sting in Dr. Samuel Johnson's mortifying question, 'How is it that we hear the loudest yelps for liberty from the drivers of Negroes?'); Danny Lewis, *George Washington's Biracial Family Is Getting New Recognition*, SMITHSONIAN MAGAZINE, Sept. 22, 2016, <https://www.smithsonianmag.com/smart-news/george-washingtons-biracial-family-new-recognition-180960553/> [<https://perma.cc/4B73-FQFS>] (noting that Parke Custis, the adopted son of George Washington—grandson of Martha Washington "had a complicated family tree. Not only did he father children with several of Washington's slaves, but his own son-in-law was Robert E. Lee . . .").

⁸⁷ Only one of the nine presidents that owned enslaved peoples freed his. See Ambrose, *supra* note 86.

⁸⁸ See, e.g., THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 143 (William Peden, ed.) (1996).

⁸⁹ See Farah Stockman, *Monticello Is Done Avoiding Jefferson's Relationship with Sally Hemings*, N.Y. TIMES (June 16, 2018), <https://www.nytimes.com/2018/06/16/us/sally-hemings-exhibit-monticello.htm> [<https://perma.cc/Z7Z9-EYXH>] ("The newly opened space at Monticello, Thomas

more of his children whom he enslaved and promised to manumit at his death.⁹⁰

Can a fixed view of Jefferson on slavery be reasonably accounted for? If so, which fixed or firm view of Jefferson should scholars, judges, and lawyers reference? The president or the predator? The coerced and involuntary reproductive servitude imposed on Black girls and women like Sally Hemings in the homes of the Founders and Framers has generally been rendered invisible by historians, certainly overlooked or dismissed by legal historians, unaccounted for in originalist theory of reproductive privacy, and mostly ignored in legal scholarship.⁹¹ Yet, this paradox, inconsistency, or hypocrisy was not confined to Jefferson. George Washington's biracial family has now been brought to light too.⁹² Washington's grandson, George Washington Parke Custis, fathered children by Arianna Carter and Caroline Branham, both enslaved Black women on the president's plantation. Both women lacked the legal status of personhood and the ability to consent to the younger Washington's sexual impositions. Simply put, arguments advanced by Erwin Chemerinsky and other scholars that point to the ambiguities inherent in early constitutional documents or the convictions of constitutional Framers are reasonable and convincing.

B. Reframing the Framers

By the 1840s, prominent Congressional abolitionists began to explicitly address the sexual terrorism aimed at Black women and girls as well as the involuntary reproduction they endured.⁹³ There are multiple reasons for this strategy to end slavery and its timing in the 1840s. Three explanations seem to be tied to and triggered by events at the time: first, the slavery debate over the territorial gains of the Mexican-American War (1846-1848); second, the Fugitive Slave Act (1850); and finally, the 1848 attempt made by enslaved women and men in Washington, D.C., to escape southern bondage and sail North on the *Pearl*⁹⁴

Jefferson's palatial mountaintop plantation, is presented as the living quarters of Sally Hemings, an enslaved woman who bore the founding father's children. But it is more than an exhibit").

⁹⁰ *Id.*

⁹¹ As expressed in prior scholarship, "[f]or nearly two centuries, most white historians wrote Sally Hemings . . . out of Thomas Jefferson's life—as a subject of his gaze and predations—even though she mothered six of his children, traveled to France with him, and slept in a windowless chamber next to his. At some point, her existence was literally papered over as managers of his estate converted her bedroom into a men's bathroom, quite literally micturating on her very existence." Michele Goodwin, *A Different Type of Property: White Women and the Human Property They Kept*, 119 MICH. L. REV. 1081, 1095 n. 72 (2021).

⁹² Lewis, *supra* note 86.

⁹³ *Id.*

⁹⁴ For a detailed history of the event and its aftermath, see JOSEPHINE PACHECO, *THE PEARL: A FAILED SLAVE ESCAPE ON THE POTOMAC* (2005); MARY KAY RICKS, *ESCAPE ON THE PEARL* (2007).

exposed how desperate Black women were for freedom and the price they were willing to pay to avoid sexual assault and involuntary reproduction.⁹⁵

The decision to escape on the *Pearl* has been described as the most infamous, daring, and “doomed from the start.”⁹⁶ Yet, where the escape took place, in Washington, D.C., could not be lost on politicians of the time. The attempt to sail just 225 miles north failed, leading to the enslaved persons to be found on the boat and brought back to Washington, D.C., shackled and chained. The fate of the women captured on the *Pearl* served as concrete evidence in speeches by Horace Mann, Joshua Giddings and Charles Sumner about the enduring atrocities of slavery and its blight on the Union.⁹⁷ Locally, in response to Black people attempting to find freedom, white people rioted for several days in Washington, D.C.

Prominent abolitionists were directly involved with the trial and subsequent pardon of Daniel Drayton and Edward Sayres, who had organized the escape attempt.⁹⁸ As a defense strategy, they gave speeches and published writings on the harsh realities of rape to demonstrate the barbarism of slavery as an institution, the moral depravity of those who supported slavery, and the soundness of their moral judgment in helping enslaved Black women escape. Horace Mann, a representative from Massachusetts described slavery as “the product of selfish motives, turning godliness into gain; and where more gain or more gratification can be obtained by the debasement, the irreligion, the pollution of the slave, there the instincts of chastity, the sanctity of the marriage relation, the holiness of maternal love, are all profaned to give security and zest to the guilty pleasures of the sensualist and debauchee.”⁹⁹ Later, in recounting the tragedy of the failed escape on the *Pearl*, he expressed, “There was one girl, who, after her recapture on the *Pearl*, was sold six times in seven weeks, in Maryland and Virginia, for her beauty’s sake. But she proved heroically and sublimely intractable. Like

⁹⁵ See, e.g., Erin Blakemore, *The Largest Attempted Slave Escape in American History*, HISTORY (Aug. 30, 2018), <https://www.history.com/news/the-largest-attempted-slave-escape-in-american-history#:~:text=All%20through%20the%20night%20of,who%20could%20fit%20on%20board> [<https://perma.cc/8F8C-JM8A>] (“All through the night of April 15, 1848, slaves slipped out of their masters’ houses and crept through the streets of Washington, D.C. Their destination was the *Pearl*, a schooner that promised freedom to as many people who could fit on board”).

⁹⁶ *Id.*

⁹⁷ See Pacheco, *supra* note 94; Ricks, *supra* note 94.

⁹⁸ Ricks, *supra* note 94, at 113–14, 166–68, 243–44. For an in-depth examination of the moral philosophy of Joshua Giddings, see James B. Stewart, *Christian Statesmanship, Codes of Honor, and Congressional Violence: The Antislavery Travails and Triumphs of Joshua Giddings*, in *IN THE SHADOW OF FREEDOM: THE POLITICS OF SLAVERY IN THE NATIONAL CAPITAL* (Paul Finkelman & Donald R. Kennon eds., 2011).

⁹⁹ Cong. Globe, 31st Cong., 1st Sess. 319–320 (1849).

Rebecca, the Jewess, she would have flung herself from the loftiest battlement, rather than yield her person to a villain.”¹⁰⁰ He expressed that the price the girl paid for “heroically and sublimely” resisting rape was that “her body was found scarred and waled with whip marks, which the villains inflicted upon her because she would not come to their bed.”¹⁰¹

Representative Joshua Giddings, speaking of the Fugitive Slave Act in 1850 expressed that “for its barbarity, that law is unequalled in the history of civilized legislation.”¹⁰² He questioned whether “a reflecting man [could] pretend that this barbarous enactment imposes upon those people any moral duty to obey it?”¹⁰³ Pointing out the paradoxes and hypocrisy of religious leaders in the South refusing to intervene against the harms experienced by Black women and girls, writing, “[w]ill preachers of righteousness tell them to submit, to let the slave-dealer rivet the chains upon the father, tear the mother from her children, and doom her to a life of wretchedness? Will such preachers advise the daughter *peacefully* to surrender herself into the hands of slave-hunters, and submit to a life of pollution and shame? And will such men be called promoters of *holiness and purity*?”¹⁰⁴

Throughout the 1850s, Senator Charles Sumner expressively condemned the raping of Black women. He argued that slavery was a violation of natural law, in contrast to its legality according to positive law. The most direct argument linking rape with violation of rights appears in the American Freedmen’s Inquiry Commission Report to Congress, one year prior to the ratification of the Thirteenth Amendment in 1864. Here, in the *Barbarism of Slavery: Senate Speech, on the Bill for the Admission of Kansas as a Free State*, he explains the sexual debauchery of American slavery. He notes:

The ties formed between slaves are all subject to the selfish interests or more selfish lust of the master, whose license knows no check. Natural affections which have come together are rudely torn asunder: nor is this all. Stripped of every defence, the chastity of a whole race is exposed to violence, while the result is recorded in tell-tale faces of children, glowing with a master’s blood, but doomed for their mother’s skin to Slavery

¹⁰⁰ Horace Mann, Speech on the Fugitive Slave Law, Delivered at Lancaster, Massachusetts (May 19, 1851) in HORACE MANN, *SLAVERY: LETTERS AND SPEECHES* 511–12 (1851).

¹⁰¹ *Id.*

¹⁰² Joshua R. Giddings, Annual Message of the President (Dec. 9, 1850) in JOSHUA R. GIDDINGS, *SPEECHES IN CONGRESS* 438 (1853).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

through descending generations. The Senator from Mississippi [Mr. Brown], galled by the comparison between Slavery and Polygamy, winces. I hail this sensibility as the sign of virtue. Let him reflect, and he will confess that there are many disgusting elements in Slavery . . . ¹⁰⁵

Senator Sumner was not silent in his opposition to slavery and neither were other abolitionists in Congress. In opposition to the Missouri Compromise, in 1852, Representative Joshua Giddings of Ohio declared, “No, Mr. Speaker, I blush for my country, when her representatives take shelter behind unmeaning generalities, and refuse to avow their honest sentiments. If gentlemen intend to support the compromise, they must of course intend to chase down the trembling female, as she flees from the inhumanity of a worse than savage oppressor.”¹⁰⁶ In 1852, Giddings persistently placed into the debate and record, the concerns of Black women, including on June 23, 1852, accusing the Southerners of hypocrisy in their “Christian-like” values, because in Washington, D.C., they advertise and sell “young [enslaved] women,” and “maintain this traffic in the bodies of women.”¹⁰⁷

A decade before ratification of the Thirteenth Amendment, Senator Sumner wrote to Passmore Williamson, “[s]trange and disgraceful as all this is, it must be considered the natural fruit of Slavery. Any person, whosoever he may be, whether simple citizen or magistrate, who undertakes to uphold this wrong, seems forthwith to lose his reason.”¹⁰⁸ He described slavery in these terms, as “an institution which separates parent and child, which stamps woman as a concubine, which shuts the gates of knowledge, and which snatches from the weak all the hard-earned fruits of incessant toil[.]”¹⁰⁹ Five years later, in 1860, Senator Sumner delivered a speech that triggered such tremendous violence against him that he nearly died. He explained that under slavery no sacrament such as marriage is permitted, and “no such contract can exist.”¹¹⁰ He continued:

¹⁰⁵ Charles Sumner, *The Barbarism of Slavery: Senate Speech, on the Bill for the Admission of Kansas as a Free State* (June 4, 1860), in 6 CHARLES SUMNER: HIS COMPLETE WORKS 133 (1863).

¹⁰⁶ Joshua R. Giddings, *Compromise Measures* (Mar. 16, 1852), in JOSHUA R. GIDDINGS, SPEECHES IN CONGRESS 483 (1853).

¹⁰⁷ Joshua R. Giddings, *Baltimore Platforms*, (June 23, 1852), in JOSHUA R. GIDDINGS, SPEECHES IN CONGRESS 495–96 (1853).

¹⁰⁸ Letter from Charles Sumner to Passmore Williamson (Aug. 11, 1855), in 6 CHARLES SUMNER: HIS COMPLETE WORKS 56 (1863).

¹⁰⁹ *Id.*

¹¹⁰ Sumner, *supra* note 105, at 133.

By license of Slavery, a whole race is delivered over to prostitution and concubinage, without the protection of any law. Surely, Sir, is not Slavery barbarous?¹¹¹

As the legislative record shows, Giddings, Mann, and Sumner were hardly alone in their articulation about the vile involuntary sexual and reproductive servitude of Black women. The speeches and writings of Representatives Joshua Grinnell (Iowa),¹¹² Thomas Shannon (California),¹¹³ Samuel Cox (Ohio and later, New York),¹¹⁴ and others, as well as the American Freedmen's Inquiry Commission organized under the Department of War, centered antislavery concerns around the harms imposed on Black women, including bearing children of whom their fathers could, by law, deny parentage.

In *Dobbs*, the majority claims to canvass history to inform its understanding of the debate involving substantive due process within the reproductive context. Yet, the Court neglects the U.S. Antebellum and Reconstruction histories. The Court does not probe the fact that criminalizing abortion was a shrewd economic and political strategy led by male obstetricians who sought to monopolize reproductive healthcare and “squeeze” midwives out.¹¹⁵ They were successful.¹¹⁶

Indeed, the legal history of antiabortion lobbying and regulation take shape in the quagmire created by the racialization and sex-exclusivity of reproductive medicine in the United States. Skilled midwives represented both real competition for men who sought to enter the practice of child delivery, and also a threat to how obstetricians viewed

¹¹¹ Sumner, *supra* note 105, at 133.

¹¹² Cong. Globe, 38th Cong., 1st Sess. 1602 (Apr. 12, 1864) (“The gentleman from the Columbus district of Ohio [Mr. Cox.] early in the session characterized us as abolitionists and miscegens, and when asked what would become of the negroes when set at liberty, said they would run over to this side of the House, a deliberate insult to men who have declared against slavery, and amalgamation, its accompaniment. I never understood until of late what the meaning of miscegenation was. I have found out now that it means the mixing of negro blood with the blood of the traitors, one species of Democrat, and I will say for the benefit of the gentleman from Ohio I think the negro blood is greatly vitiated thereby. [Laughter]”).

¹¹³ Cong. Globe, 38th Cong., 1st Sess. 2948 (June 15, 1864) (“Every form of incest is common in this, that assumes to be a paternal relation. Even polygamy is degraded by it to promiscuous prostitution. Now, sir, I love the white race too well willingly to see their blood miscegenating with the African, and must protest against any institution, however patriarchal, under which such things are profitable, and too generally, on that account, called respectable”).

¹¹⁴ Cong. Globe, 38th Cong., 1st Sess. 708–13 (Feb. 17, 1864).

¹¹⁵ See HORATIO R. STORER, ON CRIMINAL ABORTION IN AMERICA 56 (1860) [hereinafter Storer, On Criminal Abortion].

¹¹⁶ See generally GERTRUDE S. FRASER, AFRICAN AMERICAN MIDWIFERY IN THE SOUTH: DIALOGUES OF BIRTH, RACE, AND MEMORY (1998); Sharon A. Robinson, *A Historical Development of Midwifery in the Black Community 1600–1940*, 29 J. NURSE-MIDWIFERY 247 (1984); Keisha La’Nesha Goode, *Birthing, Blackness, and the Body: Black Midwives and Experiential Continuities of Institutional Racism* (Oct. 1, 2014) (unpublished Ph.D. dissertation, City University of New York) (on file with author).

themselves. Midwifery was stigmatized as a “backward” means of gynecological care given the advent of obstetrics as a lauded, *trained* profession—with tools such as forceps,¹¹⁷ other technologies,¹¹⁸ and the modern convenience of hospitals, which largely excluded women from practice within their institutions.¹¹⁹

Sensing the strong abolitionist movement gaining momentum, male obstetricians aligned with white supremacist values and galvanized the American Medical Association (AMA) as a powerful platform from which to direct their anti-midwifery and antiabortion agendas. At the time, the AMA was a race-exclusive organization that refused membership to Black people and women.¹²⁰

Dr. Horatio Robinson Storer comes to mind. He lamented that too few white people inhabited “the great territories of the far West, just opening to expansion, and the fertile savannas of the South, now dis[e]nthralled” due to the abolition of slavery. He questioned whether those regions of the country would come to be “filled by our own children or by those of aliens? This is a question our own women must answer; upon their loins depends the future destiny of the nation.”¹²¹

Much like the contemporary antiabortion movement, which links to white supremacy and the so-called “replacement theory,” so too did 19th century obstetricians advance their cause by making three claims. First, white women’s reproductive capacities were urgently needed for the health of the nation and should be used in advancement of a broader cause—namely saving the United States from being swamped with newly freed and soon to be freed Black people. However, advancing the ban on abortion was likely a proxy for the more important economic and

¹¹⁷ ROBINSON, *supra* note 116, at 116 (noting that with the advent of medical tools such as forceps, gynecology became male-dominant in Europe and the United States).

¹¹⁸ Physicians such as Dr. Marion Sims, associated with the birth of gynecology in the United States, were part of the shifting face of maternal care. Sims, who notoriously tortured the bodies of Black slaves by suturing, cutting, and experimenting on Black enslaved women (often without providing them anesthesia) became hailed as the “grandfather” of gynecology in the United States. He practiced and perfected the cesarean section on non-consenting Black slaves. See Jeffrey S. Sartin, *J. Marion Sims, the Father of Gynecology: Hero or Villain?*, 97 S. MED. J. 500 (2004); Barron H. Lerner, *Scholars Argue Over Legacy of Surgeon Who Was Lionized, Then Vilified*, N.Y. TIMES (Oct. 28, 2003), www.nytimes.com/2003/10/28/health/scholars-argue-over-legacy-of-surgeon-who-was-lionized-then-vilified.html [<https://perma.cc/24WV-KUEF>].

¹¹⁹ See LYNETTE A. AMENT, PROFESSIONAL ISSUES IN MIDWIFERY 304 (2007).

¹²⁰ Jonathan Sidhu, *Exploring the AMA’s History of Discrimination*, PROPUBLICA (July 16, 2008), <https://www.propublica.org/article/exploring-the-amas-history-of-discrimination-716> [<https://perma.cc/MD3L-24DE>] (“And the reason given by the AMA, after the fact was, ‘We did not seat you because you come from groups and schools that admit women and that admit irregular practitioners’”).

¹²¹ HORATIO R. STORER, WHY NOT? A BOOK FOR EVERY WOMAN 85 (1868) (hereinafter STORER, WHY NOT?) (also quoted in Leslie Reagan, *When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867–1973*, in THE REPRODUCTIVE RIGHTS READER 82 (Nancy Ehrenreich ed., 2008).

status gains of shutting midwifery down and taking control of this new field of medicine—obstetrics and gynecology.

Second, they claimed abortion was immoral and thus should be illegal—a strategy that would lead to midwives being criminally punished by continuing to aid women with that medical care. Just like Texas lawmakers who enacted radical antiabortion laws pre-*Dobbs*, intended to lead to the shuttering of clinics that perform abortion services—so too did Dr. Storer and AMA officials understand that midwives would leave the field. Storer wrote, “[midwives] frequently cause abortion openly and without disguise.”¹²² Even more disturbing and unconscionable to him, “[midwives] claim a right to use instruments, and to decide on the necessity and consequent justifiability of any operation they may perform.”¹²³

Storer and other (male) gynecologists desired prestige and to distance themselves from the perception of performing “women’s work.” As a result, they sought to change their social standing among their medical peers and at the same time monopolize reproductive healthcare by three means: criminalizing abortion, urging the prosecution of women who sought abortions, and smothering the practice of midwifery in the United States.¹²⁴

Third, the AMA Committee on Criminal Abortion, led by Storer, urged that quickening had “its commencement at the very beginning, at conception itself” and as such, the organization adopted the position: “we are compelled to believe unjustifiable abortion always a crime.”¹²⁵ Notably, this stood in contrast to the policies articulated by the Catholic church at the time. Prior to this time, the Catholic Church held the view that personhood did not exist before “quickening.”¹²⁶ The AMA’s interventions completely influenced the shape of the abortion debate.

A close reading of the archival record suggests that the impetus for the bans on abortion or who should be able to deliver babies did not relate to health or safety. Rather, it was in the self-interest of male gynecologists to claim that “the deliberate prevention of pregnancy . . . [is] detrimental to the health” and that “occasional child-bearing is an important means of healthful self-preservation.”¹²⁷

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Joseph B. DeLee, *Progress Toward Ideal Obstetrics, Speech at Sixth Annual Meeting of the American Association for Study and Prevention of Infant Mortality*, 73 AM. J. OBSTETRICS & DISEASES WOMEN & CHILDREN, 407–15 (1916).

¹²⁵ See STORER, ON CRIMINAL ABORTION, *supra* note 115, at 13.

¹²⁶ Jessica Ravitz, *The Surprising History of Abortion in the United States*, CNN (June 27, 2016), www.cnn.com/2016/06/23/health/abortion-history-in-united-states/ [https://perma.cc/N8G8-6FXQ].

¹²⁷ STORER, *supra* note 121, at 80.

Much like the draconian antiabortion provisions today, Storer and the AMA sought to punish individuals who aided women in the termination of pregnancy and to otherwise chill Free Speech.

Every person who shall knowingly advertise, print, publish, distribute, or circulate, or knowingly cause to be advertised, printed, published, distributed, or circulated, any pamphlet, printed paper, book, newspaper, notice, advertisement, or reference, containing words, or language, giving or conveying any notice, hint, or reference to any person, or to the name of any person, real or fictitious, from whom, or to any place, house, shop, or office where any poison, drug, mixture, preparation, medicine or noxious thing, or any instrument or means whatever, or any advice, directions, information, or knowledge, may be obtained for the purpose of causing or procuring the miscarriage of any woman pregnant with child, shall be punished . . . ¹²⁸

Not only does it not bother to take into account the duplicity of the AMA with the early antiabortion bans and the white supremacists aims of the early antiabortion movement. Instead, it references only three historians. Of them, one lacks expertise related to reproductive matters, but instead studies land and water management.¹²⁹ The second so-called historian is an antiabortion activist who served on the National Right to Life Committee, “one of the largest national anti-abortion groups.”¹³⁰ The third “historian” on whom the majority relies is a Christian ethicist whose research in history seems rather tenuous and scant at best.¹³¹

In *Dobbs*, the Court’s majority purported to thoroughly canvas history and consider original texts and their meanings, including the Constitution, in evaluating a state’s right to ban abortion, and therefore impose the condition of continued pregnancy or involuntary pregnancy on a woman or girl. In writing for the majority, Justice Alito claimed, “The *Casey* plurality’s speculative attempt to weigh the relative importance of the interests of the fetus and the mother represent a departure from the ‘original constitutional proposition.’”¹³²

According to Professor Mary Ziegler, that the Court did not cite historians whose research and scholarship directly address the questions

¹²⁸ STORER, ON CRIMINAL ABORTION, *supra* note 125, at 57–58.

¹²⁹ See e.g., Mary Ziegler, *2022 Supreme Court Review: How the Court Dismantled Democracy*, MS. MAGAZINE (July 11, 2022), <https://msmagazine.com/podcast/62-2022-supreme-court-review-how-the-court-dismantled-democracy/> [<https://perma.cc/XB6J-K7WP>].

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Dobbs v. Jackson Women’s Health*, 142 S.Ct. 2228 (2022).

debated in *Dobbs* reveals the illegitimacy of the decision. Justice Alito stated that the theory that “the Fourteenth Amendment’s Due Process Clause provides substantive as well as procedural, protection for ‘liberty’—has long been controversial.”¹³³ According to Justice Alito, of particular concern are a “select list of fundamental rights that are not mentioned anywhere in the Constitution.”¹³⁴ He asserted that the “Court has long asked whether the right is ‘deeply rooted in [our] history and tradition,’ and can be found in the United States “scheme of ordered liberty,” despite the fact that originalism itself is a fairly modern concept and was not a methodology embraced or practiced by Framers of the Constitution.

However, Justice Alito’s assertion that there is no enumeration and original meaning in the Constitution related to compulsory or involuntary sexual subordination and reproduction misinterprets and misunderstands American history and law, namely the Antebellum chattel era. It disregards the social conditions leading to the Thirteenth and Fourteenth Amendments. Indeed, it misconstrues how slavery was abolished, overlooks the deliberation and debates within Congress, and opaquely renders Black women and their bondage invisible.

Most glaringly, the Supreme Court ignored the constitutional prohibition on involuntary servitude and the meaning and debates on the Thirteenth and Fourteenth Amendments, which directly related to reproductive privacy, liberty, and autonomy. Strangely, the Supreme Court ignored these debates even while central to the ratification of the Thirteenth and Fourteenth Amendments were matters of Black women being forced to bear pregnancies against their will, compelled under threats of punishment into the status of reproductive chattel, including in states like Mississippi, Kentucky, Alabama, and Texas—with notorious histories of slavery, Jim Crow, and now Jane Crow. In these states there have been uninterrupted patterns of invidious lawmaking and discrimination that harm the interests of Black women and children—only countered by necessary federal enactments, review, and protection.

Specifically, ending the forced sexual and reproductive servitude of Black girls and women was a critical part of the passage of the Thirteenth and Fourteenth amendments. That the majority disregards this in *Dobbs* exposes its grave error. The overturning of *Roe v. Wade* reveals the Supreme Court’s neglectful reading of the amendments that abolished slavery and guaranteed all people equal protection under the law. It means the erasure of Black women from the Constitution.

Mandated, forced or compulsory pregnancy contravenes enumerated rights in the Constitution, namely the Thirteenth Amendment’s

¹³³ *Id.* at 2246.

¹³⁴ *Id.*

prohibition against involuntary servitude and protection of bodily autonomy as well as the Fourteenth Amendment's defense of privacy and freedom. This Supreme Court demonstrates a selective and opportunistic interpretation of the Constitution and legal history, which disregards the intent of the Thirteenth and Fourteenth Amendments, specifically framed to abolish slavery and all its vestiges. It ignores the campaign of the abolitionist Framers, especially their concerns about Black women's bodily autonomy, liberty, and privacy which extended beyond freeing them from labor in cotton fields to shielding them from rape and forced reproduction.

For example, at the heart of abolishing slavery and involuntary servitude in the Thirteenth Amendment was the forced sexual and reproductive servitude of Black girls and women. Senator Charles Sumner of Massachusetts who led the effort to prohibit slavery and enact the Thirteenth Amendment was nearly beaten to death in the halls of Congress two days after giving a speech that included the condemning of the culture of sexual violence that dominated slavery.¹³⁵ These issues were widely debated and part of common discourse.¹³⁶

V. CONCLUSION

Originalism can no longer be ignored in American jurisprudence. What was once dismissed as a fringe theory with limited relevance or application in American law is more germane than ever before in legal discourse and Supreme Court jurisprudence. Now, divided along ideological lines, the Supreme Court's conservative majority claims originalism as an important guiding principle or basis for their decision-making. Plausibly, given the lack of progress in Supreme Court reform and the relatively recent confirmations Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett—each under sixty years old—originalism may become a dominant methodology in Supreme Court jurisprudence for at least a generation or more into the future. As such, legal scholars and practitioners would be wise not only to reject calls to dismiss or disregard originalism, but also to invest in shaping and framing the theory—and there are good reasons for doing so.

First, the method(s) adopted by Supreme Justices to define and defend originalism reveal an alarming lack of consistency, nuance, and coherence. Second, the Court's application of originalism is also inconsistent across cases, resulting in outcome determinative rulings, lacking the character of careful, impartial, unbiased adjudications. As the

¹³⁵ *The Caning of Senator Charles Sumner*, U.S. SEN., https://www.senate.gov/artandhistory/history/minute/The_Caning_of_Senator_Charles_Sumner.htm [https://perma.cc/6RW8-NAR5].

¹³⁶ See Stockman, *supra* note 89.

Dobbs opinion exposes, originalism can serve as a proxy to achieve certain ideological ends and the consequences can be devastating and harmful. Third, while Justices may be unmoved by criticisms grounded in other legal theories or methodological approaches, critiques and arguments exposing the Court's slipshod application of originalism might be persuasive.

Finally, the failure of the Court's majority to engage more comprehensively in the history it claims to follow might suggest ignorance, a purposeful indifference to the historical record, or laziness. Or perhaps all three in operation. Equally, however, progressives' failure to critically examine the gaps now predictable and inherent in the conservative originalist framing manifests a glaring blind spot. It leaves lazy originalists to weaponize this method of judicial interpretation whereby it serves as a proxy for dismantling laws and policies that advance sex equality and racial justice.