Distorting the Reconstruction: A Reflection on 

*Dobbs*

Michele Goodwin†

History will likely record *Dobbs v. Jackson Women’s Health Organization*¹ as the most devastating case of the Supreme Court’s 2021 term and perhaps one of the worst Supreme Court decisions of all time. However, the *Dobbs* decision offers an opportunity to revisit the damaged path to reproductive freedom, dating back to American slavery and bridge pathways forward with better understanding. This Essay offers a reflection on *Dobbs*, speaking to the origins of reproductive autonomy and justice concerns that preexisted Reconstruction. The Essay argues that by examining the antebellum archive, a different type of slavery and involuntary servitude comes into view, namely the involuntary reproductive servitude imposed on Black girls and women.

This Essay’s thesis is that the record of American slavery extended beyond physical labor in cotton fields to wealth maximization in forced reproduction. It argues that the intent of the Thirteenth and Fourteenth Amendments included freeing Black women from forced reproduction. As such, this contribution adds greater nuance and insight to contemporary debates about the concerns of Reconstruction Amendments’ abolitionist ratifiers. By closely examining the Antebellum and Reconstruction archives, with specific attention on the arguments, debates, speeches, and writings of the abolitionist ratifiers, greater clarity is revealed regarding their efforts to stamp out slavery and involuntary reproductive servitude, particularly the abolitionist ratifiers that shaped the Reconstruction Amendments.

In keeping with the brevity of contributions for our symposium, this Essay proceeds in two succinct parts. Part I addresses *Dobbs* and the normalization of women’s pain. It briefly reviews the opinion, while concentrating on the Court’s omissions, specifically related to the grave rates of maternal mortality and morbidity in the United States. Part II turns to the

---

† Chancellor’s Professor, University of California, Irvine School of Law and Founding Director of the Center for Biotechnology and Global Health Policy. The author is grateful to the *Yale Journal of Law Feminism* editors and staff. This Essay benefited from the helpful research of the University of California, Irvine School of Law library as well as the Georgetown Law School Library and their respective staffs. A special note of appreciation to Amy Atchinson and Suzanne Miller. This invited Essay builds on the symposium’s theme, *Meeting the Moment: Legal Frameworks for Feminist Futures.*

¹ 142 S. Ct. 2228 (June 24, 2022).
Distorting the Reconstruction: A Reflection on Dobbs

iconography of reproductive coercion and pain in the antebellum period. Told through excavated advertisements for enslaved girls and women. First, it argues that forced reproduction, inflicted on enslaved Black girls and women, was visible. Second, it contends that the abolitionist ratifiers were concerned with the harms resulting from sexual assault and forced reproduction on Black women and girls. Third, it maintains that the Court distorts the intent of the Reconstruction ratifiers when it ignores that chief among their concerns was putting an end to forced reproduction and involuntary reproductive servitude. By resurrecting lost advertisements, this Essay also helps to complicate and correct contemporary understandings of slavery as an enterprise concentrated on field labor.2 By acknowledging the distressing involuntary reproductive servitude endured by Black girls and women, the Essay expands the narratives about both slavery and reproductive freedom and contributes to scholarship that seeks to fill the gap on Black women and the Reconstruction Amendments.

Part I: Dobbs and The Iconography of Pain

Read in the most elementary terms, Dobbs is primarily concerned with overturning the constitutional protections for abortion provided by Roe v. Wade3 and Planned Parenthood v. Casey.4 According to the Court, “Roe was on a collision course with the Constitution from the day it was decided, Casey perpetuated its errors, and those errors do not concern some arcane corner of the law of little importance to the American people.”5 Writing for the majority, Justice Alito stated that the 7-2 Roe majority “usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people”6 and unconvincingly declared that the case does not jeopardize other privacy concerns, such as gay

2 For other excellent contributions to this subject, see HARRIET A. JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL 35 (Lydia Maria Child ed., The Belknap Press of Harvard University Press 1987) (1861) (“[M]y master was, to my knowledge, the father of eleven slaves. But did the mothers dare to tell who was the father of their children? Did the other slaves dare to allude to it, except in whispers among themselves? No, indeed! They knew too well the terrible consequences.”); see generally PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES (1997) (documenting that enslaved women’s reproductive freedom and family liberty were central to the arguments put forth by abolitionists that drafted the Reconstruction Amendments); DOROTHY ROBERTS, KILLING THE BLACK BODY (1997) (examining the centrality of sexual harms against Black women to the founding of the United States); RACHEL A. FEINSTEIN, WHEN RAPE WAS LEGAL: THE UNTOLD HISTORY OF SEXUAL VIOLENCE DURING SLAVERY (2019) (analyzing the widespread accounts of sexual violence forced on Black enslaved women by white men in the United States).


5 Dobbs, 142 S. Ct. at 2265.

6 Id. at 2265.
marriage, access to contraception, or interracial marriage. This sophistry served to justify upending decades of precedent affirming reproductive autonomy from the Court’s 1942 *Skinner v. Oklahoma* decision to its 2020 *June Medical Services L.L.C. v. Russo* decision striking down a Louisiana targeted regulation of an abortion provider (“TRAP law”).

Pre-*Roe* iconography comes to mind. The disturbing 1964 police photograph of Gerri Santoro, a twenty-eight-year-old mother and victim of domestic violence, crouched over a pile of blood-soiled, white sheets in a cheap Norwich, Connecticut motel. Blood visibly stains her naked body. Santoro’s troubling death captured the human distress of criminalizing abortion. The image captured the open secret of botched, self-induced abortions and the tremendous human toll on women and their families prior to *Roe*.

Such deaths in the pre-*Roe* era were not uncommon. According to Leslie Reagan, author of *When Abortion Was a Crime: Women, Medicine, and Law in the United States*, “[p]hysicians and nurses at Cook County Hospital saw nearly one hundred women come in every week for emergency treatment following their abortions.” Of the women, “[s]ome barely survived the bleeding, injuries, and burns; others did not.” Major medical facilities like Cook County Hospital designated entire wards to address “abortion-related complications.” Serious injuries affected “[t]ens of thousands of women every year” who needed emergency care following self-induced or back-alley abortions. Deaths were particularly acute among women of color.

---

7 Supposedly, the precedents in *Griswold v. Connecticut, Lawrence v. Texas, Obergefell v. Hodges*, and *Loving v. Virginia* will be spared a similar, future fate, despite Justice Thomas’s concurring opinion. *Id.* at 2280-81 (“But we have stated unequivocally that ‘[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion.’ We have also explained why that is so: rights regarding contraception and same-sex relationships are inherently different from the right to abortion because the latter (as we have stressed) uniquely involves what *Roe* and *Casey* termed ‘potential life.’”) (internal citations omitted). But see *id.* at 2301-02 (Thomas, J. concurring) (“[I]n 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,’ we have a duty to ‘correct the error’ established in those precedents. 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.”) (internal citations omitted). *Id.* at 2301-02.

8 See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (finding that “invidious discriminations” manifest when state legislation interferes with “the basic civil rights of man” to determine his own reproductive and procreative destiny).


12 *Id.*

13 *Id.*

14 *Id.* at 210–11.

15 *Id.* at 212–13 (explaining that “[t]he racial differences in abortion-related deaths and access to safe therapeutic abortions mirrored the racial inequities in health services in general and in overall
Today, researchers predict that “Black women will largely bear the brunt of abortion restrictions” and the deaths likely resulting as well.\(^1^6\) The United States ranks as the deadliest place in the developed world to be pregnant.\(^1^7\) Its chilling maternal mortality and morbidity rates are dramatically out of line with peer nations.\(^1^8\) A recently released report by the Commonwealth Fund underscores the dangers, highlighting that “U.S. women have the highest rate of maternal deaths among high-income countries, while Black women are nearly three times more likely to die from pregnancy-related complications than white women are.”\(^1^9\) In *Dobbs*, the majority makes no reference to the gravity of pregnancy risks, nor its prior findings and analyses in *Whole Woman’s Health v. Hellerstedt*, when it recognized that “[n]ationwide, childbirth is 14 times more likely than abortion to result in death.”\(^2^0\)

Instead, the Court ignores any current trends related to maternal deaths, including in Mississippi, a state with one of the highest maternal mortality rates in the nation.\(^2^1\) In fact, Justice Alito cabins the Court’s inquiry

\(^{16}\) Cecilia Lenzen, *Facing Higher Teen Pregnancy and Maternal Mortality Rates, Black Women Will Largely Bear the Brunt of Abortion Limits*, TEX. TRIBUNE (June 30, 2022), https://www.texastribune.org/2022/06/30/texas-abortion-black-women [https://perma.cc/8GY6-Q9P4] (“Black women are three to four times more likely to experience a pregnancy-related death than white women, and the risk spans income and education levels.”).


\(^{20}\) 579 U.S. 582, 618 (2016).

on maternal mortality to 1973 in criticism of the majority in *Roe*. Why, after all, the queries, did the Court fail to defer to Texas or at least explain why it demonstrated deference in protecting pregnant women’s lives rather than leaving such matters to the state’s legislators? A skeptical reading of the majority’s opinion suggests that consequences of poor maternal health policies, including death, are beyond judicial review.

With harrowing contemporary stories of women and girls fleeing abortion-restrictive states to terminate pregnancies in “reproductive free states,” *Dobbs* now resuscitates elements of the pre-*Roe* era, a dynamic Reva Siegel describes as “preservation-through-transformation.” That is, new medical, psychological, and legal dangers lurk in the post-*Dobbs* era, particularly in abortion restrictive states. Finally, in the constellation of the Court’s concerns, sexual violence such as rape and incest do not rise within view, even though the Mississippi Gestational Age Act—the law at the heart of the case—made no exceptions for either—a worrisome feature of recent anti-abortion legislation. The majority’s failure to even gesture towards these issues signals their apathy.

**Part II: Reproductive Servitude, Antebellum Iconography, and Reconstruction Distortions**

In *Dobbs*, the Supreme Court not only reframes abortion law in the U.S. to serve a political end, but it also misreports and mischaracterizes the history of Reconstruction and the Reconstruction Amendments. In doing so, the Court invests in distortion and a political agenda at odds with ending involuntary reproductive servitude. Even if the Court’s purported methodology—to derive contemporary meaning from history and traditions

22 *Dobbs*, 142 S. Ct. at 2268 (“What *Roe* did not provide was any cogent justification for the lines it drew. Why, for example, does a State have no authority to regulate first trimester abortions for the purpose of protecting a woman’s health? The Court’s only explanation was that mortality rates for abortion at that stage were lower than the mortality rates for childbirth.”).

23 *Id.*


25 Alexa Lardieri, *U.S. Hospitals Do Little to Protect Mothers During Birth*, U.S. NEWS (July 27, 2018), https://www.usnews.com/news/health-care-news/articles/2018-07-27/report-us-most-dangerous-place-to-give-birth-in-developed-world#:~:text=The%20United%20States%20is%20the,and%20about%20700%20mothers%20dying. (“The United States is the most dangerous place in the developed world to give birth, with more than 50,000 mothers suffering severe injuries during or after childbirth and about 700 mothers dying.”).


28 See Reva Siegel, *Memory Games: Dobbs’s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEXAS L. REV. (forthcoming 2023) (manuscript at 5) (on file with author) (“On this account, executive branch appointments politics matter critically to originalism’s authority, as do originalism’s appeals to constitutional memory to legitimate the exercise of public power.”).
deeply rooted in the Constitution—was a morally and ethically sustainable approach to judicial review, it fails on its own accord. Instead, the Court siphons race and sex from Reconstruction and the Reconstruction Amendments. This omission reflects the Roberts Court’s utilitarian approach to engaging the nation’s history of racial violence. In *New York State Rifle & Pistol Ass’n v. Bruen*, the Court addresses at length the concerns of Black men and their denial of gun ownership pre-Reconstruction. While, ironically, the Court makes no mention of Black women at all in *Dobbs*.

Despite the Court’s claims otherwise, *Dobbs* offers no searching review of history or the present. To the contrary, the Court neglects any mention of the period leading to and inspiring Reconstruction, evading the Reconstruction debates, and never mentions slavery, involuntary sexual servitude, or forced “breeding”—hard truths that galvanized abolitionist ratifiers of the Reconstruction Amendments.

Generally, the neglected history of abolition and the Reconstruction Amendments leaves a troubling void in American legal analysis, creating two distinct problems. First, this void affects the framing, retelling, and prioritization of legal narratives across canons, discourses, and disciplines in American law, constitutional law most obviously, but also criminal law, civil procedure, contracts, property, torts, and family law—to name but a few. As such, *Dred Scott v. Sanford* is recorded as a tragic story about an enslaved Black man’s quest for freedom and an odious opinion written by Chief Justice Taney. Both are true. However, *Dred Scott* should also be as a case about family ties and connections. By erasing Mr. Scott’s family, he becomes a less complex character in the American drama about slavery.

Second, the abandoned history of abolition in legal analysis serves to obscure women and girls, and their unique concerns and quests for

---

29 142 S. Ct. 2111 (2022).
30 60 U.S. 393 (1857).
31 See PAUL FINKELMAN, SUPREME INJUSTICE: SLAVERY IN THE NATION’S HIGHEST COURT 172-219 (2018) (explaining in the chapter Roger B. Taney: Slavery’s Great Chief Justice, that “no other justice was like Roger Taney. At the time of his death in October 1864 he was denounced and vilified.”); Sol Wachtler, *Dred Scott: A Nightmare for the Originalists*, 22 Touro L. Rev. 575, 593 (2006) (explaining that “[i]n the Dred Scott case, a slave was taken into free territory and then returned to a slave state. The slave claimed that once in free territory, he should be free forever.”); Isabel Paterson, *The Riddle of Chief Justice Taney in the Dred Scott Decision*, 3 Georgia L. Rev. 192, 192 (1949) (offering a compelling reading about the case, but bearing no mention of Harriet or the Scott daughters, “It was indeed, eight years since the plea of the Negro Dred Scott had first been entered in any court. Briefly, the case was this: Dred Scott was born in slavery in Virginia . . . Years afterward, he brought suit in St. Louis . . . for his liberty, claiming that his residence in Illinois had freed him by virtue of the state constitution . . . ”); Michael A. Schoepner, *Status Across Borders: Roger Taney, Black British Subjects, and a Diplomatic Antecedent to the Dred Scott Decision* 100 J. Am. Hist. 46, 46 (2013) (noting that Justice Taney also “deduced that black Britons were not protected by existing Anglo-American treaties and that Great Britain had no power to compel the United States to guarantee their free entry and movement.”). But see, Charles Noble Gregory, *A Great Judicial Character, Roger Brooke Taney*, 18 Yale L. J. 10, 21 (1908) (“He was seventy-nine years old when he wrote the opinion, and that he should seek to crystallize the views of the past, rather than the feeling of the present or the conviction of the future, was natural to his age and his origin. At a like age we will be equally incapable of changing our views as to the ownership in horses and cattle if the world, in its advance, ever recognizes, as I sometimes hope it will, their inalienable rights.”).
freedom. That is, Mr. Scott sought not only his freedom but that of his wife, Harriet Robinson Scott, and daughters, Eliza and Lizzie Scott.\textsuperscript{32} Indeed, Eliza, born in October 1838, was delivered on the steamboat Gipsey, between territories that prohibited slavery.\textsuperscript{33} \textit{Dred Scott}, recorded and retold in the absence of depth and rigor, renders his daughters and wife imperceptible, their claims to freedom and their hunger for liberation, invisible. \textit{What should readers make of that which is absent from the study of American law, save that, at some point, it became irrelevant to the stories (and people) we prioritize in American law and society?} 

On deeper inspection and resurrection of their case, Mr. and Mrs. Scott fought to keep their daughters literally \textit{free} and protected from the insatiable sexual grasps of American slavery,\textsuperscript{34} which normalized sexual violence in full view.\textsuperscript{35} Arresting advertisements from the Antebellum period serve as the backdrop and iconography to Mrs. Scott’s story and that of countless others:

\begin{quote}
\textit{“RUNAWAYS. The following negroes ran away or absconded from me on Friday last . . . a negro woman named Lina, about 18 years of age and her child named Mary, about 2 years old. . . . Mary is a bright mulatto child . . . .” } Advertisement, Republican Star, Oct. 15, 1811 (Easton, Maryland).
\end{quote}

\textsuperscript{32} See Lea VanderVelde & Sandhya Subramanian, \textit{Mrs. Dred Scott}, 106 YALE L. J. 1033, 1033-34 (1997) (noting that “[i]n the progression of American people toward freedom, the contributions of one person whose life was central to that struggle have long been ignored: Harriet Robinson Scott, ‘Mrs. Dred Scott.’” In fact, “Harriet Robinson Scott, his lawfully wedded wife . . . brought her own case for freedom, a case that was submerged in his,” however, “conventional history has relegated her life to a footnote.”)


\textsuperscript{34} See VanderVelde & Subramanian, supra note 32 at 1073 (Mrs. Harriet Scott “may have been primarily concerned with keeping her family intact. In addition, [she] may have experienced abuse . . . . Taken from her family of origin to the outer frontier of Fort Snelling at age fifteen or perhaps even earlier, Harriet may also have suffered the sexual abuse (from the soldiers or other men) that many enslaved women experienced and feared . . . .”).

\textsuperscript{35} Thomas Jefferson shrewdly calculated the gains to be made on his plantations. Arguably, he determined that the maximization of capital on his plantation resided at least in part on the sexual exploitation of the enslaved Black women on his plantation. In a letter to John Wayles Eppes on June 30, 1820, now archived at Monticello, 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.” And much like Jefferson, Eppes’ fathered six Black children, all whom were enslaved, including three Black girls. See Letter from Thomas Jefferson to John Wayles Epps (June 30, 1820) (archived at https://tjrs.monticello.org/letter/380 [https://perma.cc/G2JG-TM5Z]); \textit{Sexual Violence Targeting Black Women, EQUAL JUST. INITIATIVE, https://eji.org/report/reconstruction-in-america/the-danger-of-freedom/sidebar/sexual-violence-targeting-black-women [https://perma.cc/7ZV6-84RY]} (reporting that “[e]nslaved Black women had no legal means to resist or protect themselves from sexual assault by white slaveowners. As early as the 1830s, Black abolitionist Maria Stewart called for the law to recognize Black women as full humans with rights to control their bodies and to grant or withhold consent, but reality lagged far behind.”).
“Five Dollars Reward. Ranaway on Tuesday, the 13th . . . the subscriber’s NEGRO GIRL, named Maria, with her female Mullato Child about nine months old—Maria was lately the property of Dr. Thomas H. McCall . . . N.B. Captains of vessels and all others are forbid carrying said Wench off the state, as the law will be put in force against them.” Advertisement, City Gazette and Daily Advertiser, March 22, 1810. (Charleston, South Carolina) p. 3.

“For Sale or Exchange, a Young Healthy Negro wench & child . . . tis not convenient to have a breeding Wench in the family.” Advertisement, Virginia Chronicle, March 9, 1793.

“A NEGRO WENCH, named Margaret; has a Mulatto Child, and is at this time pregnant . . . Any person apprehending and delivering her to the Master of the Work-house . . . shall have Four Dollars.” Advertisement, City Gazette and Daily Advertiser, Aug. 6, 1799 (Charleston, South Carolina) p. 3.

“To be Sold at Private Sale, A small gang of NEGROES, nearly all young . . . consistent of fellows and fine breeding wenches...” Advertisement, City Gazette, March 5, 1794 (Charleston, South Carolina) p. 4.

“FOR SALE . . . A young likely NEGRO WENCH, with a healthy MULLATTO CHILD; She is a complete Washer, Irorer, and Seamstress. For particulars, apply to DAVIS & REID, Advertisement, City Gazette, Nov. 5, 1796 (Charleston, South Carolina) p. 4.

As these advertisements convey, baked in the story of American slavery and abolition is the story of sexual terrorism inflicted on Black girls and women, so troublingly normalized that the descriptors “breeding wench” and “mullato child” simultaneously read as mundane daily affairs and horrors.36

36 Inserted among the advertisements seeking the return of escaped Black girls and women are advertisements for the sale of insurance, the leasing homes, and notices regarding the dissolution of businesses. These are the advertisements and notices that surround that of “MARGERUM runaway.” In this posting, a reward of fifty dollars is offered for her return. See e.g., City Gazette and Commercial Daily Advertiser, 1, June 14, 1820 (Charleston, South Carolina).
Conclusion

In *Dobbs*, the Court has delivered a modern breed of *Plessy*. The majority offered an important rejoinder to the question of whether harmful precedents should ever be overturned, accurately pointing to several cases, chief among them, the Court’s landmark decision *Brown v. Board of Education*,\(^{37}\) which marked the Court’s reversal of its distressing holding in *Plessy v. Ferguson* and over five decades of “separate but equal” doctrine.\(^{38}\) Sadly, however, in this context, the Court’s invocation of *Plessy*—from which many lessons remain to be drawn\(^{39}\)—serves as troubling race-baiting. Justice Alito writes, “the Court repudiated the ‘separate but equal’ doctrine, which had allowed States to maintain racially segregated schools and other facilities. In doing so, the Court overruled the infamous decision in *Plessy* . . . [a] precedent[] that had applied the separate-but-equal rule.”\(^{40}\) In other words, *Plessy* serves as a smokescreen to obscure that in striking down *Roe*, the Court resuscitated the type of odious discrimination and inequality *Plessy* made possible.

In the aftermath of *Dobbs*, exercising reproductive bodily autonomy is permissible only in some states, while banned in others—a feature reminiscent of American slavery and Jim Crow. *Dobbs* results in a two-tiered legal system related to women’s bodily autonomy, and significant chaos and distress has ensued in its aftermath. *Dobbs* also signals that striking down odious, race-discriminatory laws may serve as a proxy for upholding sex-discriminatory laws, which will hurt women generally and women of color particularly, creating a new *Jane Crow* where there was once *Jim Crow*.

Surprisingly, the Court claims to have “engaged in a careful analysis of the history of the right at issue.”\(^{41}\) Yet, their effort and concern for the lives of the women most impacted are imperceptible.

\(^{38}\) *Plessy* served as an exhilarant on a raging legacy of racial discrimination and white supremacy in America. When the Court granted its imprimatur, discriminatory, Jim Crow laws emerged throughout the United States.163 U.S. 537 (1896).
\(^{40}\) See *Dobbs*, 142 S. Ct. at 226.
\(^{41}\) See *Dobbs*, 142 S. Ct. at 2246-47 (The Court claimed to consider one question in deciding whether abortion falls into a category the majority will recognize, “whether the right is ‘deeply rooted in [our] history and tradition’ and whether it is essential to our Nation’s ‘scheme of ordered liberty.’”).
PRESENT CHALLENGES