SMU Law Review Forum

Volume 75 Article 5

3-2022

Reproductive Originalism: Why the Fourteenth Amendment's Original Meaning Protects the Right to Abortion

David H. Gans
Constitutional Accountability Center

SMU Law Review Forum

Volume 75 March 2022 191-211

REPRODUCTIVE ORIGINALISM: WHY THE FOURTEENTH AMENDMENT'S ORIGINAL MEANING PROTECTS THE RIGHT TO ABORTION

David H. Gans[*]

I. INTRODUCTION

The conventional wisdom among conservative originalists is that *Roe v. Wade*[1] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[2] are abominable rulings unmoored from the text and history of the Constitution. In the eyes of conservative originalists, the Supreme Court "created the right to abortion out of whole cloth, without a shred of support from the Constitution's text."[3]

These so-called originalists are deeply misguided. As this Essay shows, the text and history of the Fourteenth Amendment, in fact, protect unenumerated fundamental rights, including rights to bodily integrity, to marry and have a family, and to reproductive liberty.[4] The right to abortion flows logically from these fundamental rights that the Fourteenth Amendment was written to protect.

* Director of the Human Rights, Civil Rights & Citizenship Program, Constitutional Accountability Center. For helpful comments and suggestions, I thank Praveen Fernandes, Brianne Gorod, Doug Pennington, Adam Winkler, and Elizabeth Wydra. Thanks to the editors of the *SMU Law Review Forum* for excellent editorial assistance.

1. 410 U.S. 113 (1973).
2. 505 U.S. 833 (1992).
3. June Med. Servs., LLC v. Russo, 140 S. Ct. 2103, 2142 (2020) (Thomas, J., dissenting).
4. Originalist arguments for the right to abortion are few and far between. The one I make here is distinctive from those existing in the scholarly literature. *See* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292 (2007) ("[L]aws criminalizing abortion violate the Fourteenth Amendment's principle of equal citizenship and its prohibition against class legislation."); Aaron Tang, The Originalist Case for an Abortion Middle Ground 1 (Dec. 17, 2021) (unpublished manuscript), https://ssrn.com/abstract=3921358 [https://perma.cc/XDQ9-LFAR] ("[A]s of both the founding and the Fourteenth Amendment's ratification, the public would have recognized a legal right to abortion any time prior to the moment of quickening . . . .").

The Supreme Court should recognize these Fourteenth Amendment first principles when it decides this Term's blockbuster case, *Dobbs v. Jackson Women's Health Organization*, a challenge to a Mississippi law banning abortions after fifteen weeks of pregnancy.[5]

This Essay makes two central claims. First, it shows that the original meaning of the Fourteenth Amendment broadly protects fundamental rights, including rights not specifically mentioned elsewhere in the four corners of the Constitution's text. Against the backdrop of the horrors of slavery, the Fourteenth Amendment drew on the Declaration of Independence's promise of inalienable rights and the Ninth Amendment's affirmation of individual rights not specifically enumerated in the text to safeguard the protection of basic personal rights inherent in liberty.[6] Accordingly, the fact that the Constitution does not explicitly list abortion as a protected right is irrelevant.

Indeed, many rights at the core of the debates over the Fourteenth Amendment were aspects of individual liberty not traceable to any specific guarantee found in the Bill of Rights or elsewhere in the Constitution. The framers of the Fourteenth Amendment recoiled at the treatment of enslaved families. Enslaved women were forced to bear children against their will; enslaved couples were denied the right to marry and often separated; and enslaved parents were systematically denied the rights to be fathers and mothers and regularly had their children taken from them. Against the backdrop of these cruel abuses, the Thirty-Ninth Congress wrote the Fourteenth Amendment to protect the full scope of liberty, guaranteeing basic rights of personal liberty and bodily integrity to all.[7]

Second, given this history, the Constitution is not "neutral" on abortion, as Justice Kavanaugh suggested during oral argument in *Dobbs*.[8] To the contrary, the text and history of the Fourteenth Amendment protect the right to abortion as a fundamental constitutional right. While the debates over the Fourteenth Amendment did not explicitly discuss abortion, there is no meaningful daylight between the rights specifically affirmed in the debates over the Fourteenth Amendment and the right to abortion. The rights to control one's body, establish a family, and have children—all deeply rooted in the Fourteenth Amendment's text and history—necessarily safeguard the right to abortion as a fundamental right. The Fourteenth Amendment guarantees an individual's free choice in matters of family and childbirth, including the choice not to bear a child, in the same way that the freedom of speech also includes the right not to speak.[9] Accordingly, the right to bear and raise children and the right to abortion are two

5. Dobbs v. Jackson Women's Health Org., No. 19-1392 (U.S. argued Dec. 1, 2021), https://www.supremecourt.gov/docket/docketfiles/html/public/19-1392.html [https://perma.cc/DP32-CHJF].

6. *See infra* Part II.

7. *See infra* Part III.

8. *See* Transcript of Oral Argument at 77, Dobbs v. Jackson Women's Health Org., No. 19–1392 (U.S. argued Dec. 1, 2021), 2021 WL 6051127.

9. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 1000 (1978) ("[R]espect for the integrity and autonomy of the individual usually requires giving each person at least veto power over the use of her own body and, similarly, over her own speech.").

sides of the same coin—both an integral part of reproductive freedom.[10]

Understanding the true meaning of the Fourteenth Amendment is now more important than ever with the right to abortion under concerted attack by a deeply conservative Supreme Court. Oral argument in *Dobbs* confirmed what has been implicit since the Supreme Court permitted Texas's six-week ban on abortion to take effect without even holding oral argument[11]: *Roe* may not survive this Term at the Supreme Court. During oral argument in *Dobbs*, the Court's conservative Justices repeatedly compared *Roe* to *Plessy v. Ferguson*, the case that blessed Jim Crow segregation,[12] and suggested that the Court should preserve what Justice Kavanaugh called "a position of neutrality" by leaving the issue for state legislatures to decide, unconstrained by judicial review.[13] Justice Barrett repeatedly intimated that there is no constitutional problem with forcing women to carry their pregnancies to term because they can simply surrender their children at birth.[14] With *Roe* on the line, it is more important than ever to focus on the Fourteenth Amendment's first principles. Stare decisis will not save *Roe* this time.[15] The case for protecting the right to abortion must be made on the basis of the Fourteenth Amendment's text and history.

This Essay proceeds as follows. Part II examines the text and history of the Fourteenth Amendment and shows that its authors wrote the provision to broadly protect fundamental rights, including rights not enumerated elsewhere in our nation's charter. Part III demonstrates that the right to control one's body, establish a family, and decide whether to bear children lie at the core of the Fourteenth Amendment's text and history. The right to abortion flows seamlessly from the substantive fundamental rights the Fourteenth Amendment was designed to protect. Part IV addresses claims for fetal personhood. It demonstrates that a fetus is not a person within the meaning of the Constitution and that history undercuts any notion that the government has a compelling interest in protecting "potential life throughout pregnancy."[16] A short conclusion follows.

10. *See* Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. PA. L. REV. 83, 95–97 (1989).

11. Whole Woman's Health v. Jackson, 141 S. Ct. 2494 (2021) (refusing to vacate stay of injunction); Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2022) (finding challenge to state abortion ban largely foreclosed by sovereign immunity). As Justice Sotomayor observed, "[t]he Court's order is stunning. Presented with an application to enjoin a flagrantly unconstitutional law engineered to prohibit women from exercising their constitutional rights and evade judicial scrutiny, a majority of Justices have opted to bury their heads in the sand." *Whole Woman's Health*, 141 S. Ct. at 2498 (Sotomayor, J., dissenting).

12. 163 U.S. 537, 544, 551–52 (1896).

13. Transcript of Oral Argument, *supra* note 8, at 77, 80, 92–95.

14. *See id.* at 56–58, 109.

15. *See* Melissa Murray, *The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308, 310 (2020) (observing that "stare decisis is the alpha and the omega of the Supreme Court's abortion jurisprudence").

16. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992).

II. THE FOURTEENTH AMENDMENT'S PROTECTION OF UNENUMERATED FUNDAMENTAL RIGHTS

The Fourteenth Amendment was the culmination of a decades-long struggle to erase the stain of slavery from our national charter, broadly guarantee equal citizenship stature, and redress the suppression of fundamental rights.[17] For my purposes here, the most important takeaway from the Fourteenth Amendment's text and history is that the Amendment's sweeping protections broadly guarantee fundamental rights and are not limited in any way to those rights explicitly listed elsewhere in the Constitution's four corners.

The Fourteenth Amendment fundamentally altered our Constitution's protection of individual, personal rights by establishing new limits on state governments in order to secure "the civil rights and privileges of all citizens in all parts of the republic,"[18] and to keep "whatever sovereignty [a state] may have in harmony with a republican form of government and the Constitution of the country."[19] Central to that task was the protection of the full range of personal, individual rights essential to liberty. To achieve these ends, in Section 1 of the Fourteenth Amendment, the framers chose sweeping language specifically intended to protect the full panoply of fundamental rights and safeguard equal citizenship stature:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[20]

Section 1's overlapping guarantees were adopted to "forever disable every one of [the states] from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction."[21] "The great object of the first section of th[e] amendment," Senator Jacob Howard explained in introducing the Amendment in the Senate, was "to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[22] The Fourteenth Amendment wrote into the Constitution the idea that "[e]very human being in the country, black or white, man or woman, . . . has a right to be protected in life, in property, and in liberty."[23] In this way, Section 1 "gives to the humblest, the poorest, the most despised of the race the same rights and the

17. *See generally* JACK M. BALKIN, LIVING ORIGINALISM 220–73 (2011); ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019); RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER & SPIRIT (2021).

18. *See* JOINT COMM. ON RECONSTRUCTION, 39TH CONG., REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, at xxi (1866).

19. CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866).

20. U.S. CONST. amend. XIV, § 1.

21. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

22. *Id.*

23. *Id.* at 1255.

same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty."[24] The Amendment "made the liberty and rights of every citizen in every State a matter of national concern[,]" making the United States into a "republic of equal citizens."[25]

The Fourteenth Amendment's broad guarantee of fundamental rights drew upon the inalienable rights proclaimed by the Declaration of Independence and the Ninth Amendment's textual recognition that the Constitution protects individual rights not specifically enumerated in the Constitution's text.[26] The Fourteenth Amendment aimed to protect the inalienable rights laid out in the Declaration,[27] ensuring the "new birth of freedom" President Abraham Lincoln had promised at Gettysburg.[28]

Indeed, the principles at the heart of the Declaration were repeatedly cited as forming the core of the Fourteenth Amendment. Decades of suppression of fundamental rights convinced the framers of the Fourteenth Amendment that "slavery, and the measures designed to protect it, were irreconcilable with the principles of equality, government by consent, and inalienable rights proclaimed by the Declaration of Independence and embedded in our constitutional structure."[29]

In the House debates over the Amendment, Representative Thaddeus Stevens quoted Section 1 and explained that its guarantees "are all asserted, in some form or other, in our DECLARATION or organic law."[30] In the Senate debates, Senator

24. *Id.* at 2766.

25. CONG. GLOBE, 41st Cong., 2d Sess. 3608 (1870); *see also* BALKIN, *supra* note 17, at 198 (explaining that the overlapping guarantees of Section 1 "together . . . were designed to serve the structural goals of equal citizenship and equality before the law").

26. *See* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 2 (2006) (explaining that the Ninth Amendment "seems explicitly to affirm that persons have other constitutional rights beyond those enumerated in the first eight Amendments").

27. The Privileges or Immunities Clause was the part of the Fourteenth Amendment's text designed to safeguard fundamental personal rights, but it never was allowed to play that critical role because the Supreme Court effectively nullified the Clause in the *Slaughter-House Cases*, 83 U.S. 36 (1872). As a result, for more than a century, the Supreme Court has enforced the original meaning of the Fourteenth Amendment by broadly interpreting the Due Process Clause to protect substantive liberties. *See, e.g.*, McDonald v. City of Chi., 561 U.S 742, 758 (2010) (adopting a broad reading of the Due Process Clause rather than reviving the Privileges or Immunities Clause); Timbs v. Indiana, 139 S. Ct. 682, 691 (2019) (Gorsuch, J., concurring) (agreeing that "regardless of the precise vehicle," the Fourteenth Amendment protects substantive fundamental rights).

28. Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), *in* 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 23 (Roy P. Basler ed., 1953).

29. *McDonald*, 561 U.S. at 807 (Thomas, J., concurring in part and concurring in judgment); *see also* William E. Forbath, *Lincoln, The Declaration, and the "Grisly, Undying Corpse of States' Rights": History, Memory and Imagination in the Constitution of a Southern Liberal*, 92 GEO. L.J. 709, 735-36 (2004) ("The idea that Section 1 incorporated or wrote into law the principles of the Declaration is one that historians . . . have found running through the discourse of Republicans of all stripes—radical, moderate, and conservative—in Congress and in the ratifying conventions."); Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, the Bill of Rights, and Fourteenth Amendment*, 66 TEMPLE L. REV. 361, 385 (1993) ("Throughout their deliberations, the Republicans reiterated the theme that the Founders had omitted the Declaration's principles from the Constitution because of slavery, and that those principles must now become the supreme law of the land.").

30. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866); *see also* CONG. GLOBE, 39th Cong.,

Luke Poland pointed out that the Amendment's overlapping guarantees represented "the very spirit and inspiration of our system of government" and were "essentially declared in the Declaration of Independence."[31] In short, as Schuyler Colfax boasted, the Fourteenth Amendment would be "the gem of the Constitution" because "it is the Declaration of Independence placed immutably and forever in our Constitution."[32] Discussion of the Amendment in the press, too, stressed the necessity of restoring the full protection of liberty promised in the Declaration. The people of the nation—as one author writing in the *New York Times* explained—"demand and will have protection for every citizen of the United States, everywhere within the national jurisdiction—*full and complete protection* in the enjoyment of life, liberty, property, the pursuit of happiness."[33]

The debates about the Fourteenth Amendment also made explicit that the Amendment reflected the Ninth Amendment's recognition that no enumeration of specific rights could possibly be exhaustive.[34] As Senator Jacob Howard explained in his famous speech introducing the Fourteenth Amendment, the fundamental rights of Americans "cannot be fully defined in their entire extent and precise nature."[35] Senator James Nye invoked the Ninth Amendment to explain that constitutionally guaranteed rights could not be cabined to rights enumerated in the Constitution's four corners. He observed that, "[i]n the enumeration of natural and personal rights to be protected, the framers of the Constitution apparently specified everything they could think of."[36] Then "lest something essential . . . be[] overlooked, it was provided in the ninth amendment that 'the enumeration in the Constitution of certain rights should not be construed to deny or disparage other rights not enumerated.'"[37] Senator Nye went on: "This amendment completed the document. It left no personal or natural right to be invaded or impaired by construction. All these rights are established by the fundamental law."[38]

In short, the framers of the Fourteenth Amendment embraced the idea that the amendments that comprise the Bill of Rights "do not define all the rights of

1st Sess. 2510 (explaining that the Due Process and Equal Protection Clauses are "so clearly within the spirit of the Declaration of Independence" that "no member of this House can seriously object to [them]").

31. CONG. GLOBE, 39th Cong., 1st Sess. 2961.

32. Speech of Rep. Schuyler Colfax (R-IN), Indianapolis, IN (Aug. 7, 1866), *in* 2 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS 257 (Kurt T. Lash ed., 2021).

33. Madison, *The National Question: The Constitutional Amendments—National Citizenship*, N.Y. TIMES, Nov. 10, 1866, at 2, https://timesmachine.nytimes.com/timesmachine/1866/11/10/83463331.html?pageNumber=2.

34. *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 158 (2012) ("[A]ny textual mention of . . . the Bill of Rights would have fallen far short of the Reconstruction Republicans' goal of ensuring state obedience to *all* fundamental rights, freedoms, privileges, and immunities of Americans."); BARNETT & BERNICK, *supra* note 17, at 208 (noting wealth of "pre- and post- ratification evidence of Republicans representing the [Privileges or Immunities] clause as encompassing rights that cannot fairly be described as 'enumerated'"); BALKIN, *supra* note 17, at 196 (noting that "many" of the privileges and immunities of citizenship discussed in the debates "were unenumerated").

35. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

36. *Id.* at 1072.

37. *Id.*

38. *Id.*

American citizens. They define some of them."[39] As Senator John Sherman explained, "[t]he Constitution itself amply secures some of the rights of American citizens, but the [N]inth [A]mendment expressly provides that—'[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.'"[40] Indeed, there is "no evidence that *any* Republican articulated an enumerated-rights-only theory prior to the ratification of the Fourteenth Amendment."[41]

The framers were not alone in looking to the Declaration and the Ninth Amendment for guidance. By 1868, when the Fourteenth Amendment was ratified, twenty-seven states (of the thirty-seven states then in the Union) had inserted into their own state constitutions provisions that guaranteed the protection of fundamental, inalienable rights, many tracking the words of the Declaration.[42] By 1868, eighteen states had inserted into their state constitutions Ninth Amendment analogues, which provided that the enumeration of certain rights "should not be construed to deny others retained by the people."[43] Thus, at the time of the ratification of the Fourteenth Amendment, the idea that individuals possessed individual, personal rights that were not explicitly enumerated in a constitutive charter was commonplace.

What unenumerated rights are protected under an originalist reading of the Fourteenth Amendment? The next Section sketches a partial answer. While a comprehensive analysis of the full sweep of the Fourteenth Amendment's protection of all fundamental rights is beyond the scope of this Essay, the evidence demonstrates that the Fourteenth Amendment safeguards rights to bodily integrity, to marry, to have a family, and to reproductive liberty.

III. *ROE*'S ROOTS: BODILY INTEGRITY, THE RIGHT TO A FAMILY, AND REPRODUCTIVE FREEDOM

The Fourteenth Amendment's protection of fundamental rights and equal citizenship did not emerge out of a vacuum. It was directly responsive to the horrific abuses of slavery.[44] Against the backdrop of slavery's systematic denial of basic liberties, the framers of the Fourteenth Amendment sought to safeguard a number of fundamental rights that have no explicit textual basis in the Bill of Rights, but that were crucial to liberty, equality, and equal citizenship stature. Two particular sets of rights are crucial to understanding why the Fourteenth Amendment safeguards the right to abortion: (1) bodily integrity, and (2) a set

39. CONG. GLOBE, 42d Cong., 2d Sess. 843 (1872).

40. *Id.*

41. BARNETT & BERNICK, *supra* note 17, at 211.

42. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 88 (2008); Steven G. Calabresi & Sofía M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299, 1303 (2015) ("[I]n 1868, approximately 67% of all Americans then living resided in states that constitutionally protected unenumerated individual liberty rights.").

43. Calabresi & Agudo, *supra* note 42, at 89.

44. *See supra* Part II.

of fundamental rights—which might be called rights of heart and home—that safeguards the right to marry a loved one, to establish a family, and to decide whether to bear and raise children. This section examines the Fourteenth Amendment's protection of these inalienable rights, which are at the core of the right to abortion.

The right to bodily integrity, the right to marry and to have a family and the right to reproductive freedom all flow out of the Fourteenth Amendment's promise of freedom. These rights mark what it means to be free and equal—not enslaved.

The right of bodily integrity has a long heritage as a core aspect of liberty. The framers of the Fourteenth Amendment called bodily integrity the "right of personal security," and the evidence demonstrates that they considered it one of the fundamental natural rights of individuals.[45]

Steeped in the writing of William Blackstone, the framers of the Fourteenth Amendment frequently invoked a trilogy of fundamental rights as inherent in freedom and citizenship: personal security, personal liberty, and private property. During the debates in the Thirty-Ninth Congress, Representative William Lawrence explained that "there are some inherent and inalienable rights, pertaining to every citizen, which cannot be abolished or abridged by State constitutions or laws," including the "right to live, the right of personal security, personal liberty, and the right to acquire and enjoy property."[46] These were, Senator Lyman Trumbull argued, "inalienable rights, belonging to every citizen of the United States, as such, no matter where he may be."[47] Personal security was synonymous with bodily integrity. Personal security, as defined by Blackstone, included a person's "uninterrupted enjoyment of his life, his limbs, his body, [and] his health."[48] By guaranteeing personal liberty and security as basic rights, the Fourteenth Amendment vindicated the abolitionists' claims that "[t]he right to enjoy liberty is inalienable" and that every person "has a right to his own body."[49] The Fourteenth Amendment ensured that the individual is "the rightful owner of his own body," safeguarding the right to bodily integrity championed by Frederick Douglass and others.[50]

Indeed, any conception of liberty that excluded bodily integrity would have permitted some of the worst abuses of slavery to continue. Slavery represented

45. CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866).

46. *Id.* at 1832–33.

47. *Id.* at 1757.

48. *Id.* at 1118.

49. William Lloyd Garrison, Am. Anti-Slavery Soc'y, *Declaration of Sentiments of the National Anti-Slavery Convention (1833)*, *in* ANTISLAVERY POLITICAL WRITINGS, 1833–60: A READER 43 (C. Bradley Thompson ed., 2004).

50. FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 208 (Phillip S. Foner ed. 1999) ("It is a fundamental truth that every man is the rightful owner of his own body."); Declaration of Rights and Wrongs, PROCEEDINGS OF THE COLORED PEOPLE'S CONVENTION OF SOUTH CAROLINA, HELD IN ZION CHURCH, CHARLESTON, NOVEMBER, 1865, at 27 (1865) ("We have been deprived of our natural rights, . . . which consist[] of personal liberty, the right to be free in our persons, and the right of personal security and protection against injuries to our body and good name. . . . [O]ur bodies have been outraged with impunity.").

the ultimate violation of bodily integrity.[51] Enslaved persons lacked any control of their bodies: they could be beaten, whipped, or tortured at their owner's whim, sold to another, and forced to submit to their owner's will.[52] In the wake of the Civil War, white-dominated state governments enacted Black Codes to criminalize Black freedom and subject those newly freed from bondage to brutal whippings.[53] "What kind of freedom," Senator Lyman Trumbull asked, "is that which the Constitution of the United States guaranties to a man that does not protect him from the lash if he is caught away from home without a pass?"[54] White police officers engaged in a campaign of unending violence against Black people, killing, raping and brutalizing those newly freed from enslavement.[55] To ensure true freedom and prevent the subjugation of Black people required, at a minimum, safeguarding control over one's person or body as a basic right.[56] Without bodily integrity, the Fourteenth Amendment's promise of equal citizenship would be illusory.

The right to marry, establish a family, and choose whether to bear and raise children all grow out of the basic efforts to define what it means not to be enslaved—to be free. At the time of the drafting and ratification of the Fourteenth Amendment, these rights were widely understood as inherent in freedom and critical to human dignity and flourishing.

One of the cruelest aspects of slavery was the horrific denial of reproductive autonomy and free choice in matters of family life.[57] Plantation owners forced enslaved women to bear children who would be born into bondage. Rape and other forms of coerced procreation enabled the growth of the institution of slavery, even after the international slave trade was outlawed in 1808.[58] "Slavery is terrible for men," wrote Harriet Jacobs in the 1861 narrative of her enslavement, "but it is far more terrible for women."[59] Jacob's autobiography,

51. *See* Seth F. Kreimer, *Rejecting "Uncontrolled Authority Over the Body": The Decencies of Civilized Conduct, the Past and Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 423, 448 (2007) ("[S]lavery, abhorred as the antithesis of free citizenship from the outset . . . was defined by the 'uncontrolled authority over the body of the slave.'") (quoting State v. Mann, 13 N.C. (2 Dev.) 263, 266 (1829)).

52. *See, e.g.*, RANDALL KENNEDY, RACE, CRIME AND THE LAW 77 (1998).

53. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 198–202 (Henry Steele Commager & Richard B. Morris eds., updated ed. 2014).

54. CONG. GLOBE, 39th Cong., 1st Sess. 941–42 (1866).

55. David H. Gans, *"We Do Not Want to Be Hunted": The Right to be Secure and Our Constitutional Story of Race and Policing*, 11 COLUM. J. RACE & L. 239, 279-84 (2021).

56. *Id.* at 290 ("The Fourteenth Amendment struck at centuries of history that permitted Black bodies to be violated indiscriminately, and instead promised personal security to all.").

57. DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 24 (2d ed. 2017); Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2034 (2021) (describing the "absence of sexual autonomy" possessed by enslaved persons and their "knowledge that their children were not their own and could be sold away from them").

58. DAINA RAMEY BERRY, THE PRICE FOR THEIR POUND OF FLESH: THE VALUE OF THE ENSLAVED, FROM WOMB TO GRAVE, IN THE BUILDING OF A NATION 13 (2017) (noting that the abolition of the slave trade "shifted the source" of enslaved persons from the international slave trade "to the natural, coerced, encouraged, and forced reproduction of enslaved women").

59. HARRIET JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL 119 (Boston, L. Maria Child ed. 1861).

as Henry Louis Gates writes, demonstrated how enslaved women were treated as "object[s] to be raped, bred, or abused."[60] By the middle of the nineteenth century, as Stephanie Jones-Rogers has shown, "slave owners prized enslaved females of childbearing age" who could be "forced . . . to engage in nonconsensual sex with enslaved men" to perpetuate the institution of slavery.[61]

Not only were enslaved persons coerced into bearing children but enslaved persons in loving relationships had no right to marry or raise and care for their own children.[62] A spouse or a child could be sold on a whim, and untold numbers were. As Frederick Douglass wrote, "One word of the appraisers, against all preferences and prayers, could sunder all the ties of friendship and affection, even to separating husbands and wives, parents and children."[63] Indeed, such family separations were endemic to slavery: About one half of enslaved persons sold on the interstate market were forced to leave behind a spouse or a parent.[64]

These brutal abuses were part and parcel of the abolitionist critique of slavery that had a powerful influence on the framing of the Fourteenth Amendment.[65] Abolitionists maintained that enslaved persons "enjoy no constitutional nor legal protection from licentious and murderous outrages upon their persons; and are ruthlessly torn asunder—the tender babe from the arms of its frantic mother—the heartbroken wife from her weeping husband—at the caprice or pleasure of irresponsible tyrants."[66] It was a common refrain in abolitionist thought that "American slavery, both in theory and practice[,] is nothing but a system of *tearing asunder the family ties*" designed to produce untold wealth through the "*breeding of slaves*."[67] Frederick Douglass, in a trenchant letter to his former owner, wrote:

60. Henry Louis Gates Jr., *To Be Raped, Bred or Abused*, N.Y. TIMES BOOK REV., Nov. 22, 1987, at 12, https://timesmachine.nytimes.com/timesmachine/1987/11/22/551687.html?pageNumber=97.

61. STEPHANIE E. JONES-ROGERS, THEY WERE HER PROPERTY: WHITE WOMEN AS SLAVE OWNERS IN THE AMERICAN SOUTH 20–21 (2019).

62. FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS, *supra* note 50, at 32 ("What is to be thought of a nation boasting its liberty . . . and yet having within its borders three millions of persons denied by law the right of marriage?"); ROBERTS, *supra* note 57, at 33 ("The domination of slave women's reproduction continued after their children were born. Black women in bondage were systematically denied the rights of motherhood."); PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 91 (1998) (observing that "the denial of parental ties . . . touched each enslaved person at the moment of birth, imposing a social construction by which s/he would be defined as a commodity rather than as the child of a family, community, and nation").

63. FREDERICK DOUGLASS, LIFE AND TIMES OF FREDERICK DOUGLASS 118 (Boston, De Wolfe, Fiske & Co. 1892).

64. ANTHONY GENE CAREY, SOLD DOWN THE RIVER: SLAVERY IN THE LOWER CHATTAHOOCHEE VALLEY OF ALABAMA AND GEORGIA 51 (2011) ("About one-quarter of slaves traded across regions were between eight and fifteen years of age, and about one-half of all slaves enmeshed in the interstate trade were separated from spouses or parents."); HERBERT G. GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750–1925, at 318 (1976) (presenting evidence that "one in six (or seven) slave marriages were ended by force or sale").

65. Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 54 (2019) ("The abolition struggle profoundly shaped not only the specific language of the Reconstruction Amendments but also the very meaning of those constitutional principles.").

66. Garrison, *supra* note 49, at 43.

67. *The Disruption of Family Ties*, 2 ANTISLAVERY REC. 9 (Mar. 1836).

> [A] slaveholder never appears to me so completely an agent of hell, as when I think of and look upon my dear children. . . . I remember the chain, the gag, the bloody whip; the death-like gloom overshadowing the broken spirit of the fettered bondman; the appalling liability of his being torn away from wife and children, and sold like a beast in the market.[68]

In her celebrated novel *Uncle Tom's Cabin,* Harriet Beecher Stowe offered a redefinition of freedom in light of the horrific denials of family integrity and dignity to enslaved persons, presaging the changes the Thirteenth and Fourteenth Amendments would make to our constitutional order:

> To your fathers, freedom was the right of a nation to be a nation. To [one enslaved], it is the right of a man to be a man, and not a brute; the right to call the wife of his bosom his wife, and to protect her from lawless violence; the right to protect and educate his child; the right to have a home of his own, a religion of his own, a character of his own, unsubject to the will of another.[69]

In short, central to the abolitionist project was the idea that, as Jill Hasday has put it, "[s]lavery's desecration of familial bonds was a distinct injustice that demanded rectification in its own right."[70]

The Reconstruction framers first sought to restore the fundamental rights long denied to enslaved persons by ratifying the Thirteenth Amendment and abolishing chattel slavery. The Thirteenth Amendment aimed to redress the reality that those held in bondage "could not say my home, my father, my mother, my wife, my child, my body."[71] Upon ratification, Senator Henry Wilson exclaimed, "[T]he sharp cry of the agonizing hearts of severed families will cease to vex the weary ear of the nation," and "the hallowed family relations of husband and wife, parent and child, will be protected."[72] In response to slaveholders' claims that they had vested rights that could not be abrogated even by a constitutional amendment, Representative John Farnsworth pointedly responded, "What vested rights so high or so sacred as a man's right to himself, to his wife and children, to his liberty, and to the fruits of his own industry? Did not our fathers declare that those rights were inalienable?"[73] The framers of the Thirteenth Amendment regarded "the rights of a husband to his wife—the marital relation; the right of a father to his child—the parental relation; and the right of a man to the personal liberty with which he was endowed by nature and by God" as "great fundamental natural rights" which "you cannot take away."[74]

68. FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 426 (New York, Miller, Orton & Co. 1857).

69. HARRIET BEECHER STOWE, 2 UNCLE TOM'S CABIN; OR, LIFE AMONG THE LOWLY 234 (Boston, John P. Jewett & Co. 1852).

70. Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1332 (1998).

71. CONG. GLOBE, 38th Cong., 2d Sess. 120 (1865).

72. CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864).

73. CONG. GLOBE, 38th Cong., 2d Sess. 200 (1865).

74. *Id.* at 193.

The abolition of chattel slavery proved insufficient to this task. Almost immediately, white Southern governments sought to hollow out the meaning of freedom and turn liberty into a "solemn mockery" by denying Black people practically every aspect of freedom enjoyed by white persons, including the right to marry and the right to have a family.[75] State after state enacted Black Codes, which included discriminatory state laws that forced Black people to marry the person with whom they were then living and allowed the state to seize Black children and force them into apprenticeships—enslavement in another guise.[76] Rather than being nurtured by their parents and enjoying the opportunity to play, no Black child was "safe for one moment from a compulsory serfdom."[77] Whites who had accumulated untold wealth by enslaving Black people simply refused to respect that Black people and their families were free. As one Mississippi former-slaveholder told the Joint Committee of Reconstruction in the course of its investigations that would inform the drafting of the Fourteenth Amendment: "As to recognizing the rights of freedmen to their children, I will say there is not one man or woman in all the South who believes they are free, but we consider them as stolen property—stolen by the bayonets of the damnable United States government."[78]

These experiences convinced Congress that specific safeguards of fundamental rights were necessary to secure true freedom, equality, and equal citizenship stature. Beginning in late 1865, the Thirty-Ninth Congress spent months arguing over the meaning of freedom in order to safeguard the "inherent, fundamental rights" that "belong[] to every citizen of the United States, as such, no matter where he may be."[79] These debates, which initially focused on the Freedman's Bureau Act and the Civil Rights Act of 1866, convinced the Thirty-Ninth Congress that it was necessary to add to the Constitution new guarantees to "permanently secur[e]" bedrock "constitutional right[s] that cannot be wrested from any class of citizens, or from the citizens of any State by mere legislation."[80] My purpose here is not to detail these rich debates—which have been deeply mined in the scholarship[81]—or to give a full accounting of the rights

75. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1160 (1866).

76. *Id.* at 589, 1160.

77. CONG. GLOBE, 39th Cong., 1st Sess. 93 (1865); O.O. HOWARD, WAR DEP'T, BUREAU OF REFUGEES, FREEDMAN, AND ABANDONED LANDS, REPORT OF THE COMMISSIONER OF THE BUREAU OF REFUGEES, FREEDMEN AND ABANDONED LANDS, at 41 (1867) ("Not a day passes but my office is visited by some poor woman who has walked perhaps ten or twenty miles to see the agent of the bureau, and try to procure the release of her children taken forcibly away from her and held to all intents and purposes in slavery.").

78. JOINT COMM. ON RECONSTRUCTION, *supra* note 18, pt. III, at 31. Black parents answered these claims of theft by insisting on their inalienable rights as parents. As one Black solider poignantly wrote to his former owner, "you say I tried to steal to plunder my child away from you[,] now I want you to understand that mary is my Child and she is a God given rite of my own . . . ." FAMILIES & FREEDOM: A DOCUMENTARY HISTORY OF AFRICAN-AMERICAN KINSHIP IN THE CIVIL WAR ERA 196 (Ira Berlin & Leslie S. Rowland eds. 1997).

79. CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866).

80. *Id.* at 1095.

81. *See, e.g.*, BARNETT & BERNICK, *supra* note 17, at 109–205; AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 163–215 (1998); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 57–92 (1986).

deeply rooted in the Fourteenth Amendment's text and history, but to demonstrate that what I call rights of heart and home—the right to marry a loved one, to establish a family, and to decide whether to bear and raise children—were deeply embedded in the Fourteenth Amendment framers' understanding of liberty and equal citizenship.

The through line in the debates over the Freedman's Bureau Act, the Civil Rights Act of 1866, and the Fourteenth Amendment was the idea that true freedom would be impossible without securing those freed from enslavement the right "to be protected in their homes and family," as Senator John Sherman put it in the opening days of the Thirty-Ninth Congress.[82] Because reproductive freedom and family life were impossible "[w]here the wife is the property of the husband's master, and may be used at will; where children are bred, like stock, for sale[,]" Representative Thomas Eliot argued, "no act of ours can fitly enforce their freedom that does not contemplate for them the security of home."[83] The denial of these basic rights under slavery provided an invaluable lesson about the meaning of freedom: decisions about marriage, family, and reproduction had to be left to the individual, not coerced by the government or subject to the brutal domination of another. The Fourteenth Amendment secured these rights to protect individual liberty, dignity, and autonomy.

Senator Jacob Howard, who played a central role in drafting the Fourteenth Amendment, eloquently spoke to how enslaved persons had been robbed of their dignity and stripped of their right to marry a loved one, start a family according to their desires, or enjoy reproductive freedom. An enslaved person, Senator Howard told Congress, "had not the right to become a husband or a father in the eye of the law, he had no child, he was not at liberty to indulge the natural affections of the human heart for children, for wife, or even for friend."[84] He urged that the "attributes of a freeman according to the universal understanding of the American people" include "the right of having a family, a wife, children, home."[85] "What definition," he asked, "will you attach to the word 'freeman' that does not include these ideas?"[86] The rights to marry, to establish a home, and to choose whether to bear and raise children were all rights universally understood to be a core part of liberty and essential to equal citizenship. Rejecting a reality in which Black people had no choice in the composition of their own families, the Fourteenth Amendment guaranteed the rights to choose to have a family and whether or not to bear and raise children as a matter of basic dignity, autonomy, and equal citizenship.

82. CONG. GLOBE, 39th Cong., 1st Sess. 42 (1865).

83. CONG. GLOBE, 39th Cong., 1st Sess. 2779 (1866).

84. *Id.* at 504.

85. *Id.* at 343, 504 ("[T]he poor man, whose wife may be dressed in a cheap calico, is as much entitled to have her protected by equal law as is the rich man to have his jeweled bride protected by the laws of the land[.]"); Governor O.P. Morton, Speech of Governor Morton, at Anderson, Madison County, Ind. (Sept. 22, 1866), *in* CINCINNATI COMMERCIAL: SPEECHES OF THE CAMPAIGN OF 1866, IN THE STATES OF OHIO, INDIANA AND KENTUCKY 35 (1866) ("We say that the colored man has the same right to enjoy his life and property, to have his family protected, that any other man has.").

86. CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866).

Turning a blind eye to this text and history, Justice Kavanaugh suggested during oral argument in *Dobbs* that the Constitution is studiously neutral concerning whether states respect the bodily integrity and life and familial choices of those who seek to access abortion care or instead force them to carry their pregnancies to term, including all the physical burdens and risks and life-altering consequences that entails.[87] And Justice Barrett, taking a truly cramped view of the right to bodily integrity the Fourteenth Amendment guarantees, suggested that the Constitution permits pregnant citizens to be forced to bear children against their will.[88]

Although neither justice put it quite this way at argument, one might argue that the text and history of the Fourteenth Amendment are silent on abortion, even if they are not silent on the broader right to bodily integrity and family choice. But that ignores that the rights to control one's body, establish a family, and bear and raise children of one's own necessarily safeguard the right to abortion as a fundamental right. The right to access abortion care is protected because it is inextricably intertwined with the rights to control one's body, to determine the shape of one's family, and choose whether to bear and raise children. In other words, the right to abortion flows from the specific rights the Fourteenth Amendment was designed to safeguard. There is no principled basis for drawing a dividing line between the rights to bodily integrity and reproductive freedom at the core of the Fourteenth Amendment's text and history and the right to abortion.[89]

The fundamental rights of bodily integrity and reproductive freedom protect both the right to bear children and the right not to bear children. In our constitutional heritage, laws that prohibit abortion and those that compel abortion are equally offensive to bodily integrity, autonomy, and equal dignity. Numerous other constitutional rights work in exactly the same fashion.[90] The right to freedom of speech includes the right not to be compelled by the government to speak,[91] the right of association includes the freedom to exclude nonbelievers from an association,[92] the right to the free exercise of religion prohibits the government from coercing religious belief on nonbelievers,[93] and

87. *See* Transcript of Oral Argument, *supra* note 8, at 76–80.

88. *See id.* at 56–58.

89. Opponents of *Roe* have argued that the right to abortion is different from other constitutionally guaranteed rights because it "necessarily involves the destruction of the fetus." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 952 (1992) (Rehnquist, C.J., concurring in part and dissenting in part). But, as Walter Dellinger and Gene Sperling observe, "this is not an argument about whether there is a fundamental right involved, but whether the state's asserted interest in potential life should constrain or override that right." Dellinger & Sperling, *supra* note 10, at 94. I evaluate the government's interest in protecting potential life in Part IV.

90. *See* Joseph Blocher, *Rights to and Not to*, 100 CALIF. L. REV. 761, 776 (2012) ("Nearly all substantive rights are choice rights. . . . [A]lmost every right to engage in an activity encompasses the freedom to choose whether or not to engage in that activity.").

91. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995) (holding that government compulsion of speech "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message").

92. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) ("Freedom of association therefore plainly presupposes a freedom not to associate.").

93. Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (holding that a government cannot

the right to the assistance of counsel includes the right to decide to represent oneself at trial, notwithstanding all the known pitfalls of doing so.[94] There is simply no principled line between coerced childbearing and coerced abortion.

What about the fact that many states banned abortion at the time of the ratification of the Fourteenth Amendment? During oral argument in *Dobbs*, Justice Alito questioned whether the right to abortion could be considered a fundamental right when twenty-six out of thirty-seven states prohibited it when the Fourteenth Amendment was adopted.[95] This is not a new argument—it formed the basis of then-Justice Rehnquist's dissent in *Roe*[96]—but it is a radical one.

The view that state practice defines the scope of the Fourteenth Amendment is a perversion of originalism.[97] And it ignores the seismic transformation the Fourteenth Amendment effected: the Fourteenth Amendment's overlapping guarantees of liberty and equal citizenship redefined the meaning of freedom and revolutionized our federal system against the backdrop of a long history of suppression of fundamental rights. A sweeping guarantee of liberty and equal citizenship was necessary because, in the words of Representative John Bingham, one of the leading framers of the Fourteenth Amendment, "many instances of State injustice and oppression have already occurred in the State legislation of this Union."[98] While the first ten Amendments to the Constitution limited the powers of the federal government to impinge on basic rights, the Fourteenth Amendment "declares particularly that no *State* shall do it—a wholesome and needed check upon the great abuse of liberty which several of the States have practiced, and which they manifest too much purpose to continue."[99] In short, rather than lock in preexisting practices, the Fourteenth Amendment was designed to disrupt and end state traditions and practices that denied fundamental personal rights.[100]

It is "completely circular," as Chief Justice Roberts recognized in his confirmation testimony, to make state practice at the time of the Fourteenth Amendment's adoption control the meaning of the constraints the Fourteenth Amendment impose on the states.[101] To illustrate, he pointed to the Court's

"constitutionally force a person 'to profess a belief or disbelief in any religion'").

94. Faretta v. California, 422 U.S. 806, 833–34 (1975) (stressing that "compulsory counsel" cannot be squared with the Sixth Amendment's guarantee of the assistance of counsel).

95. Transcript of Oral Argument, *supra* note 8, at 75.

96. Roe v. Wade, 410 U.S. 113, 174–77 (1973) (Rehnquist, J., dissenting).

97. *See* Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 669 (2009) ("What judges must be faithful to is the enacted law, not the expectations of the parties who wrote the law. . . . [I]t is the text of the Fourteenth Amendment that was ratified in 1868.").

98. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).

99. CONG. GLOBE, 39th Cong., 1st Sess. app. 256 (1866).

100. *See* BARNETT & BERNICK, *supra* note 17, at 220 (rejecting the view that "the set of privileges and immunities was closed in 1866, 1868, or at any other time"); Ill. State Emps. Union, Council 34 v. Lewis, 473 F.2d 561, 568 n.14 (7th Cir. 1972) ("[I]f the age of a pernicious practice were a sufficient reason for its continued acceptance, the constitutional attack on racial discrimination would . . . have been doomed to failure.").

101. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States*: *Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 330 (2005),

decision in *Loving v. Virginia*,[102] observing that the Fourteenth Amendment guarantees the right to marry a loved one of another race even though miscegenation laws existed in 1868.[103] Rather than looking to state practice at the time of ratification, Chief Justice Roberts observed, the Court in *Loving* looked to whether the right to marry is fundamental.[104] His basic point is that the Fourteenth Amendment controls state practice, not the other way around. State practice in 1868 does not fix in place the fundamental rights for all future generations. Indeed, to accept the argument that state practice in 1868 is determinative would jettison many decades of Supreme Court precedent safeguarding a broad range of fundamental rights, including the fundamental rights to marry, to use contraceptives, and to enjoy sexual intimacy with a loved one.[105]

The right to access abortion care flows seamlessly from the fundamental rights the Fourteenth Amendment was designed to protect. Neither the Fourteenth Amendment's failure to mention abortion explicitly nor the existence of state abortion bans at the time of the framing of the Fourteenth Amendment provides a convincing reason for giving states the power to completely extinguish an individual's fundamental right to bodily integrity and reproductive liberty.

IV. ABORTION AND FETAL PERSONHOOD

The argument for a constitutional right to abortion is not complete without grappling with the claim that the fetus has a right to life that is deserving of protection. At oral argument in *Dobbs*, one of the reasons Justice Kavanaugh gave for suggesting that the Constitution is neutral on the subject of abortion is that courts have no principled basis for insisting that the individual has fundamental rights that prevail over the interest in potential life.[106] But as this Section shows, a fetus is not a person in the contemplation of the Constitution. What is more, history undercuts the notion that the government has a compelling interest in potential life that permits it to override the individual's constitutional rights to control her body and her life.

https://www.govinfo.gov/content/pkg/GPO-CHRG-ROBERTS/pdf/GPO-CHRG-ROBERTS.pdf [https://perma.cc/93RY-MP33] [hereinafter *Roberts Confirmation Hearing*].

102. 388 U.S. 1 (1967).

103. *See Roberts Confirmation Hearing*, *supra* note 101, at 330.

104. *Loving*, 388 U.S at 12 (holding that the right to marry was "one of the vital personal rights essential to the orderly pursuit of happiness by free men").

105. Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (striking down law banning the use of contraceptives, which was first enacted in 1879); *Loving*, 388 U.S. at 6, 11–12 (holding that state anti-miscegenation law was incompatible with the fundamental right to marry, even though "[p]enalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period"); Lawrence v. Texas, 539 U.S. 558, 571 (2003) (striking down law prohibiting sexual intimacy by two persons of the same sex despite the fact "that for centuries there have been powerful voices to condemn homosexual conduct as immoral"); Obergefell v. Hodges, 576 U.S. 644, 657, 681 (2015) (holding that same-sex couples have a fundamental right to marry, while noting the centuries-old "understanding that marriage is a union between two persons of the opposite sex").

106. Transcript of Oral Argument, *supra* note 8, at 106–07.

In *Roe*, the Supreme Court held that a fetus is not a person within the meaning of the Fourteenth Amendment.[107] No Justice has ever dissented from that conclusion and for good reason.[108] The Fourteenth Amendment opens by declaring that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[109] A fetus, if the pregnancy is carried to full term, will eventually become a living person. But before birth, the Fourteenth Amendment's text makes clear, a fetus is not yet a person in the contemplation of the Constitution. It is true that the Fourteenth Amendment protects both citizens and the broader category of persons, but the Amendment's text makes the notion of fetal personhood a far-fetched one.[110] The Fourteenth Amendment, for example, provides that "[r]epresentatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed," but no one thinks that the census count used to apportion representatives must count fetuses equally with living persons.[111] In *Dobbs*, Mississippi wisely did not press the argument that a fetus is a person in contemplation of the Constitution vested with constitutional rights of its own.

The argument that the government has a compelling interest in protecting potential life from the moment of conception fares no better. This does not rest on a subjective value judgment but reflects the fact, noted by Walter Dellinger and Gene Sperling, that "there is no substantial evidence of a settled consensus through American history that life begins at conception or that abortion laws traditionally reflect a primary or compelling interest in potential life."[112] The history of abortion law, in fact, counts powerfully against the claim that the government's interest in protecting potential life is compelling throughout pregnancy.

The common law the Constitution's founders inherited from England did not regard the interest in potential life as compelling from the moment of conception but permitted abortion well into the second trimester of pregnancy. At the founding and for much of the nation's first century, abortion was legal until quickening—the time during pregnancy when a woman could first feel fetal movement in the womb. As the leading historical work on the history of abortion law explains, "[f]or centuries prior to 1800 the key to the common law's attitude toward abortion" was the "phenomenon . . . known as quickening. . . . The common law did not formally recognize the existence of a fetus in criminal cases until it had quickened."[113] "Quickening generally occurred near the midpoint of

107. Roe v. Wade, 410 U.S. 113, 156–58 (1973).

108. *See* Balkin, *supra* note 4, at 337.

109. U.S. CONST. amend. XIV, § 1.

110. *See* Balkin, *supra* note 4, at 337–38; Jonathan H. Adler, *Why the 14th Amendment Does Not Prohibit Abortion*, VOLOKH CONSPIRACY (Nov. 29, 2021, 4:24 PM), https://reason.com/volokh/2021/11/29/why-the-14th-amendment-does-not-prohibit-abortion/ [https://perma.cc/2TEQ-RVMV].

111. U.S. CONST. amend. XIV, § 2; *see also* Balkin, *supra* note 4, at 338.

112. Dellinger & Sperling, *supra* note 10, at 111.

113. JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL

gestation, late in the fourth or early in the fifth month" of pregnancy, though it could vary from woman to woman.[114] As far as the common law was concerned, prior to quickening, as one state court observed in 1849, there was "no precedent, no authority, nor even a *dictum* . . . which recognize[d] the mere procuring of an abortion as a crime known to the law."[115] Before quickening, women had a legal right to terminate their pregnancy. By the 1840s, "abortion became, for all intents and purposes, a business, a service traded in the free market. . . . Indeed, abortion became one of the first specialties in American medical history."[116]

When some states, in the mid-nineteenth century, enacted bans on abortion throughout pregnancy,[117] these bans typically rested on outmoded and discriminatory justifications concerning women's proper role in society as well as racist fears that white Protestant women were flouting their maternal duties at a time when immigrant populations were swelling.[118] As Melissa Murray has observed, "criminalizing[] abortion was hand in glove with the effort to ensure that America remained a white nation."[119] Rather than respecting fundamental rights of bodily integrity and reproductive liberty, state lawmakers sought to conscript women's bodies and treat them as second-class citizens in a manner fundamentally inconsistent with the Fourteenth Amendment's guarantees.

Proponents of these laws, of course, believed that potential life should be protected before quickening. But their arguments for reforming the criminal law to outlaw abortion were primarily about controlling women.[120] The history of these state bans are rife with blatant sexism, embracing the view, also shared by the Supreme Court of the era, that the "paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother."[121] In the eyes of the all-male physicians' lobby that pushed to criminalize abortion, it was a woman's natural and God-given role to bear children; for women to violate this command was to bring ruin on themselves and the nation.[122] In 1871, the American Medical Association's Committee on Criminal Abortion described women who chose to have abortion as follows: "She becomes unmindful of the course marked out for her by Providence, she overlooks the duties imposed on her by the marriage contract. She yields to the pleasures but shrinks from the pains and responsibilities of maternity."[123] In the male doctors' way of thinking,

POLICY, 1800–1900, at 3 (1978).

114. *Id.*

115. State v. Cooper, 22 N.J.L. 52, 55 (1849); *see also* Commonwealth v. Parker, 50 Mass. 263, 265–66 (1845) ("[A]t common law, no indictment will lie, for attempts to procure abortion with the consent of the mother, until she is quick with child.").

116. MOHR, *supra* note 113, at 47.

117. The conventional wisdom that a majority of states rejected the quickening rule at the time of the ratification of the Fourteenth Amendment is now in doubt. *See* Tang, *supra* note 4, at 4 (presenting evidence that, at the time of ratification, "[j]ust 16 of the 37 states then in the union departed from the settled understanding that abortions were lawful prior to quickening").

118. Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 285–323 (1992).

119. Murray, *supra* note 57, at 2036.

120. *See id.*

121. Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring in judgment).

122. *See* Siegel, *supra* note 118, at 282–323.

123. D.A. O'Donnell & W.L. Atlee, Am. Med. Ass'n, *Report on Criminal Abortion*, 22

abortion under any circumstances was "disastrous to a woman's mental, moral, and physical well-being."[124] Criminalization was necessary because women were too "prone to depression[] and . . . derangement" to be "allowed to judge for herself in this matter."[125]

Those pushing for state bans on abortion were not equally concerned about all potential life. They enlisted state power out of fear that a white America was slipping away as white middle-class women terminated their pregnancies, while immigration populations exploded.[126] The question of abortion was whether America would be populated "by our own children or by those of aliens?"[127] For example, when the Ohio legislature criminalized abortion in the mid-nineteenth century, it insisted that "educated" and "wealthy" women "avoiding the duties and responsibilities of married life . . . are, in effect, living in a state of legalized prostitution" and would leave "our broad and fertile prairies to be settled only by the children of aliens[.]"[128] This is not what compelling state interests are made of.

"The past is never dead. It's not even past" as William Faulkner observed.[129] Today, lawmakers that act to criminalize abortion do not explicitly invoke outmoded and discriminatory reasoning about women's natural and God-given roles that their nineteenth century predecessors did, but they continue to regulate with the aim of controlling women rather than respecting their fundamental rights to bodily integrity, reproductive liberty, and equal citizenship stature. Mississippi's ban on abortion before the Court in *Dobbs* perpetuates deeply ingrained stereotypes that pregnant persons cannot be trusted to make up their minds and that the choice to end a pregnancy will ultimately harm the so-called "maternal patient,"[130] as the text of Mississippi's abortion ban insists—the same unscientific judgment that informed abortion bans in the nineteenth century.[131] Mississippi insists that it must criminalize abortion to protect potential life, even as it refuses to use its authority to support its citizens with desired pregnancies and help reduce the incidence of abortion, such as providing comprehensive health insurance, guaranteeing access to contraceptives, and providing financial assistance to needy families. In short, rather than empower pregnant persons and help them enjoy the Fourteenth Amendment's promise of liberty, Mississippi intruded to control their bodies and their lives.[132] Like the abortion bans of the

TRANSACTIONS AM. MED. ASS'N 239, 241 (1871).

124. HORATIO ROBINSON STORER, WHY NOT?: A BOOK FOR EVERY WOMAN 76 (Boston, Lee & Shepard 1866).

125. *Id.* at 74–75.

126. *See* Siegel, *supra* note 118, at 285.

127. STORER, *supra* note 124, at 85.

128. *Additional Report from the Select Committee to Whom Was Referred S.B. No. 285*, 63 J. Sen. of Ohio, app. 233, 235 (1867).

129. WILLIAM FAULKNER, REQUIEM FOR A NUN 73 (1951).

130. MISS. CODE ANN. § 41-41-191(2)(b)(ii) (2018).

131. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2315 (2016) (observing that "[n]ationwide, childbirth is 14 times more likely than abortion to result in death").

132. Reva B. Siegel, *Why Restrict Abortion?: Expanding the Frame on* June Medical, 2020 S. CT. REV. 277, 360 ("We see disrespect when government protects women's health by restricting abortion with a single-minded focus it does not devote to protecting the health of women who are

nineteenth century, Mississippi's interest in protecting life is about compelling the "maternal patient" to be maternal.[133]

Moreover, recognizing a compelling interest in potential life throughout pregnancy would have huge ramifications beyond the subject of abortion and could justify extreme deprivations of individual liberty and equal citizenship. Could a woman be forced to stay on bedrest throughout pregnancy on the basis of evidence that working during pregnancy might increase the possibility of miscarriage?[134] Could a woman be forced to undergo surgery to protect the potential life of a fetus, even if it involved a serious risk to her own health?[135] The interest in potential life, once recognized as compelling, could countenance a wide range of deprivations of fundamental rights without any limiting principle, effectively consigning half the population to second-class citizenship. It would mark a return to the time when it was accepted that a woman's "physical structure and a proper discharge of her maternal functions" consigned her to second-class citizenship.[136] These considerations point powerfully in favor of the balance struck in *Roe* and *Casey*: whatever the weight given to the state's interest in protecting potential life, it cannot be superior to the interests of an individual who has already been born in vindicating their full constitutional rights.

At oral argument in *Dobbs*, Justice Kavanaugh suggested that courts were at sea in abortion cases, unable to strike a principled constitutional balance, and the solution might be to adopt what he called a position of neutrality—effectively allowing states to ban abortion or permit them as they saw fit without any meaningful judicial review.[137] We are now in a position to understand why the neutrality frame is fundamentally flawed. The Constitution fully safeguards the liberty and equal citizenship of the pregnant person. A fetus, by contrast, is not a person within the contemplation of the Constitution. And history casts serious doubt on the notion that the interest in potential life—particularly when invoked in a selective fashion—can be regarded as compelling throughout pregnancy. If history shows anything, it is that states have invoked potential life in order to

bearing children, giving birth, and caring and providing for new life. Under *these* circumstances, antiabortion animus seems to concern control more than care."); Dellinger & Sperling, *supra* note 10, at 115 ("Surely it is constitutionally dubious for a state to select coercive measures with the maximum destructive impact on women's autonomy as a *first* step to discourage abortion.") (emphasis added)).

133. MISS. CODE ANN. § 41-41-191(2)(b)(ii).

134. Dellinger & Sperling, *supra* note 10, at 116 ("Imagine, for example, that a state made the following findings: complete rest in the first three months of pregnancy reduced miscarriages by 9% and working at video display terminals increased miscarriages by 4%. On these bases the state passed a law prohibiting all pregnant women from working at display terminals or working anywhere more than four hours a day during the first three months of pregnancy.").

135. *In re* A.C., 573 A.2d 1235, 1244 (D.C. 1990) (en banc) (overturning a court order forcing a pregnant woman to undergo fetal-protective surgery and observing that "a fetus cannot have rights . . . superior to those of a person who has already been born").

136. Muller v. Oregon, 208 U.S. 412, 422 (1908); David H. Gans, Note, *Stereotyping and Difference:* Planned Parenthood v. Casey *and the Future of Sex Discrimination Law*, 104 YALE L.J. 1875, 1892 (1995) (discussing *Muller*'s failure "to recognize the harm of constructing women's childbearing capacity as a duty limiting their freedom to be full and equal citizens").

137. Transcript of Oral Argument, *supra* note 8, at 76–80.

deny pregnant persons bedrock constitutional freedoms of bodily integrity and dignity, to force them into a stereotyped vision of their proper roles, and to treat them as second-class citizens. Justice Kavanaugh's neutrality frame has no grounding in either constitutional first principles or history.

V. CONCLUSION

The Supreme Court's conservative Justices claim that they are textualist and originalist. But overruling *Roe* would be neither. The Fourteenth Amendment's text broadly protects liberty and secures equal citizenship, including by safeguarding rights basic to freedom and equality not enumerated elsewhere in the Constitution's text. Seeking to erase the stain of slavery, the Fourteenth Amendment's original meaning guarantees the right to bodily integrity, the right to establish a family, and the right to decide whether to bear and raise children—all inalienable rights long denied to enslaved people. Out of the crucible of slavery, the Fourteenth Amendment defined the meaning of freedom. The right to abortion flows seamlessly from the promise of fundamental rights and equal citizenship at the core of the Fourteenth Amendment.

The Supreme Court should reaffirm that the Constitution guarantees the right to abortion—not simply because of five decades of precedent reaffirming that right—but because the right to abortion is deeply rooted in the Fourteenth Amendment's text and history.