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### An Exegesis of the Meaning of *Dobbs*: Despotism, Servitude, & Forced Birth

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#### Recommended Citation

Athena D. Mutua, *An Exegesis of the Meaning of Dobbs: Despotism, Servitude, & Forced Birth*, 27 CUNY L. Rev. 1 (2024).

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# AN EXEGESIS OF THE MEANING OF *DOBBS*: DESPOTISM, SERVITUDE, & FORCED BIRTH

Athena D. Mutua<sup>†</sup>

I. THE <i>DOBBS</i> DECISION.....	4
II. “ <i>I AM THE PEOPLE</i> ”: HOW <i>DOBBS</i> FURTHER UNDERMINES DEMOCRACY.....	6
III. “ <i>YOU LOSE</i> ”: FORCED BIRTH AND THE COURT’S THEORY OF LIFE.....	10
IV. “ <i>NOT YOUR BODY, NOT YOUR CHOICE</i> ”: INVOLUNTARY SERVITUDE & INEQUALITY.....	11
V. “ <i>YOUR BODY IS MINE</i> ”: IS THIS A STATE INTEREST?.....	17
VI. “AND YOU’RE HAVING MY BABY”.....	21
VII. CATHEDRAL MAN AS BENEFICIARY: SURVEILLANCE, PUNISHMENT, & OTHER CONSEQUENCES.....	24

*The Dobbs decision has been leaked. Gathered outside of New York City’s St. Patrick’s Old Cathedral, pro-choice protesters chant: “Not the church, not the state, the people must decide their fate.”<sup>1</sup>*

*A white man wearing a New York Fire Department sweatshirt and standing on the front steps responds: “I am the people, I am the people, I am the people, the people have decided, the court has*

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<sup>1</sup> See Khaleda Rahman, *Man Tells Abortion Rights Activists ‘Your Body Is Mine’ in Viral Video*, NEWSWEEK (May 9, 2022, 5:29 AM), <https://perma.cc/J9QW-7GTC>.

*decided, you lose . . . . You have no choice. Not your body, not your choice, your body is mine and you're having my baby.*"<sup>2</sup>

Despicable but not unexpected,<sup>3</sup> this man's comments provide insight into the meaning of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*<sup>4</sup> and the conditions it creates for women, girls, and others capable of pregnancy. Despite the Supreme Court's assertions that it is returning the decision of abortion back to "the people," a disingenuous concept from the start,<sup>5</sup> American society currently finds itself facing dueling judicial opinions about whether individuals can access abortion medication (mifepristone) to exercise control over their own bodies and lives.<sup>6</sup>

This Article is an exegesis of the statements of this man. His statements and the instincts that support them tell us a great deal about the condition of U.S. society, the state of our democracy, and the relationship of both to the concrete meaning of *Dobbs* and its "theory of life."<sup>7</sup> Through a host of past cases, the Supreme Court has facilitated despotism in multiple states, a despotism that appears to be a near universal precondition for the enactment of severe abortion restrictions and bans.<sup>8</sup> The *Dobbs* decision itself facilitates conditions that encompass forced pregnancy, forced birth, involuntary servitude, disturbing outcomes of "permissive" rape, and the false idolatry of adoption, with the man on the cathedral steps and others like him as the immediate beneficiaries. These conditions have real consequences for women, girls, and others who are capable of pregnancy, including trans and gender-diverse people.<sup>9</sup> They are eerily reminiscent of the reproductive subjugation imposed on

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<sup>2</sup> *Id.*

<sup>3</sup> See Indisputable with Dr. Rashad Richey, *Man Declares "Your Body Is Mine" At Abortion Rally*, YOUTUBE (May 9, 2022), <https://perma.cc/6YSG-X7WA>.

<sup>4</sup> See generally *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (Breyer, Sotomayor, & Kagan, JJ., dissenting).

<sup>5</sup> *Id.* at 2234; see also *infra* pp. 4-6.

<sup>6</sup> See *Danco Laboratories, LLC v. All. for Hippocratic Med.*, 143 S. Ct. 1075 (2023) (staying decision in *Alliance for Hippocratic Medicine v. FDA*, No. 2:22-cv-00223-Z, which issued a preliminary injunction suspending the approval of mifepristone FDA issued over twenty years ago, and part of which the Fifth Circuit had upheld in *Alliance for Hippocratic Medicine v. U.S. Food & Drug Administration*, 48 F.4th 210 (5th Cir. 2023)); see also *Washington v. FDA*, No. 1:2023cv03026 (E.D. Wash. 2023) (ordering the FDA to maintain distribution mechanisms of mifepristone in seventeen states and the District of Columbia).

<sup>7</sup> *Dobbs*, 597 U.S. at 262, 364; see also Khiara M. Bridges, *Foreword: Race in the Robert's Court*, 136 HARV. L. REV. 23, 40-41 (2022) (discussing how, although the *Dobbs* majority purported to embrace no "theory of life," its decision ultimately did embrace such a theory by prioritizing the rights of unborn fetuses over those of pregnant people under the guise of federalism).

<sup>8</sup> See *infra* pp. 4-6.

<sup>9</sup> See *infra* pp. 14-15.

enslaved Black women.<sup>10</sup> It has been said that history does not repeat itself, but it often rhymes.<sup>11</sup> These conditions admittedly do not mark the chattel slavery of the past but are part of a broader notion of slavery, of *involuntary servitude*. And, these conditions of servitude no longer apply to just a single group of women but are now *extended* to all those capable of pregnancy.

The perspectives of the man from his perch on the cathedral steps—let us call him “Cathedral Man”—are not simply a regurgitation of conservative talking points. Nor are they the product of searching interrogation or moral or ethical reflection. And yet they capture the essential meaning of *Dobbs*, and apparently the views of a majority of the Supreme Court. This is likely so because, no matter how disturbing, Cathedral Man’s statements reflect the experiential knowledge of a cultural native: a person born, bred, and raised in our society. He is someone who, in some sense, knows at a deeper level how the intended operation of this society’s

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<sup>10</sup> See generally Michele Goodwin, *No, Justice Alito, Reproductive Justice Is in the Constitution*, N.Y. TIMES (June 26, 2022) <https://www.nytimes.com/2022/06/26/opinion/justice-alito-reproductive-justice-constitution-abortion.html> (on file with CUNY Law Review) (arguing that the Thirteenth Amendment not only freed Black women from labor in the fields but also freed them from forced reproductive labor and describing *Dobbs* as reading Black women out of the Constitution); Michele Goodwin, *Distorting the Reconstruction: A Reflection on Dobbs*, 34 YALE J.L. & FEMINISM 30, 34 (2023) (arguing in part that the *Dobbs* majority “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,” presumably one of the goals of the amendments.) [hereinafter Goodwin, *Distorting the Reconstruction*]; Michele Goodwin, *Involuntary Reproductive Servitude: Forced Pregnancy, Abortion, and the Thirteenth Amendment*, 2022 U. CHI. LEGAL F. 191 (2022) (analyzing in part the *Dobbs* Court’s flawed and incomplete application of originalism - as a theory of interpretation - to the Reconstruction Amendments, particularly the Thirteenth Amendment and the Court’s erasure of the trafficking and forced reproduction of Black women during slavery); Pamela D. Bridgewater, *Ain’t I a Slave: Slavery Reproductive Abuse, and Reparations*, 14 UCLA WOMEN’S L.J. 89, 113-128 (2005) (describing the rape and forced reproduction of enslaved Black women and the discussions of their experiences in congressional debates of the Thirteenth Amendment and subsequent legislation) [hereinafter Bridgewater, *Slavery Reproductive Abuse, and Reparations*]; Pamela D. Bridgewater, *Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 WASH. & LEE RACE & ETHNIC ANC. L.J. 11, 12-13 (2001) (discussing slave breeding as a profitable economic endeavor and arguing that accounts of breeding enslaved women provides a fuller narrative of enslaved life and would also enhance the doctrine, particularly of the Thirteenth Amendment) [hereinafter Bridgewater, *Slave Breeding in Thirteenth Amendment Jurisprudence*]; DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 22-55 (2d ed. 2017) (charting the various cultural and institutional practices since slavery to control Black women’s reproductive practices and freedom by dehumanizing them and disparaging Black motherhood.).

<sup>11</sup> This idea is often attributed to Mark Twain. See Brian Adams, *History Doesn’t Repeat, But It Often Rhymes*, HUFFINGTON POST (Jan. 18, 2017, 6:47 PM), <https://perma.cc/52PE-9VNT>.

social statuses and hierarchal presumptions and practices are supposed to work. He has the kind of experiential and cultural knowledge that people of color also possess but which is often ignored,<sup>12</sup> even more so when sharpened by “‘critical’ knowledge produced ‘from the bottom’ through collective struggle and self-critical reflection.”<sup>13</sup> This knowledge is deeply internalized and embodied; it provides a grounded sense of the current moment created by the Supreme Court and others.

### I. THE *DOBBS* DECISION

In a nearly unprecedented move, the *Dobbs* decision stripped women and other people capable of pregnancy of a fifty-year old constitutional right: the right to interrupt conception – to terminate a pregnancy, even a pre-viability pregnancy.<sup>14</sup> In doing so, the Court overturned *Roe v. Wade*<sup>15</sup>

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<sup>12</sup> See generally Devon W. Carbado, *Strict Scrutiny and the Black Body*, 69 UCLA L. REV. 2 (2022) (describing the social regime of strict scrutiny under which Black people live and in which Black voices and experiences are largely ignored, requiring extreme suffering until and unless others find their stories extremely compelling); Athena D. Mutua, *The Rise, Development, and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. L. REV. 329, 354 (2006) (noting that critical race theory insists on recognition of both the experiential knowledge and critical consciousness of people of color in understanding law and society); Athena D. Mutua, *Reflections on Critical Race Theory in a Time of Backlash*, 100 DENV. L. REV. 553 (2023) (reflecting back on the role of critical race theory in our society and how it has recently resulted in erasure and backlash).

<sup>13</sup> FRANCISCO VALDES ET AL., CRITICAL JUSTICE: SYSTEMIC ADVOCACY IN LAW AND SOCIETY 9 (2021). This quote describes those who are directly impacted by a social phenomenon and who have seriously thought about the issue, often with others, as opposed to those with no direct experience but have perhaps some abstract understandings. *Id.* In my personal experience in the policing and child welfare context, directly impacted people often come to the table advocating change in the status quo and proposing alternative practices as solutions. Nonetheless, when they do so, their views and experiences are often discounted and strenuously resisted. For instance, the Defund the Police Campaign at base suggests that our society’s substantial investment in the institutions of violence and punitive practice be transferred into building the resilience, sustainability, and health of communities. See generally *The Time Has Come to Defund the Police*, MOVEMENT FOR BLACK LIVES, <https://perma.cc/U8RL-PLKS> (last visited Dec. 17, 2023). Arising from marginalized communities disproportionately affected by police violence, the idea has become the object of ridicule and distortion by those defending the status quo. See, e.g., Naomi Schaefer Riley, *Why Ending Child Services is the New Defund the Police*, N.Y. POST (Aug. 12, 2023, 9:30 AM), <https://perma.cc/4DGM-AMGU>; Katie Rogers, *Trump Continues Criticism of Movement to Defund the Police*, N.Y. TIMES (July 13, 2020), <https://www.nytimes.com/2020/07/13/us/politics/trump-police-reform.html> (on file with CUNY Law Review).

<sup>14</sup> See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 300 (2022) (Breyer, Sotomayor, & Kagan, JJ., dissenting).

<sup>15</sup> *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

and *Planned Parenthood v. Casey*,<sup>16</sup> thereby allowing states to ban abortion from the point of conception.

In determining whether abortion was constitutionally protected under the Due Process Clause of the Fourteenth Amendment, the Court in *Dobbs* examined whether abortion was grounded in our nation's "history" starting from 1868, the year the Fourteenth Amendment was ratified.<sup>17</sup> The *Dobbs* Court noted that the word "abortion" does not appear in the Constitution<sup>18</sup> (though neither do the words "marriage" or "the unborn"), while also providing what many have characterized as a "bad" historical account of abortion.<sup>19</sup> Nonetheless, the argument essentially went: If abortion was legal during and subsequent to 1868, then it is constitutionally protected today as part of the nation's deeply rooted history and traditions. However, as the dissent points out, women were not entitled to vote in 1868 because they were not part of the body politic until a half-century later.<sup>20</sup>

The Court glossed over this obvious problem with its analysis by concluding that women can vote now, they do so in higher numbers than men, and they are not electorally or politically powerless.<sup>21</sup> In doing so, the Court ignored the historical and continuing disadvantages that women face in U.S. society from multiple sources in spite of these numbers; it also overlooked the social movements for gender justice and their demands in part for women's empowerment, liberty, and equality that has raged for well over a century.<sup>22</sup> It is through decisions like *Dobbs* that we can most clearly see how the Court's selectively applied theory of

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<sup>16</sup> *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

<sup>17</sup> *See Dobbs*, 597 U.S. at 246-48.

<sup>18</sup> *Id.* at 235.

<sup>19</sup> *See* Heather Cox Richardson, *June 24, 2022, LETTERS FROM AN AMERICAN* (Jun. 25, 2022), <https://perma.cc/PN94-NDEV>; Bridges, *supra* note 7, at 39 ("The existence of other perfectly plausible histories of abortion suggests that the *Dobbs* majority's decision to elevate as right and true the historical account that it provides in its opinion is not the apolitical exercise that the majority pretends it to be.").

<sup>20</sup> *See* Bridges, *supra* note 7, at 35-36 (citing *Dobbs*, 597 U.S. at 371-72 (Breyer, Sotomayor, & Kagan, JJ., dissenting)).

<sup>21</sup> *See Dobbs*, 597 U.S. at 288.

<sup>22</sup> Consider, for example, the suffrage movement's goal of securing women's right to vote, which is considered part of first-wave feminism. *See generally Feminism: The First Wave*, NAT'L WOMEN'S HIST. MUSEUM (Apr. 5, 2021), <https://perma.cc/86SS-GTR9>. Second-wave feminism, on the other hand, encompasses, in part, the women's movements of the 1960s, as well as the Stonewall uprising, often seen as marking a change in and the rise of the LGBTQ+ movement. *See, e.g., History of the Women's Rights Movement Living the Legacy: The Women's Rights Movement (1848-1998)*, NAT'L WOMEN'S HIST. ALL., <https://national-womenshistoryalliance.org/history-of-the-womens-rights-movement/>; Michael Boucai, *Glorious Precedents: When Gay Marriage Was Radical*, 27 YALE J. OF L. & HUMAN. 1, 10, 13-17 (2015).

originalism<sup>23</sup> operates to embed, obfuscate, and perpetuate historical injustices.<sup>24</sup> Here, the Court weaponizes originalism to deny women and those capable of pregnancy control over their own bodies and instead permits others, including the State, to control them.

.II. “*I AM THE PEOPLE*”<sup>25</sup>: HOW *DOBBS* FURTHER UNDERMINES DEMOCRACY

Shouting, “I am the people,”<sup>26</sup> the Cathedral Man’s insistence of his superior status partially captures those whom the framers of the original Constitution envisioned when they penned the words: “We the People.” These people, propertied white men, were entitled to voting, self-governance, liberty, and the power to control and impose their will upon others. This entitlement included the ability to inflict mass rape, forced pregnancy, forced birth, and family separation on enslaved women and their families. Although these practices were purportedly abolished by the Thirteenth and Fourteenth Amendments, the *Dobbs* Court has effectively reinstated much of this by extending the permissibility of their infliction upon all those capable of pregnancy.

The *Dobbs* Court does so in part by making the disingenuous claim that it is restoring democracy to “the people” by presumably returning the abortion decision back to democratic state processes. In reality, today’s Court has increasingly undermined democracy. It has done so first by tilting control of the electoral process toward corporate and monied interests through decisions like *Citizens United v. Federal Election Commission*.<sup>27</sup> Instead of ensuring an electoral process that facilitates ordinary

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<sup>23</sup> See, e.g., Richard H. Fallon, *Selective Originalism and Judicial Role Morality* 4-7 (Harv. Pub. L., Working Paper No. 23-15, 2023), <https://perma.cc/9KSR-EAB5>.

<sup>24</sup> In my view, originalism began largely as a racial dog whistle, initially praising primarily the white male Founders of the first Constitution, which excluded enslaved Black people, poor people, and women from the definition of “We the People” and claimed liberty while enshrining slavery. Originalism developed over time, and scholars such as Jack Balkin and Randy Barnett have done interesting and serious work to develop it in many ways from opposite perspectives. See RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT* (2021); JACK M. BALKIN, *LIVING ORIGINALISM* (2011). But, in the hands of the current right-wing partisans sitting on the Court, it largely remains a white supremacist patriarchal dog whistle. See Baynard Woods, *The Supreme Court’s Originalism Is White Supremacy*, NBC NEWS (July 2, 2022), <https://perma.cc/CBK2-KKK7>; see also Goodwin, *Distorting the Reconstruction*, *supra* note 10 (discussing the erasure of Reconstruction from originalist review). But see Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527 (2015) (charting, in part, the changing meaning of originalism).

<sup>25</sup> See Rahman, *supra* note 1.

<sup>26</sup> See *id.*

<sup>27</sup> 558 U.S. 310 (2010) (striking down a statutory prohibition on corporate general treasury spending for political advertising in the weeks immediately before an election).

Americans' self-governance, liberty, and equal political participation,<sup>28</sup> the Court has created a marketplace for political power in which wealth overwhelmingly speaks the loudest and secures its own self-serving political preferences.<sup>29</sup> Second, through decisions such as *Husted v. A. Philip Randolph Institute*,<sup>30</sup> *Shelby County v. Holder*,<sup>31</sup> *Abbott v. Perez*,<sup>32</sup> and *Rucho v. Common Cause*,<sup>33</sup> the Court has facilitated voter suppression and extensive gerrymandering in the states. Together, these decisions enable potential despotic control that frustrates the just will of the American majority,<sup>34</sup> including the will to protect the right to bodily integrity and autonomy for all.

Examples of this anti-democratic phenomenon and its connection to abortion include activities in the state of Michigan, where the "state

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<sup>28</sup> As Timothy K. Kuhner explains, the Court, in relying on older cases and holding in *Citizens United* that money is speech and the corporate identity of the speaker is irrelevant, the Court permitted money, and those who have the most access to it, to dictate political policies at the expense of voters—thereby facilitating plutocracy and undermining democracy. See Timothy Kuhner, *The Third Coming of American Plutocracy: What Campaign Finance Reformers Are up Against*, in *DEMOCRACY BY THE PEOPLE: REFORMING CAMPAIGN FINANCE IN AMERICA* 19, 53-54 (Eugene D. Mazo & Timothy K. Kuhner eds., 2018) [hereinafter *Kuhner, The Third Coming*]; see also Timothy Kuhner, *Citizens United as Neoliberal Jurisprudence: The Resurgence of Economic Theory*, 18 VA. J. SOC. POL'Y & L. 395, 465-67 (2011); Lynn Adelman, *The Roberts Court's Assault on Democracy* 14 HARV. L. & POL'Y REV. 131 (2019) (arguing that the Roberts Court's decisions in the area of voting and the economy undermine democracy).

<sup>29</sup> See Kuhner, *The Third Coming*, *supra* note 28, at 20, 53.

<sup>30</sup> *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018) (upholding a massive purge of voters by Ohio legislature alleged to disproportionately disenfranchise poor people and people of color); see also *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (upholding an Indiana voter ID law); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021) (reversing the Ninth Circuit decision striking down Arizona out-of-precinct and ballot collection laws that disproportionately and negatively impacted voting rights of Native Americans and other people of color).

<sup>31</sup> 570 U.S. 529 (2013) (striking down the coverage section of the Voting Rights Act, reasoning that it was based on stale information and thereby nullifying the preclearance section that had required review of proposed changes in voting procedures of continuously discriminatory states).

<sup>32</sup> 138 S. Ct. 2305 (2018) (holding that the State was entitled to the presumption of good faith and upholding the majority of a Texas gerrymander despite evidence of racial discrimination).

<sup>33</sup> 139 S. Ct. 2484 (2019) (holding partisan gerrymandering nonjusticiable and thereby permitting it).

<sup>34</sup> Both parties engage in gerrymandering districts, though the GOP has a distinct advantage. See DAVID LANDAU & ROSALIND DIXON, *FLA. STATE COLL. OF L., DOBBS, DEMOCRACY, AND DYSFUNCTION* 12-13 (2022), <https://perma.cc/2B2E-5FNX>; see also Girardeau A. Spann, *Gerrymandering Justiciability*, 108 GEO. L.J. 981, 982 (2020) (suggesting that the Court has reserved for itself the unrestrained discretion to decide whether a gerrymandering scheme constitutes justiciable and unconstitutional racial gerrymandering or nonjusticiable partisan gerrymandering, which will put the Democratic party at a disadvantage).



legislative gerrymander [was] rated by the Schwarzenegger Institute as one of the worst in the country—the fourth most egregious, with Republicans winning solid majorities in both houses in 2018 despite winning less than 48 percent of the vote.”<sup>35</sup> These Republicans oppose abortion. Yet, in a 2022 state referendum, Michigan voters chose to put abortion rights protections in the state constitution by directly voting for an amendment.<sup>36</sup> They did so in spite of an attempt by Republicans to block the referendum.<sup>37</sup> Similarly via state referenda, voters in the Republican state of Kansas defeated “an amendment seeking to remove the right to abortion from the state constitution,”<sup>38</sup> while voters in Ohio approved an amendment to their constitution guaranteeing access to abortion.<sup>39</sup>

These examples underscore the fact that the majority of Americans support individuals’ legal rights to control their own bodies, including through abortion.<sup>40</sup> This majority, which generally supports bodily autonomy, exists in almost every state,<sup>41</sup> even though differences remain about the appropriate regulation of abortion, often ostensibly out of concern for “potential life.”<sup>42</sup> For many others, they simply trust women to do what is best for themselves and their families under the circumstances in which they live.<sup>43</sup> These circumstances often include already having children, a phenomenon represented by 59% of abortion-seekers under the age of 35

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<sup>35</sup> LANDAU & DIXON, *supra* note 34, at 28.

<sup>36</sup> See Alice Miranda Ollstein, *Michigan Votes to Put Abortion Rights into State Constitution*, POLITICO (Nov. 9, 2022, 3:43 AM), <https://perma.cc/XVC4-NRZY>.

<sup>37</sup> See Mitch Smith, *Michigan Board Says Abortion Referendum Should Not Go to Voters*, N.Y. TIMES (Aug. 31, 2022), <https://www.nytimes.com/2022/08/31/us/michigan-referendum-abortion-ballot.html> (on file with CUNY Law Review).

<sup>38</sup> LANDAU & DIXON, *supra* note 34, at 42.

<sup>39</sup> Alice Herman, *Ohio Voted to Protect Abortion Rights. Republicans Are Scheming to Undo It*, GUARDIAN (Nov. 17, 2023), <https://perma.cc/U6X4-ZZLZ>.

<sup>40</sup> See, e.g., Hannah Hartig, *About Six-in-Ten Americans Say Abortion Should Be Legal in All or Most Cases*, PEW RSCH. CTR. (June 13, 2022), <https://perma.cc/E9WZ-QTHU>.

<sup>41</sup> See *Abortion Attitudes in a Post-Roe World: Findings From the 50-State 2022 American Values Atlas*, PUB. RELIGION RSCH. INST. (Feb. 23, 2023), <https://perma.cc/LKJ5-6CWD>.

<sup>42</sup> But see generally Cynthia Soohoo, *An Embryo Is Not a Person: Rejecting Prenatal Personhood for a More Complex View of Prenatal Life*, 14 CONLAWNOW 81 (2023), <https://perma.cc/VV7B-MHJ5> (describing the *Dobbs* Court’s false conception of the “prenatal personhood” of zygotes, embryos, or fetuses as entities having rights and interests that conflict with the pregnant person who carries them).

<sup>43</sup> See, e.g., *Centering Black Women’s Issues & Leadership: Trust Black Women*, SISTERSONG, <https://perma.cc/2SBD-MPCZ> (last visited Dec. 8, 2023); *SisterSong’s Response*, TRUST BLACK WOMEN, <https://perma.cc/YNT3-LL4T> (last visited Dec. 8, 2023); see also *About*, TRUST WOMEN, <https://perma.cc/PBV5-5KYC> (last visited Dec. 8, 2023) (describing Trust Women’s clinics in Oklahoma and Kansas being committed to ensuring women have access to reproductive health care); REBECCA TODD PETERS, TRUST WOMEN: A PROGRESSIVE CHRISTIAN ARGUMENT FOR REPRODUCTIVE JUSTICE (2018); *infra* notes 80-81 and the accompanying discussion on pro-choice arguments under the First Amendment.

and 89% of those over the age of 35.<sup>44</sup> They can also include having limited financial resources, reflected by those with the “fewest resources seek[ing] abortion care at the highest rates; indeed, half of abortions in the U.S. are sought by those living below the federal poverty level.”<sup>45</sup>

In spite of this majority support across most states for pregnant people’s right to bodily integrity, autonomous decision-making, and the right to choose, less than half the states possess a referendum mechanism to reject severe abortion restrictions and bans.<sup>46</sup> Furthermore, there are other obstacles to state democratic processes that frustrate the just will of the people, including “problems of inertia and blind spots surrounding decades old[,] newly revived laws.”<sup>47</sup> And the most gerrymandered states in the union also have some of the most draconian anti-abortion laws, such as those without exceptions for rape and incest.<sup>48</sup>

Although legal scholars like David Landau and Rosalind Dixon are prepared to give the Court the benefit of the doubt regarding its claim of leaving the abortion issue to democratic processes, they too suspect that the Court is engaging in the rhetoric of democracy while actively seeking to undermine it.<sup>49</sup> And at least some in the Republican Party (“GOP”) do not even feign loyalty to state democratic practices despite their so-called commitments to state rights; they have prepared a bill to ban abortion nationally.<sup>50</sup>

Accordingly, Cathedral Man is likely correct in his instinct that the Court did not mean to return the decision to “the people.” Rather, the Court purposefully handed back the abortion decision to “We the People” defined as the Cathedral Man, or to politicians preferably like him. *The Dobbs Court intended to return the abortion decision to politicians who agree with and tend to be like Cathedral Man. These politicians too often have suppressed voting and gerrymandered themselves into control of states where—with the Court’s decisional permission—they increasingly govern in despotic and neofascist ways.*

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<sup>44</sup> Lynn M. Paltrow et al., *Beyond Abortion: The Consequences of Overturning Roe*, 22 AM. J. BIOETHICS 3, 4 (2022).

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

<sup>46</sup> LANDAU & DIXON, *supra* note 34, at 39.

<sup>47</sup> *Id.* at 6.

<sup>48</sup> *Id.* at 14-16.

<sup>49</sup> *See id.*

<sup>50</sup> *See* Press Release, Sen. Lindsey Graham, Graham Introduces Legislation to Protect Unborn Child, Bring U.S. Abortion Policy in Line with Other Developed Nations (Sept. 13, 2022), <https://perma.cc/LC8N-C56B>; Nikki McCann Ramirez, *Lindsey Graham Introduces Nationwide Abortion Ban Weeks After Saying It’s up to States*, ROLLING STONE (Sept. 13, 2022), <https://perma.cc/ZDR9-8UDV>.

III. “YOU LOSE”<sup>51</sup>: FORCED BIRTH AND THE COURT’S THEORY OF LIFE

The Cathedral Man, from his perch on the church steps, conflates the People with the Court when he chants: “[T]he people have decided, the [C]ourt has decided, you lose.”<sup>52</sup> The Court is not the People. The Court may consist of some people; mostly affluent, white, and male people. But the Court is an institution. It consists of nine unelected government officials with unlimited terms. It renders binding legal decisions that are unaccountable to direct democratic processes. Its undemocratic nature is intensified by its current right-wing majority, of which all but one were appointed by presidents who initially failed to win the popular vote.<sup>53</sup> In fact, most of these unelected government officials were confirmed by senators that represented a minority of the U.S. population.<sup>54</sup>

Nevertheless, the Cathedral Man correctly appreciates that he and the Court are on the same side and that those opposed to the forced continuation of pregnancy *and* opposed to forced birth, lost. Despite the Court’s pretense of neutrality and claims that it is not proposing a “theory of life,” the *Dobbs* Court in fact possesses and imposes precisely such a theory.<sup>55</sup> Its “theory of life” believes that pregnant people’s lives, their “plans, desires, dreams, ambitions, aspirations, and prayers”<sup>56</sup> are less significant than fetal life; “that their lives can be subordinated to the fetuses they carry . . . and that it is legitimate to force birth.”<sup>57</sup> It is no wonder that young women increasingly shun dating conservative men who so devalue

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<sup>51</sup> See Rahman, *supra* note 1.

<sup>52</sup> See *id.*

<sup>53</sup> See Timothy Noah, *Women Wouldn’t Lose Their Right to Choose if We Elected Presidents by Popular Vote*, NEW REPUBLIC (May 4, 2022), <https://perma.cc/WEG2-SKFF>. Noah’s article makes the point that Chief Justice Roberts and Justice Alito were appointed to the Supreme Court in George W. Bush’s second term when he won the presidency by a slight majority of the popular vote. *Id.* However, Bush would have never gotten a second term if the Supreme Court had not ruled in his favor and installed him as president for his first term in *Bush v. Gore*, 531 U.S. 98 (2000). See Phillip Bump, *The Minoritarian Third of the Supreme Court*, WASH. POST (Dec. 2, 2021, 12:04 PM), <https://perma.cc/PZ8B-ZZRB>. But see Akhil Reed Amar, *Bush, Gore, Florida, and the Constitution*, 61 FLA. L. REV. 945, 946 (2009); Richard L. Hasen, *Bush, Gore and the Lawlessness Principle: A Comment on Professor Amar*, 61 FLA. L. REV. 979 (2009). Arguably, even though the constitutional text provides for the judiciary, the current Supreme Court operates with a great deal more power, much less accountability, and a much larger democratic deficit than the administrative state that they are inclined to criticize.

<sup>54</sup> Bump, *supra* note 53.

<sup>55</sup> Bridges, *supra* note 7, at 41.

<sup>56</sup> *Id.*

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

a woman's personhood that they are willing to diminish women's rights to control their own bodies and plan their lives.<sup>58</sup>

IV. "NOT YOUR BODY, NOT YOUR CHOICE"<sup>59</sup>: INVOLUNTARY SERVITUDE & INEQUALITY

The Cathedral Man's pronouncement that it is "Not your body, not your choice"<sup>60</sup> begs the question: Why do pregnant people have no constitutional right to make decisions about their own bodies? How can a person who is presumably entitled to the full panoply of constitutional rights and protections, including bodily integrity, lose their bodily and decisional autonomy under law? How can they be subjected to the involuntary servitude specifically prohibited by the Thirteenth Amendment once they become pregnant?<sup>61</sup> The Thirteenth Amendment states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction . . . . Congress shall have power to enforce this article by appropriate legislation."<sup>62</sup>

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<sup>58</sup> Editorial Board, Opinion: *If Attitudes Don't Shift, a Political Dating Mismatch Will Threaten Marriage*, WASH. POST, (Nov. 22, 2023), [https://www.washingtonpost.com/opinions/2023/11/22/marriage-polarization-dating-trump/?\\_pml=1](https://www.washingtonpost.com/opinions/2023/11/22/marriage-polarization-dating-trump/?_pml=1) (on file with CUNY Law Review) (lamenting statistics that suggests that younger women, who tend to be more liberal are refusing to date Republican men); Amanda Marcotte, *It's a Good Thing Most Women Don't Want to Date Trump Voters*, SALON (Nov. 28, 2023), <https://perma.cc/Q6K6-UZJQ> (ridiculing the Washington Post article on Democratic women's reluctance to date Republican men arguing that it is meant to shame women into marrying men who believe in an ideology that views women as less than human, about asking them to lower their standards and to be responsible for male bad behavior.).

<sup>59</sup> See Rahman, *supra* note 1.

<sup>60</sup> *Id.*

<sup>61</sup> See Dan Mangan, *Judge Suggests Abortion Might Be Protected by Thirteenth Amendment Despite Supreme Court Ruling*, CNBC (Feb. 6, 2023), <https://perma.cc/7QM3-99CW> (discussing *United States v. Handy*, No. 22-096, 2023 WL 6199084 (D.D.C. Sept. 22, 2023), where ten anti-abortion access "activists" were charged with conspiring to block access to an abortion clinic); Goodwin, *Distorting the Reconstruction*, *supra* note 10; Bridgewater, *Slave Breeding in Thirteenth Amendment Jurisprudence*, *supra* note 10; ROBERTS, *supra* note 10. See generally Andrew Koppelman, *Forced Labor, Revisited: The Thirteenth Amendment and Abortion* (NW Univ. School of Law, Working Paper No. 32, 2010) [hereinafter Koppelman, *Forced Labor, Revisited*] (revisiting his earlier article that argued abortion bans violate the Thirteenth Amendment, recounting the reactions to the initial argument and outlining some weaknesses but adhering to the basic argument); Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990) (arguing that laws that prohibit abortion violate the Thirteenth Amendment by compelling women to labor in service and on behalf of another, the fetus, constituting involuntary servitude and violating both liberty and equality by coercing women to use their unique capacities for purposes other than their own and turning them into a servant class.).

<sup>62</sup> U.S. CONST. amend. XIII.

In *Bailey v. Alabama*, involving the breach of a one-year labor agreement, the Court explained that the Thirteenth Amendment's "plain intention was to abolish slavery of whatever name and form and all its badges and incidents."<sup>63</sup> The *Bailey* Court defined slavery as "that control by which the personal service of one man is disposed of or coerced for another's benefit," elaborating that this control is "the essence of involuntary servitude."<sup>64</sup> The Amendment's prohibition seems to be absolute but for one exception: it prohibits the existence of any and all forms of involuntary servitude in and across the nation unless they are imposed for a crime for which the person has been duly convicted.<sup>65</sup> If having consensual sex is not a "crime" under this exception per se, pregnant people arguably cannot be coerced to labor for the benefit of and in service to a fetus, the profitability and self-aggrandizement of those in political and economic control, the religious beliefs of others, and the State.<sup>66</sup> The Court's imposition on basic human rights is breathtaking.

Generally, the Court's rulings on abortion have justified restrictions on abortion by reasoning, in part, that pregnancy is a unique condition because it involves "fetal life,"<sup>67</sup> and the State has an interest in protecting potential life.<sup>68</sup> This justification is unresponsive to the Thirteenth Amendment prohibition of involuntary servitude and forced labor. Though the *Dobbs* Court did not rule on the Thirteenth Amendment's application to abortion, enforcement of significant restrictions and bans on abortion on the basis of the State's interest in protecting fetal life potentially violates it. By prohibiting pregnant people from terminating pregnancies, *Dobbs* coerces, compels, and forces them to labor in the service

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<sup>63</sup> *Bailey v. Alabama*, 219 U.S. 219, 241 (1911).

<sup>64</sup> *Id.*; see also *Slaughter-House Cases*, 83 U.S. 36, 72 (1872) (discussing the Thirteenth Amendment and slavery in addition to noting that involuntary servitude is broader than slavery as is commonly understood).

<sup>65</sup> See James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465 (2019) (suggesting the interpretation that a conviction strips one of Thirteenth Amendment protection is a Confederate interpretation in contradiction to the amendment's original meaning which focused on imprisonment because it curtails the freedom of movement).

<sup>66</sup> See Koppelman, *Forced Labor, Revisited*, *supra* note 61, at 7, 15. Koppelman notes that parental obligations, which can be criminally enforced, raise a valid objection to this argument (the wide availability of adoption aside) but do not totally defeat it, especially in the cases of rape, pregnancy by minors, and possibly in the case of failed contraceptives. *Id.* For a broader approach grounded in part in human rights, see Loretta Ross, *Conceptualizing Reproductive Justice Theory: A Manifesto for Activism*, in *RADICAL REPRODUCTIVE JUSTICE: FOUNDATION, THEORY, PRACTICE, CRITIQUE* 170 (Loretta Ross et al. eds., 2017).

<sup>67</sup> *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 273 (2022) (Breyer, Sotomayor, & Kagan, JJ., dissenting) (suggesting that the contraceptive and related cases were different because they did not involve what *Roe* termed "potential life").

<sup>68</sup> The *Roe* and *Casey* Courts make a similar claim. See *infra* note 69.

of and for the benefit of others against their will even though they have committed no crime.

Further, the Court has only cursorily defined the state interest in fetal life.<sup>69</sup> Having decided that pregnant people do not have a constitutional right to choose abortion, the *Dobbs* Court then permitted broad justifications for state interference in pregnant people's decisional autonomy and bodily integrity. These justifications for state interference included "respect for and preservation of prenatal life at all stages of development . . . ; the elimination of particularly gruesome, or barbaric medical procedures; the preservation of the integrity of the medical profession; [and] the mitigation of [supposed] fetal pain."<sup>70</sup>

But do these State interests even minimally justify the involuntary servitude of compelled birth under abortion bans for the purported benefit of fetal life—not to mention these bans' discriminatory application to

<sup>69</sup> For example, in *Roe* the Court accepts Texas's position in part by suggesting that states have an interest in protecting life and this protection extends to potential (prenatal) life. *See Roe v. Wade*, 410 U.S. 113, 150 (1973). In *Casey*, Justice Stevens notes in his partial concurrence that the State's "interest in protecting potential life is not grounded in the Constitution. It is, instead, an indirect interest supported by both humanitarian and pragmatic concerns." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 914-15 (1992). But Justice Stevens posits:

The State may also have a broader interest in expanding the population, believing society would benefit from the services of additional productive citizens—or that the potential human lives might include the occasional Mozart or Curie. These are the kinds of concerns that comprise the State's interest in potential human life. *Id.*

Justice Stevens goes on to explain that, while the State can express its support for birth, it must respect the individual's freedom to choose abortion. *Id.* In short, the Court in *Roe*, *Casey*, and *Dobbs* generally found that the State had an interest in regulating abortion to protect the health of the mother. *See Roe*, 410 U.S. at 164-66; *Casey*, 505 U.S. at 852-53; *Dobbs*, 597 U.S. at 286-97.

<sup>70</sup> *Dobbs*, 597 U.S. at 219. For a more detailed analysis of the State's interest in life, see Justice Stevens's concurrence in *Washington v. Glucksberg*, 521 U.S. 702, 740, 744-45 (1997) (discussing *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990), regarding issues of dignity and liberty in assisted suicide and noting:

There is truth in John Donne's observation that "No man is an island." The State has an interest in preserving and fostering the benefits that every human being may provide to the community—a community that thrives on the exchange of ideas, expressions of affection, shared memories and humorous incidents, as well as on the material contributions that its members create and support. The value to others of a person's life is far too precious to allow the individual to claim a constitutional entitlement to complete autonomy in making a decision to end that life. *Id.* at 740-41.

Justice Stevens later continues:

The state interests supporting a general rule banning the practice of physician assisted suicide do not have the same force in all cases . . . . Properly viewed, however, this interest is not a collective interest that should always outweigh the interests of a person who because of pain, incapacity, or sedation finds her life intolerable, but rather, an aspect of individual freedom. *Id.* at 745-46.

only one segment of the population: pregnant people? Even if these stated concerns could justify rules about how abortion is “reasonably” carried out, they arguably do not justify interference in “the private realm of family life” that the Court in *Griswold* held “the state cannot enter.”<sup>71</sup> “If the right of privacy means anything,” the *Eisenstadt* Court further explained, “it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>72</sup> Neither of these cases have been overruled.<sup>73</sup>

All of this is to say that the involuntary servitude of forced birth does not merely implicate a violation of the Thirteenth Amendment; it also implicates the privacy rights embedded in the *liberty* protected by the Fourteenth Amendment’s Due Process Clause. In interpreting the Due Process Clause in *Dobbs*, the Court unsurprisingly got it wrong, a contention with which the dissent and a host of prior cases would likely agree.<sup>74</sup> Forced birth also likely implicates the Privileges & Immunities Clause of the Fourteenth Amendment, which declares that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”<sup>75</sup> Here some scholars suggests that the developments over the twentieth century—including gender justice movements generally, and particularly the sexual revolution, the second wave of feminism and decades of life under *Roe v. Wade*—likely rendered the intimate association right of abortion a privilege or immunity protected under the Clause.<sup>76</sup> However, this is unclear as the Court wrongly eviscerated this

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<sup>71</sup> 381 U.S. 479, 495 (1965) (Goldberg, J. concurring).

<sup>72</sup> 405 U.S. 438, 453 (1972).

<sup>73</sup> Some may argue that this language is dicta located in each case’s concurrences and therefore not binding on later courts. However, these comments are central and necessary to the holdings in the cases, which prohibited states from interfering in the intimate family relations of couples, married or single, regarding decisions to use contraceptives.

<sup>74</sup> The *Dobbs* dissent comments, “The majority thinks that a woman has no liberty or equality interest in the decision to bear a child, so a State’s interest in protecting fetal life necessarily prevails.” *Dobbs*, 597 U.S. at 369 n.1 (Breyer, Sotomayor, & Kagan, JJ., dissenting). Section 1 of the Fourteenth Amendment reads:

All 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. 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.

U.S. CONST. amend. XIV § 1. See also, e.g., CTR. FOR REPROD. RTS, THE CONSTITUTIONAL RIGHT TO REPRODUCTIVE AUTONOMY: REALIZING THE PROMISE OF THE 14TH AMENDMENT, (2022), <https://perma.cc/2PEU-T3PB>.

<sup>75</sup> See U.S. CONST. amend. XIV, § 1.

<sup>76</sup> See e.g., Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 328-336 (2007) and Richard A. Epstein, *Of Citizens and Persons: Reconstructing the*

Clause in deciding the *Slaughter-House* cases in 1873, a mistake the current Court has largely conceded.<sup>77</sup>

The elimination of a constitutional right to abortion also potentially violates the Equal Protection Clause of the Fourteenth Amendment, as Justice Ginsburg has argued<sup>78</sup> and the *Dobbs* dissent suggests.<sup>79</sup> Specifically, the dissent reasoned that a constitutional right to abortion protects the intertwined rights of women's liberty *and* equality under the Fourteenth Amendment.<sup>80</sup> Safeguarding women's reproductive freedom, the dissent suggests, also protects "the ability of women to participate equally in this Nation's economic and social life."<sup>81</sup> The dissent elaborates: "Without the ability to decide whether and when to have children, women could not—in the way men [take] for granted—determine how they would live their lives, and how they would contribute to the society around them."<sup>82</sup>

Legal scholar Jack Balkin agrees that abortion bans violate the Equal Protection Clause and the interconnected right of liberty protected by the Fourteenth Amendment.<sup>83</sup> He suggests that the Fourteenth Amendment protects equal citizenship by prohibiting class legislation (imposing special laws that target a group for special benefits or burdens), caste legislation (creating or maintaining a subordinated group or caste through

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*Privileges or Immunities Clause of the Fourteenth Amendment*, 1 N.Y.U. J.L. & LIBERTY 334, 352 (2005).

<sup>77</sup> See *Slaughter-House Cases*, 83 U.S. 36, 37-38 (1872) (limiting the Privileges and Immunities Clause to a notion of federal citizenship). *But see* *McDonald v. City of Chicago*, 561 U.S. 742, 756-58 (2010) (rejecting Justice Thomas's invitation to strike down a ban on certain guns under the Privileges and Immunities Clause, while acknowledging that most legal scholars believe the *Slaughter-House Cases* were too narrowly decided regarding the meaning of the clause and ultimately refusing to overturn this interpretation); see also BARNETT & BERNICK, *supra* note 24 at 31-5 (discussing the reasons they believe the courts have been reluctant to resurrect the clause).

<sup>78</sup> Regarding Justice Ginsburg's views, see generally Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771, 773, 776 (2010) (discussing how Ginsburg's litigation brief on behalf of Captain Susan Struck reflected her "conception of discrimination against pregnant women as a core case of sex discrimination"); Louise Melling, *For Justice Ginsburg, Abortion Was About Equality*, ACLU NEWS & COMMENT (Sept. 23, 2020), <https://perma.cc/RWT7-BFT5> (discussing how Ginsburg believed that obtaining abortion rights was crucial to achieving equality between men and women).

<sup>79</sup> See *Dobbs*, 597 U.S. at 359.

<sup>80</sup> *Id.*; see also Koppelman, *Forced Labor, Revisited*, *supra* note 61 (arguing that the Thirteenth Amendment protects both liberty and equality interests).

<sup>81</sup> *Id.* at 2318 (describing the constitutional law before the *Dobbs* majority decision).

<sup>82</sup> *Id.* at 2330.

<sup>83</sup> See Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007).



law), or legislation that treats some as second-class citizens.<sup>84</sup> He argues that criminalizing abortion

limits women's liberty because it denies them the liberty to choose whether or not to become mothers, and because it requires women to adopt life-altering obligations that will place them in conditions of economic and social dependence. It limits equality because it imposes special obligations on women to surrender their bodies to bear children, and because by withdrawing their choice whether or not to become mothers it helps place women in conditions of social and economic dependency, which helps maintain their subordinate status as citizens.<sup>85</sup>

Thus, he argues, the criminalization of abortion limits pregnant people's "liberty profoundly[,] and it is also class legislation that violates the equal citizenship principle" by creating a subordinated servant caste of second-class citizens.<sup>86</sup>

Finally, the First Amendment's guarantee of the free exercise of religion,<sup>87</sup> as well as the Establishment Clause, may protect pregnant people against severe restrictions and bans on abortion.<sup>88</sup> In fact, since the *Dobbs* decision, "clergy and members of various religions, including Christian and Jewish denominations, have filed about fifteen lawsuits in eight states

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<sup>84</sup> See *id.* at 315-18.

<sup>85</sup> *Id.* at 325-26.

<sup>86</sup> *Id.* at 26. Some argue that it is the capacity to bear children that burdens pregnant people. However, Balkin argues that because only women (or those with a uterus) can get pregnant, the state uses pregnancy "as a lever to subordinate women, assigning them a second class status in society." *Id.* at 322-23. This is often done through law, which the Fourteenth Amendment forbids. *Id.* It is not the stereotyped difference between men and women that leads to one group's subordination but what society makes of those differences through legal, institutionalized, other social practices that restrict and assign women to subordinate roles.

<sup>87</sup> See generally Olivia Roat, *Free-Exercise Arguments for the Right to Abortion: Reimagining the Relationship Between Religion and Reproductive Rights*, 29 UCLA J. GENDER & L. 1,4 (2022) (recovering the lost history of the claim that people have and provide abortions because of and pursuant to their faith and arguing that "protecting the right to abortion is actually more consistent with religious-liberty principles than restricting.").

<sup>88</sup> See generally Pam Belluck, *Religious Freedom Arguments Underpin Wave of Challenges to Abortion Bans*, N.Y. TIMES, <https://www.nytimes.com/2023/06/28/health/abortion-religious-freedom.html> (Jul. 5, 2023) (on file with CUNY Law Review) (surveying the various religious-liberty claims made in recently instituted cases *challenging* abortion bans across the United States); Rachel Kranson, *History Shows that the First Amendment Should Protect Abortion*, WASH. POST (May 12, 2022, 6:00 AM), <https://www.washingtonpost.com/outlook/2022/05/12/first-amendment-could-save-abortion-rights/> (on file with CUNY Law Review) (noting some traditions might require abortion as a practice of faith, and tracing the history of the Religious Freedom Restoration Act, which some initially believed would strengthen access to abortion).

saying abortion bans and restrictions infringe on their faiths.”<sup>89</sup> Some argue that their religions allow or may even require abortions in several circumstances that include when the life of the mother is threatened, a religious conviction upon which abortion bans infringe.<sup>90</sup> Others simply seek religious exemptions to obtain abortive care.<sup>91</sup> But many people suing for religious reasons claim that “abortion bans embed conservative Christian ideology into state law,”<sup>92</sup> presumably in violation of the Establishment Clause. Further, some religions simply reject the belief that life begins at conception and suggest other possibilities.<sup>93</sup> Others emphasize the sacredness of pregnant people’s moral agency; the sacredness of a divine personal right to decide.<sup>94</sup>

The two Reconstruction Amendments, though diluted by political compromise and historically undermined by the Court, would nonetheless seem to have freed Black women from the incidents and badges of slavery that included forced pregnancy and forced birth. By extension, these Amendments ought to ensure the freedom of all pregnant people from the possibility of forced pregnancy and birth in the United States today.

But Cathedral Man gleefully proclaims to the pro-choice protestors on the streets: “Not your body, not your choice.”<sup>95</sup> Regarding those who are already pregnant or capable of pregnancy, the current right-wing majority on the *Dobbs* Court agrees with him.

#### V. “YOUR BODY IS MINE”<sup>96</sup>: IS THIS A STATE INTEREST?

The Court declares that the State has an interest in promoting potential life, what some have called the sanctity of life. One should be skeptical of the commitment to life of a government that has engaged in genocide, slavery, internment, dropped bombs on two civilian-occupied cities, has been at war in at least 225 out of the 243 years since its founding,<sup>97</sup> and is currently supporting a massacre in Gaza where women, children and newborns are disproportionately bearing the brunt of the hostilities.<sup>98</sup>

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<sup>89</sup> Belluck, *supra* note 88.

<sup>90</sup> *Id.*; see also Roat, *supra* note 87, at 11 (describing forms of Judaism that support various iterations of abortion rights).

<sup>91</sup> Belluck, *supra* note 88.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Roat, *supra* note 87, at 16. For a nuanced pro-choice understanding of Christianity, see generally MARGARET D. KAMITSUKA, *ABORTION AND THE CHRISTIAN TRADITION: A PRO-CHOICE THEOLOGICAL ETHIC* (2019).

<sup>95</sup> See Rahman, *supra* note 1.

<sup>96</sup> *Id.*

<sup>97</sup> See generally U.S. DEP’T OF VETERANS AFFS., *AMERICA’S WARS 1* (2023).

<sup>98</sup> World Health Organization, *Women and Newborns Bearing the Brunt of the Conflict In Gaza, UN Agencies Warn* (Nov. 3, 2023), <https://perma.cc/9QL2-WLN6>.

The State has and continues to be only shallowly interested in enhancing the flourishing of infants, children, or pregnant people's lives.

Nowhere is this more evident than in the state where *Dobbs* first arose, and which has a near total ban on abortion: Mississippi. Mississippi is the poorest state in the United States.<sup>99</sup> It is extremely gerrymandered and under despotic GOP control.<sup>100</sup> As legal scholar Khiara M. Bridges notes, it is unlikely that the abortion ban that the governors of Mississippi had the temerity to bring to the Supreme Court represents the will of the State's people.<sup>101</sup> In fact, in 2011, Mississippians rejected a proposed state constitutional amendment which, in an attempt to ban abortions, would have defined a fertilized egg as a person!<sup>102</sup> They did so by a 58% to 42% margin vote.<sup>103</sup> Today, polling suggests that 51% of Mississippians oppose the *Dobbs* decision, with 49% agreeing that abortion should be legal in most or all cases.<sup>104</sup>

Further, as the *Dobbs* dissent points out, Mississippi has the highest infant mortality rate in the country.<sup>105</sup> It is ranked forty-eight out of fifty states in terms of the well-being of its children.<sup>106</sup> And, although Mississippi ranks higher than other states for its maternal mortality rate, its rate is still unacceptably high. Black women in particular bear the brunt of

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<sup>99</sup> See *Poorest States 2023*, WORLD POPULATION REV., <https://perma.cc/RNS3-KBTB> (last visited December 8, 2023); *Top 10 Poorest States in the U.S.*, FRIENDS COMM. ON NAT'L LEGIS. (Oct. 11, 2022), <https://perma.cc/WX2T-5WHQ>. See *Poorest States 2023*, WORLD POPULATION REV., <https://perma.cc/2JAW-B8YC> (last visited Sept. 17, 2023); *Top 10 Poorest States in the U.S.*, Friends Comm. On Nat'l Legis. (Oct. 11, 2022), <https://perma.cc/BK8H-KE6R>; Liz Knueven, *The Typical American Household Earns \$61,000 a Year. Here Are 15 States Where the Typical Resident Earns Even Less.*, BUS. INSIDER (Aug 19, 2019, 11:00 AM), <https://perma.cc/WT2A-TGRX>

<sup>100</sup> LANDAU & DIXON, *supra* note 34, at 15, 29.

<sup>101</sup> Bridges, *supra* note 7, at 46; see also PUB. RELIGION RSCH. INST., *supra* note 41, at 10 (indicating that a majority of Americans say abortion should be legal in most or all cases in all except seven states).

<sup>102</sup> Geoff Pender, *Poll: Majority of Mississippians Oppose Supreme Court Abortion Decision*, MISS. TODAY (July 14, 2022), <https://perma.cc/53P6-TN6D>.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* (finding additionally, in a poll commissioned by the ACLU of Mississippi, that "only 18% of those polled believe abortion should be illegal in all cases, with 81% believing it should be legal with some restrictions and 32% saying it should be legal in all cases . . . 46% said women in Mississippi should have the choice to have an abortion up to 16 weeks of pregnancy, with 43% saying no). *But see* PUB. RELIGION RSCH. INST., *supra* note 41 (noting that 49% of Mississippians polled believe abortion should be available in most or all cases).

<sup>105</sup> See *Dobbs*, 597 U.S. at 398; Isabelle Taft, *Mississippi Remains Deadliest State for Babies, CDC Data Shows*, MISS. TODAY (Sept. 29, 2022), <https://perma.cc/757S-RFWR>.

<sup>106</sup> See Orlando Mayorquin, *Study Ranks Best, Worst States for Child Well-Being: Massachusetts Tops List, New Mexico Trails*, USA TODAY, <https://perma.cc/YF99-KA6F> (Aug. 9, 2022, 8:28 PM).

these statistics: They suffer “65.1 deaths per 100,000 live births, more than four times the white ratio of 16.2 deaths.”<sup>107</sup>

In spite of these alarming statistics, the state of Mississippi refused to expand Medicaid.<sup>108</sup> The mostly white, Republican state officials who govern Mississippi turned down federal money that could have saved pregnant people and babies, and the Supreme Court’s Affordable Care Act decision made it easier for Mississippi’s state government to do so.<sup>109</sup> Through this decision, the Court gave a greenlight to Southern states to engage in their “longstanding tradition . . . of severely restricting social-service benefits to their poorest citizens, most of whom are African American.”<sup>110</sup> This intentionally depleted government support system dovetails with anti-abortion politics in conservatively governed states. As legal scholar Mary Ziegler notes, “Today, the states most closely aligned with the anti[-]abortion movement tend to be the most conservative, have the weakest social safety nets, and record the worst outcomes for children.”<sup>111</sup>

Against this backdrop, the Court regales the country with tales of the State’s purported interest in potential life. The Court demands respect for the equality and dignity of faceless states, while ignoring the overwhelming evidence of racist, misogynist, homophobic, and transphobic behavior of politicians who have suppressed voting and gerrymandered their way into state power.<sup>112</sup> The Court permits these bad actors to proceed with

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<sup>107</sup> See Adam Ganucheau, *Mississippi’s Already Troubling Maternal Mortality Rate Is Worsening*, MISS. TODAY (Jan. 26, 2023), <https://perma.cc/4FNM-3B6Y>.

<sup>108</sup> Q&A: *What Is Medicaid Expansion, Really?*, MISS. TODAY (Nov. 9, 2022), <https://perma.cc/XU3Y-LW67>.

<sup>109</sup> Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 585 (2012) (striking down the incentive structure of the Act meant to encourage state expansion of Medicaid as beyond the spending power of Congress). These racist policies continue. See Michael Wines, *In Mississippi’s Capital, Old Racial Divides Take New Forms*, N.Y. TIMES (Feb. 20, 2023), <https://www.nytimes.com/2023/02/20/us/jackson-mississippi-policing-plan.html> (on file with CUNY Law Review).

<sup>110</sup> Adelman, *supra* note 28, at 155 (citing Stephen Griffin, *The Tragedy of Medicaid Expansion (Part II)*, BALKANIZATION (Mar. 4, 2017, 3:55 PM), <https://perma.cc/9HN7-W6CK>) (discussing *Sebelius*, 567 U.S. 519).

<sup>111</sup> Mary Ziegler, *The End of Roe v. Wade*, 22 AM. J. BIOETHICS 16, 17 (2022). It should also be noted that Mississippi is a right-to-work state, which means it is a state that generally disfavors union organizing and participation and has no minimum wage. See *A Quick and Easy Guide to Labor and Employment Law in Mississippi*, BAKER DONELSON (Sept. 2023), <https://perma.cc/PCY8-PGHM>.

<sup>112</sup> See *Shelby Cnty. v. Holder*, 570 U.S. 529, 530 (2013) (discussing the principle of the “equal sovereignty” of states); see also Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207 (2016); Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1090 (2016) (describing Justice Ginsberg’s opinion that the new doctrine of the equal sovereignty and dignity of the states articulated in *Shelby County v. Holder*, was “utterly made up”); Vik Anwar, *A Fugitive from the Camp of the Conquerors: The Revival of Equal Sovereignty Doctrine in Shelby County v. Holder*, 7 TOURO L.J. OF RACE, GENDER, &

impunity so long as they do so under cover of state political office,<sup>113</sup> much like the impunity the Court grants to those with police badges.<sup>114</sup>

While the Court manufactures this mythology around the State's interest in the sanctity of life, we must not forget the State's historic mistreatment of children and families. One example of this mistreatment was the Trump administration's malevolent and inhumane family separation program at the Texas-Mexico border.<sup>115</sup> We must remember how the State allowed Border Patrol Agents to forcibly tear children from their parents' arms, and how these children were later housed in cages or farmed out to foster and adoption agencies around the country.<sup>116</sup> We must remember how many of these families remain separated to this day.<sup>117</sup>

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ETHNICITY & BERKELEY J. OF AFR.-AM. L. & POL'Y 272 (2015); Adelman, *supra* note 28, at 143.

<sup>113</sup> See, e.g., Adelman, *supra* note 28, at 141-43 (discussing *Abbott v. Perez*, 138 S. Ct. 2305 (2018), which involved a Texas gerrymandering scheme, and arguing that the Court essentially ignored voluminous evidence that the legislation was motivated by intentional discrimination).

<sup>114</sup> On judicial deference to the police, see Barry Friedman, *Why Do Courts Defer to Cops? Responding to Anna Lvovsky*, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. F. 323 (2017) (responding to work Friedman considers quite good, but not without flaws, by Lvovsky, which seeks to demonstrate the spillover effects of deference in one area crossing into and causing bias in other areas (citing Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995 (2017))). On qualified immunity in policing, see DEVON CARBADO, UNREASONABLE: BLACK LIVES, POLICE POWER, AND THE FOURTH AMENDMENT 16 (2022) (describing qualified immunity doctrine in the police context as turning on "hairsplitting" factual distinctions that border on the absurd and noting that critique of it crosses the ideological spectrum) (first citing Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605 (2021); then citing Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, CATO INST. (Sept. 14, 2020), <https://perma.cc/XL8G-DG25>; and then citing Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017)).

<sup>115</sup> See Caitlin Dickerson, *The Secret History of Family Separation*, ATLANTIC (Aug. 7, 2022), <https://perma.cc/TJW3-V9G8>. According to the article, approximately over 700 families remain separated. *Id.* Also, as Peggy Phelan notes, Scott Stewart, who was the lead counsel for the state of Mississippi, worked as the Justice Department's lead immigration lawyer during the Trump Administration's Zero Tolerance family separation policy. See Peggy Phelan, *The Dobbs Decision: Abortion, Adoption, and the Supreme Court*, 10 ADOPTION & CULTURE 171, 174 (2022). His claim to fame was trying to force a seventeen-year-old girl in a federal refugee camp to continue pregnancy or be deported pursuant to the administration's policy. *Id.* at 178 n.15; see also Giulia Heyward, *Scott Stewart, the Lawyer Representing Mississippi, Was at the Center of a 2017 Abortion Controversy*, N.Y. TIMES, <https://www.nytimes.com/2021/12/01/us/politics/scott-stewart-mississippi-supreme-court.html> (Dec. 2, 2021) (on file with CUNY Law Review).

<sup>116</sup> See Dickerson, *supra* note 115.

<sup>117</sup> See Geoff Bennett et al., *Hundreds of Migrant Children Remain Separated from Families Despite Push to Re-Unite Them*, PBS (Feb. 6, 2023, 6:30 PM), <https://perma.cc/9WMB-GP4Z> (noting that while "the Biden administration has succeeded in uniting some 600 children with their parents, about 1,000 remain separated").

VI. “AND YOU’RE HAVING MY BABY”<sup>118</sup>

While the State and its politicians claim their prerogative to control people’s bodies and reproductive capacities, the Cathedral Man makes a similar claim, chanting: “Your body is mine, and you’re having my baby.”<sup>119</sup> This part of the Cathedral Man’s chant, when considered alongside the couple’s sign reading, “I’ll adopt your baby,”<sup>120</sup> underscores the interwoven relationship between rape and the *Dobbs* Court’s references to adoption and the “domestic supply” of infants.<sup>121</sup>

Several scholars have suggested that the Court and the overwhelmingly male political establishment pretend that their discussions and impositions on women’s bodies are neutral and above the fray by obscuring men’s interests and roles in sex and reproduction.<sup>122</sup> This omission is particularly sinister in light of the fact that both incest and rape are greatly underreported,<sup>123</sup> with men overwhelmingly committing these crimes against women.<sup>124</sup> In fact, “rape is rarely investigated or prosecuted, making sexual assault the easiest violent crime to get away with.”<sup>125</sup>

The Cathedral Man, in declaring that “you are having my baby,” instinctively knows that he can rely on the power dynamics that these statistics reflect that are embedded in our society’s political, social, and economic hierarchies. That is, he knows that he, like countless others, can likely get away with violently forcing himself and pregnancy on women, girls, and others capable of pregnancy. He may even know that some American states give him rights and access to the child produced by his rape and thus to his rape victim in future proceedings.<sup>126</sup>

At the same time, the couple with the “I’ll adopt your baby” sign may have been signaling their agreement with the *Dobbs* decision and offering to adopt the forced birth of a baby potentially sired by rape. More likely, as Susan Phelan suggests, they appreciated the false implication, which Justice Barrett proposed, that ending abortion can solve the

<sup>118</sup> See Rahman, *supra* note 1.

<sup>119</sup> *Id.*

<sup>120</sup> See Phelan, *supra* note 115, at 180; see also Giulia Carbonaro, ‘We Will Adopt Your Baby’ Signs Spark Memes, Backlash, NEWSWEEK (June 28, 2022, 4:49 AM), <https://perma.cc/G3RL-HJPG>.

<sup>121</sup> Phelan, *supra* note 115, at 180.

<sup>122</sup> *Id.* at 172.

<sup>123</sup> *Id.*

<sup>124</sup> See Supporting Survivors, *Sexualized Violence Statistics*, CAL POLY HUMBOLDT, <https://perma.cc/QH3Y-Q84U> (last visited Sept. 29, 2023).

<sup>125</sup> See Barbara Bradley Hagerty, *American Law Does Not Take Rape Seriously*, ATLANTIC (Jan. 28, 2020), <https://perma.cc/29Z2-4HJT>.

<sup>126</sup> See Doug Criss and Tony Marco, *Maryland’s Among A Handful of States That Allow Rapists Parental Rights. That’s About to Change*, CNN, <https://perma.cc/9DJM-S5VF> (Feb. 9, 2018, 2:54 PM).

problem of a limited “domestic supply of infants.”<sup>127</sup> The couple’s sign may suggest that adoption is an adequate answer to an unplanned pregnancy under safe haven laws, which allow women to terminate parental rights soon after being forced to give birth.<sup>128</sup>

Justice Barrett posited this idea in oral arguments.<sup>129</sup> She suggested that the problem in *Dobbs* is not forced pregnancy and birth, which she astonishingly compared to vaccination requirements, but rather the burdens of parenting.<sup>130</sup> She proposed that these burdens could be solved through the operation of safe haven and adoption laws.<sup>131</sup> As a true slave-master’s daughter might admonish: just endure the mere inconvenience of a forced pregnancy, give birth against your will, and then simply terminate your parental rights so that I may benefit. Barrett’s approach “dismisses the physical, financial, and emotional difficulties of pregnancy and underestimates the legal, emotional, and psychological complexities of terminating parental rights.”<sup>132</sup> Yet the *Dobbs* Court gives an approving nod to this logic<sup>133</sup> by referencing the fact that all fifty states have enacted safe haven laws since *Casey*, in addition to citing a Center for Disease Control report noting that nearly a million women were waiting to adopt a child in 2002.<sup>134</sup>

Substituting the right of women and girls to control their own bodies with the right to terminate their parental rights under a regime of compelled birth, Barrett’s offensive idea is underscored by the commodification of babies implicit in the market term “domestic supply of infants” referenced in *Dobbs*.<sup>135</sup> Although there are over a million people waiting to adopt children—70% of whom are white and “Christian”—some 400,000 children between the ages and six and fifteen remain in foster care, where African Americans are overrepresented.<sup>136</sup>

Furthermore, fewer than 9% of women forced to give birth were found to have chosen adoption.<sup>137</sup> Adoption is simply a less popular

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<sup>127</sup> See generally Phelan, *supra* note 115, at 178-81.

<sup>128</sup> *Id.* at 177.

<sup>129</sup> Transcript of Oral Argument at 56-59, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 15 (2022); see also *id.* at 176, 174-78;

<sup>130</sup> See Transcript of Oral Argument, *supra* note 129, at 56-59.

<sup>131</sup> *Id.*

<sup>132</sup> Phelan, *supra* note 115, at 176.

<sup>133</sup> See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 257-58 (2022) (Breyer, Sotomayor, & Kagan, JJ., dissenting).

<sup>134</sup> *Id.* at 2259 nn.45-46.

<sup>135</sup> *Id.* at 2259 n.46.

<sup>136</sup> Phelan, *supra* note 115, at 178-79.

<sup>137</sup> *Id.* at 178.

choice.<sup>138</sup> As the *Dobbs* dissent notes, the choice for pregnant people is to terminate pregnancy or to parent.<sup>139</sup> Indeed, most pregnant people will likely choose parenting if forced to continue an unplanned pregnancy.<sup>140</sup> After all, as Phelan suggests, who would want to turn their newborn child over to the State and others who so routinely manifest utter disregard for a pregnant person's life and those of their children? As a result of this imposed false dilemma, Black women who are forced to bear unplanned children are particularly likely to experience increased structural poverty.<sup>141</sup> But as Phelan argues, "There is no discernible mathematical equation that will convert abortions into adoptions, despite Barrett's argument that adoption 'takes care of the problem' of abortion. Thus, despite her wishful thinking, terminating pregnancies and terminating parental rights are not equivalent."<sup>142</sup>

Consistent with the Cathedral Man's views, it appears, the United States has come full circle regarding bodily autonomy: forced pregnancy, forced birth, and even forced family separation are approved by the Court for the benefit of people such as Justices Roberts, Barrett, and others like them.<sup>143</sup> However, the scope of these practices has now been extended to all people capable of pregnancy. And, vigilantes and police are empowered to both enforce these practices and perpetuate them.<sup>144</sup> Tellingly, "police sexual violence is the second-most frequently reported form of police misconduct, after excessive force" and both of these are also tied

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<sup>138</sup> See Olga Khazan, *Why So Many Women Choose Abortion over Adoption*, ATLANTIC (May 20, 2019), <https://perma.cc/6G75-WMNV>; Mary Louise Kelly, *Sociologist Says Women Are More Likely to Choose Abortion over Adoption*, NPR (Dec. 3, 2023, 4:15 PM), <https://perma.cc/6TMV-FRA6>.

<sup>139</sup> See *Dobbs*, 597 U.S. at 397.

<sup>140</sup> See Phelan, *supra* note 115, at 181; see also *Dobbs*, 597 U.S. at 397 n.17 (Breyer, J., dissenting) ("A study of women who sought an abortion but were denied one because of gestational limits found that only 9 percent put the child up for adoption, rather than parenting themselves") (citing Gretchen Sisson et al., *Adoption Decision Making Among Women Seeking Abortion*, 27 WOMEN'S HEALTH ISSUES 136, 139 (2017)).

<sup>141</sup> See Phelan, *supra* note 115, at 181.

<sup>142</sup> *Id.*

<sup>143</sup> Both are adoptive parents and appear to have adopted children from abroad. See Stephanie Dube Dwilson, *Jack & Josie Roberts, John Roberts' Children: 5 Fast Facts You Need to Know*, HEAVY., <https://perma.cc/48KS-97GS> (Aug. 4, 2023, 7:57 PM); Régine Jean-Charles, *Amy Coney Barrett's 'Happy Go Lucky' Haitian Children and the White Savior Narrative*, MS. MAG. (Oct. 21, 2020), <https://perma.cc/UK5M-ESBQ>.

<sup>144</sup> This makes the current era potentially different from the past, when enforcement of laws banning abortion were unevenly enforced. Although abortion was illegal, it was widely practiced. See LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 41 (1990); LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES 1867-1973*, 81 (1997). I thank my student Mitch Mertel for this insight and materials!



to racism.<sup>145</sup> American society, with the continuing forces of white supremacy, patriarchy, and predatory capitalism at work, cannot seem to overcome the legacies, practices, and stench of the racialized and gendered economic arrangements of slavery and involuntary servitude. This includes reproductive coercion for the benefit of the few, a practice on which the United States was founded.<sup>146</sup>

#### VII. CATHEDRAL MAN AS BENEFICIARY: SURVEILLANCE, PUNISHMENT, & OTHER CONSEQUENCES

Landau and Dixon argue, as did the *Dobbs* dissenters, that “[w]ithout access to abortion, women will have limited choice but to play the role of mother and caregiver,”<sup>147</sup> the (often) free labor upon which capitalism and the society more generally depends.<sup>148</sup> As a result, women and others as caregivers will face “significant additional obstacles in engaging in paid employment and be limited in their capacity to plan and seek out electoral office.”<sup>149</sup> The elimination of caregivers in competition for these positions of power will be a boon to those of the Cathedral Man’s persuasion.

That is, the Cathedral Man embodies and symbolizes those likely to benefit from the nefarious consequences of *Dobbs*. However, these benefits are likely only temporary because the right-wing infrastructure upon which the GOP partially relies is funded by globalized corporate interests committed to the endless accumulation and extraction of profit at all costs, and masked through neofascism.<sup>150</sup> These costs include the concentration

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<sup>145</sup> Dara E. Purvis & Melissa Blanco, *Police Sexual Violence: Police Brutality, #MeToo, and Masculinities*, 108 CALIF. L. REV. 1487, 1491 (2020); see also Cara E. Trombadore, *Police Officer Sexual Misconduct: An Urgent Call to Action in a Context Disproportionately Threatening Women of Color*, 32 HARV. J. RACIAL & ETHNIC JUST. 153, 163 (2016); CATO INST., NATIONAL POLICE MISCONDUCT REPORTING PROJECT 2010 ANNUAL REPORT (Oct. 23, 2023, 3:29 PM), <https://perma.cc/8BP6-G6RT>.

<sup>146</sup> See Goodwin, *Distorting the Reconstruction*, *supra* note 10; Bridgewater, *Slavery Reproductive Abuse, and Reparations*, *supra* note 10; ROBERTS, *supra* note 10.

<sup>147</sup> LANDAU & DIXON, *supra* note 34, at 19.

<sup>148</sup> See generally Carmen Gonzalez & Athena D. Mutua, *Mapping Racial Capitalism: Implications for Law*, 2 J.L. & POL. ECON. 127, 154 (2022).

<sup>149</sup> LANDAU & DIXON, *supra* note 34, at 19-20.

<sup>150</sup> See generally Prabhat Patnaik, *Why Neoliberalism Needs Neofascists*, BOS. REV. (July 19, 2021), <https://perma.cc/M2ZY-F36K> (describing the effects of neoliberalism, its crisis in 2008 and the globalized alliance with local neofascism to both mask and keep the free flow of capita going); Alfredo Saad Filho, *Neoliberalism, Crisis, Alternatives: Revitalizing Public Goods*, 16 U. ST. THOMAS J.L. & PUB. POL’Y 23 (2023); Ronald W. Cox & Daniel Skidmore-Hess, *How Neofascism Emerges from Neoliberal Capitalism*, 44 NEW POL. SCI. 590 (2022) (describing neoliberalism and suggesting that financialization is the most important process, one of subordinating economic and social reproduction to the accumulation of financial capital). LANDAU & DIXON, *supra* note 34, at 24; DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 42-55 (2005) (describing the development of the conservative and corporate

of wealth in fewer and fewer hands, rising inequality, a shrinking middle class in the United States, increased economic precarity for many, and planetary destabilization.<sup>151</sup> Broad societal support for these policies is often based on debunked “trickle-down” economic theories.<sup>152</sup> And, it is pursued through the socially destructive policies of state-supported neoliberalism.<sup>153</sup>

Neoliberal policies include financializing the domestic and global economies by methods such as dispossessing people of their assets through debt, suppressing wages, cutting and moving jobs to venues with lower labor costs, repressing unions, destroying social safety net systems, deregulating safety and environmental rules, and privatizing public goods such as education and healthcare, so only those who can pay gain adequate access. As Prabhat Patnaik argues: proponents of these policies cannot explain or resolve persistent problems of unemployment and social deterioration.<sup>154</sup> They cannot resolve these social problems because their funders’ profitability depends on perpetuating them. The concurrent rising profitability of the gun industry and mass shootings exemplify this phenomenon.<sup>155</sup>

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consensus and rehearsal of neoliberalism and its embodiment in the Republican party, and noting that the powerful “corporations involved accounted for ‘about one half of the [Gross National Product] of the United States during the 1970s’”).

<sup>151</sup> See generally Gonzalez & Mutua, *supra* note 148 (describing two crucial features of racial capitalism as profit-making and race-making); Cox & Skidmore-Hess, *supra* note 150 (arguing that neofascism has resulted from neoliberal capitalism).

<sup>152</sup> See generally David Hope, *Tax Cuts for the Wealthy Only Benefit the Rich: Debunking Trickle-Down Economics*, LONDON SCH. ECON. & POL. SCI. (Jan. 24, 2023), <https://perma.cc/8E9M-6R88> (explaining how lesser taxes for top earners only benefit the wealthy); Lucas Chancel et al., *World Inequality Report 2022*, WORLD INEQ. LAB (2022), <https://perma.cc/6ECV-624L> (documenting wealthy inequality across the world); see also Juliana Kaplan & Andy Kiersz, *A Huge Study of 20 Years of Global Wealth Demolishes the Myth of ‘Trickle-Down’ and Shows the Rich are Taking Most of the Gains for Themselves*, BUS. INSIDER (Dec. 7, 2021, 1:20 PM), <https://perma.cc/BYQ5-NHJR>; Bruce Bartlett, *Tax Cut Fever: Republican Trickle-Down Theory is Lies*, USA TODAY, <https://perma.cc/Z43J-BHWZ> (Sept. 27, 2017, 3:15 AM).

<sup>153</sup> See Filho, *supra* note 150, at 27; Cox & Skidmore-Hess, *supra* note 150.

<sup>154</sup> See Patnaik, *supra* note 150. President Biden’s shift away from some neoliberal policies seems to have had a positive impact on some of the problems created by neoliberalism, including unemployment, among others. See, e.g., K. Sabeel Rahman, *Saving Bidenomics*, BOS. REV. (January 4, 2024), <https://perma.cc/DQ7W-R6Y8> (discussing Biden’s industrial program as a massive shift from neoliberalism that has already had some positive impacts).

<sup>155</sup> See generally JOINT ECON. COMM. DEMOCRATS, 112TH CONG., GUN COMPANIES ARE MAKING MILLIONS AT THE EXPENSE OF AMERICAN LIVES (2022), <https://perma.cc/Y7YR-PU8H>; Belinda Luscombe, *How Gunmakers May Benefit from Mass Shootings*, TIME (June 14, 2022, 2:15 PM), <https://perma.cc/4T57-9LQG>; Champe Barton, *Shootings Have Surged — and Gun Companies Have Made Billions*, TRACE (May 27, 2022), <https://perma.cc/JX65-ZSK3>.

Neofascism is thus necessary to mask the use of state power to facilitate both the endless extraction of wealth from an increasingly impoverished mass of people gradually denied social and economic support in the form of social safety nets and organized resistance, among other things.<sup>156</sup> If Cathedral Man is not wealthy, these policies will eventually also affect him and others like him. Neofascism works by demonizing, scapegoating, and marginalizing socially stigmatized groups,<sup>157</sup> in addition to narrowing the life options of women,<sup>158</sup> while cultivating grievance among dominant groups by instilling fear, lying, and subverting social institutions.<sup>159</sup> In creating cultural conflict and driving anti-democratic policies, neofascists seek to bury the knowledge that ultimately all but the wealthy few will be imperiled by neoliberal policies.<sup>160</sup> In the meantime, the Cathedral Man can enjoy the fruits of seemingly being on top of a dominant group, though not part of the economic elite.<sup>161</sup>

A further consequence of *Dobbs* is that it will not only impact pregnant people who seek abortions but “anyone who becomes pregnant, including those who [plan to] continue a pregnancy . . . and those with pregnancy complications or adverse pregnancy outcomes . . . .”<sup>162</sup> Pregnant people will become “newly vulnerable to legal surveillance, civil detentions, forced interventions, and criminal prosecution.”<sup>163</sup> As such, abortion bans “will provide the basis for curtailing fundamental rights for all people who become pregnant” and “will disproportionately affect persons of color.”<sup>164</sup>

However, as we have already seen, the consequences of *Dobbs* will not be limited solely to pregnant people. Neofascist governors have already contemplated surveilling the menstrual cycles of teenagers and young women via cell phone apps.<sup>165</sup> Access to contraceptives is likely

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<sup>156</sup> See Patnaik, *supra* note 150.

<sup>157</sup> *Id.*

<sup>158</sup> See, e.g., Maya Oppenheim, *The Rise of the Far Right Is Costing Women Their Dignity and Human Rights Around the World – Here’s How*, INDEP. (May 11, 2019, 3:21 PM), <https://perma.cc/442N-8NVZ>.

<sup>159</sup> See Patnaik, *supra* note 150.

<sup>160</sup> *Id.*

<sup>161</sup> Patnaik argues that classical fascism operated under a system that facilitated extraction and scapegoated stigmatized groups while marshaling national resources to expand the social and economic resources for the dominant group imagined to be the “real” nationals. See *id.*

<sup>162</sup> Paltrow et al., *supra* note 44, at 3.

<sup>163</sup> *Id.* at 3 (emphasis added).

<sup>164</sup> *Id.*

<sup>165</sup> See Philip Marcelo, *Florida Weighs Mandating Menstrual Cycle Details for Female Athletes*, ASSOC. PRESS (Feb. 3, 2023, 7:04 PM), <https://perma.cc/CXC3-TPLB>; Editorial Board, *Virginia Menstrual-Tracking Bill Underscores Bizarre Extremes in Abortion Debate*, ST. LOUIS POST-DISPATCH (Feb 18, 2023), <https://perma.cc/422T-236Z>.

next.<sup>166</sup> While some have argued that contraceptives and the broad access to them permitted by cases such as *Griswold* and *Eisenstadt* will not be challenged, these messages are not to be believed.<sup>167</sup>

For instance, there were previous suggestions that women, girls, and those capable of pregnancy would not be criminalized by violations of abortion restrictions and bans.<sup>168</sup> However, the recent ninety-day imprisonment and two-year probation of an eighteen-year-old Nebraska girl for using mifepristone to induce an abortion and disposing of the fetal remains, suggests otherwise.<sup>169</sup>

The case raises two issues and the message seems clear. First, the case suggests that the abortion restrictions and bans are not simply about *access* to abortion services but apply to all abortions, including self-managed abortions, even those using traditional herbs. The ostensible motives for abortion bans do not seek to reduce access to available services and medicines for their own sake, but rather to force pregnant people to continue their pregnancies and force birth.

Second, the conflict over the abortion medication mifepristone raises the question of whether girls, women, and those capable of pregnancy are entitled to access *modern medicine and technology* to enhance or plan their lives, as others presumably can. The answer seems to be: No, they cannot where their involuntary services have been commandeered to serve the needs of the fetus and the self-aggrandizement of others' power and belief systems.

Finally, given that economic inequities are closely tied to racial inequities, "loss of abortion care" and perhaps access to modern medicine "and all of its sequelae will be disproportionately felt by people of color."<sup>170</sup> In fact, scholars like Bridges suggest that the demise of *Roe* will

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<sup>166</sup> See Robin Abcarian, *Hang on to the Pill and Your IUD: After Abortion, Birth Control Is the Next Fight*, L.A. TIMES (Apr. 12, 2023, 3:00 AM), <https://perma.cc/X5ZH-HY8X>; Annie Karni, *House Passes Bill to Ensure Contraception Rights After Dobbs*, N.Y. TIMES (July 21, 2022), <https://www.nytimes.com/2022/07/21/us/politics/house-contraception.html> (on file with CUNY Law Review).

<sup>167</sup> See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 384 (2022) (Breyer, Sotomayor, & Kagan, JJ., dissenting) (discussing the concurrences by Justices Thomas and Kavanaugh and arguing that we should not take comfort in assurances that cases like *Griswold* will not be overruled); see also Alison Durkee, *Overturing Roe v. Wade: Here's How It Could Threaten Birth Control Access*, FORBES (Jun. 29, 2022, 10:44 PM), <https://perma.cc/Z6DX-YA5X>.

<sup>168</sup> See, e.g., Clarke Forsythe, *Why the States Did Not Prosecute Women for Abortion Before Roe v. Wade*, AMERICANS UNITED FOR LIFE (April 23, 2010), <https://perma.cc/U8FE-PDHV>

<sup>169</sup> Margery A. Beck, *18-Year-Old Nebraska Woman Sentenced to 90 Days in Jail for Burning Fetus After Abortion*, ASSOC. PRESS (July 20, 2023, 1:55 PM), <https://perma.cc/WN4K-A8RL>.

<sup>170</sup> Paltrow, *supra* note 44, at 4.

be of such harm to Black women that it constitutes a racial injury.<sup>171</sup> However, she argues that the Roberts Court has adopted an intentionally impoverished understanding of racism so that it is unlikely it will consider the racially disparate impact of abortion restrictions on Black people or the existence of such a claim.<sup>172</sup> The Court, she contends, only remedies Black injury if it serves regressive ends or comports with over-simplified notions of pre-Civil Rights era tools of oppression that would be embarrassing if not addressed (e.g., genocide).<sup>173</sup> Unsurprisingly, this conservative approach to racial remedies is not utilized when addressing white people's newly "felt" racial injuries in response to policies like affirmative action.<sup>174</sup> We can expect the same treatment for the larger group of struggling women.

Ultimately, the Cathedral Man's understandings seem on point. He likely understands that the Supreme Court, through its decisions, is undermining democracy and facilitating a revival and expansion of the "badges and incidents" of slavery in pursuit of (elite) white male-minority rule. As a result, Cathedral Man knows that, for now at least, he will be among the last ones standing.

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<sup>171</sup> Bridges, *supra* note 7, at 25, 31, 42-53.

<sup>172</sup> *Id.* at 32, 53-55.

<sup>173</sup> *Id.* at 24-34.

<sup>174</sup> *Id.* at 28-30, 32; *see also* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).