Re-Righting History: A Critical Race Perspective of *Dobbs v. Jackson Women's Health Organization*

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INTRODUCTION

In 1973, the Supreme Court held in *Roe v. Wade* that the Fourteenth Amendment of the U.S. Constitution protects the right to an abortion. Nearly fifty years later, the Court reversed itself with *Dobbs v. Jackson Women's Health Organization*, overruling *Roe* and its progeny and returning the issue of abortion to the states. In addition to overturning a rule that had been affirmed and re-affirmed many times over, the *Dobbs* decision effectively withdrew a right that had been understood as "fundamental" for nearly half a century. In truth, however,

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Roe stood on the shoulders of a long line of cases interpreting the Reconstruction Amendments—particularly the Fourteenth Amendment—in a way that willfully undermined the reach of those Amendments and prevented them from having the broad, affirmative powers they were meant to have.

Inspired by *Critical Race Judgments*, a collection of U.S. court opinions re-written a Critical Race perspective, this opinion re-writes the *Dobbs* majority decision as if it were written by a Supreme Court that acknowledges its flawed history and addresses it head-on.[1] The opinion re-frames the issue presented and uses historical context to show that reproductive autonomy is an issue of race as well as gender, and that the inability to control one's body is precisely the kind of harm the Reconstruction Amendments were meant to guard against. It then finds that Mississippi's 15-week abortion ban and the fetal personhood theory supporting it are nothing less than a continuation of the relentless state regulation and control that Black women have experienced since they first arrived on this continent. In holding that such policies violate the Reconstruction Amendments as they were meant to be interpreted, the opinion acknowledges the fact that the United States' practices have long conflicted with its founding promises, and demonstrates that only when that acknowledgement is incorporated into our legal framework can the two be brought into alignment.

SYLLABUS

Respondents challenge a Mississippi law that prohibits abortion care after the fifteenth week of pregnancy, several weeks before the point of viability. We decline to overturn a half century of legal precedent. Rather, we take this opportunity to review our past precedents and expand our previous holdings in *Roe v. Wade* and *Planned Parenthood v. Casey* regarding the Constitution's protection of reproductive autonomy. We find that the Mississippi law violates principles expressed in our founding documents and definitively embraced in the Reconstruction Amendments to the Constitution. Reproductive autonomy is a fundamental "liberty" interest and is entitled to equal protection under the law pursuant to the Fourteenth Amendment. Additionally, restrictions on reproductive autonomy violate the Thirteenth Amendment's prohibition of involuntary servitude and "badges and incidents" of slavery.

OPINION

Justice BRILL delivered the opinion of the Court.

I. ISSUE AT HAND

For more than fifty years, American law has recognized a constitutionally protected right to reproductive autonomy and privacy with respect to personal

1. *See generally*, Bennett Capers, et. al. Critical Race Judgments: Rewritten U.S. Court Opinions on Race and the Law (2022).

decision-making and one's reproductive capabilities.[2] Since the Court's *Roe v. Wade* decision in 1973, this right has included a woman's[3] right to terminate her pregnancy before the point of fetal viability[4] without undue state interference.[5] This right is widely recognized as fundamental to a woman's ability to "participate equally in the economic and social life of the Nation," and has been repeatedly affirmed by this Court—most recently just two years ago.[6]

The law at issue here, Mississippi's Gestational Age Act ("HB 1510"), contains this central provision: "Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform . . . or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks." § 4(b).

Respondents, the only remaining abortion clinic in Mississippi, quickly challenged HB 1510, and a District Court found the law unconstitutional as a clear violation of long-standing precedent prohibiting abortion bans before the point of viability.[7] Mississippi does not dispute the fact that a fetus cannot be viable before at least 23-24 weeks of pregnancy.[8] The Fifth Circuit unanimously affirmed, observing that beginning with *Roe v. Wade*, Supreme Court precedent has established ("and affirmed, and reaffirmed") that the Constitution protects the

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2. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923) (finding that parents have a right to control their children's upbringing and education); Griswold v. Connecticut, 381 U.S. 479 (1965) (finding a right to use contraception); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (recognizing procreation as one of the "basic civil rights of man"); Lawrence v. Texas, 539 U.S. 558 (2003) (finding a right to have consensual sexual relations with the person of one's choosing); Loving v. Virginia, 388 U.S. 1 (1967) (rejecting prohibitions on interracial marriage); Obergefell v. Hodges, 576 U.S. 644 (2015) (recognizing a right to same-sex marriage).
3. Although the Court will use the terms "woman" and "women" throughout this opinion, the Court hereby takes judicial notice that "individuals of all gender expressions may also become pregnant" and seek abortion and reproductive health services. *See* Brief for the Howard University School of Law Human and Civil Rights Clinic as Amicus Curiae Supporting Respondents at 2 n.5, Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228 (2022) (No. 19-1392) [hereinafter "Brief for Howard University"]. This opinion applies equally to all individuals with the capacity to become pregnant and reproduce.
4. *See* Brief for Respondents at 5, Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228 (2022) (No. 19-1392) [hereinafter "Brief for Respondents"]. Fetal viability is the point at which a fetus could conceivably survive outside the pregnant person's body, and today generally falls around the 23-24th week of pregnancy. *Id.*; *see also* Roe v. Wade, 410 U.S. 113, 163 (1973); *see also infra* notes 67-73 and accompanying text.
5. *Roe*, 410 U.S. at 153; *see also* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846, 874 (1992) (reaffirming *Roe*'s "essential holding" and establishing that before the point of viability states may regulate abortion but may not impose an "undue burden" on a woman's right to choose).
6. *Casey*, 505 U.S. at 856; *see also* Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016); *see also* June Medical Services v. Russo, 140 S.Ct. 2103, 2112-13 (2020) (where the Louisiana statute being challenged was "almost word-for-word identical" to the Texas law that was struck down in *Whole Woman's Health*, thereby resulting in findings of fact that "mirror[ed] those made in *Whole Woman's Health* in every relevant respect and require[d] the same result," namely, that the law imposing undue burdens on abortion access was unconstitutional).
7. Brief for Respondents, *supra* note 4, at 7-8.
8. *Id.* at 8.

right to terminate a pregnancy before the point of viability.[9]

II. THE CONSTITUTIONAL QUESTION

Before the Court is the question of whether to overrule *Roe* and its progeny, which would require a finding that the Constitution does not protect the right to terminate one's pregnancy after fifteen weeks. In other words, we are being asked to overturn nearly fifty years of precedent. In defending HB 1510, the State of Mississippi boldly asserts that we should reconsider and overrule *Roe* and *Casey* and once again allow the States to regulate abortion as their citizens wish[10]—or, at the very least, to do away with the viability line. On the other hand, Respondents and the Solicitor General ask us to reaffirm *Roe* and *Casey*; they contend that the Mississippi law cannot stand if we do so. Allowing Mississippi to prohibit abortions after fifteen weeks of pregnancy, they argue, "would be no different than overruling *Casey* and *Roe* entirely."[11] They contend that "no half-measures" are available and that we must either reaffirm or overrule *Roe* and *Casey*.[12]

We must first acknowledge that *stare decisis* alone is an insufficient reason to adhere to prior precedents. The doctrine of *stare decisis* is based on the idea that the rule of law underlying our Constitution "requires such continuity over time that a respect for precedent is, by definition, indispensable."[13] On the other hand, *stare decisis* recognizes that some rulings may come to be viewed "so clearly as error" that they must be re-examined and possibly overruled.[14] We would lack all

9. *Id.* (internal quotes omitted).

10. *See* Brief for Petitioners at 14-18, Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228 (2022) (No. 19-1392). Though Mississippi argues that overturning *Roe* and *Casey* would allow the States to regulate abortion as their citizens wish, polling indicates that the states that are currently working to restrict or ultimately ban abortion are doing so against the wishes of a majority of their citizens. *See, e.g.*, Alison Durkee, *More Americans Support 15-Week Abortion Ban—But Don't Want Stricter Restrictions—Poll Finds*, FORBES (Apr. 14, 2022), https://www.forbes.com/sites/alisondurkee/2022/04/01/more-americans-support-15-week-abortion-ban-but-dont-want-stricter-restrictions-poll-finds/?sh=71b35cbcbf5b [https://perma.cc/5EQK-5KBD] (discussing a *Wall Street Journal* poll finding that 55% of Americans believe abortion should be legal "in all or most cases"); *see, e.g.*, Sarah McCammon, *Poll: One year after SB 8, Texans express strong support for abortion rights*, NPR (Sept. 1, 2022), https://www.npr.org/2022/09/01/1120472842/poll-one-year-after-sb-8-texans-express-strong-support-for-abortion-rights [https://perma.cc/NZP4-M29P] (noting that one year after Texas's S.B. 8, which allows for civil lawsuits to enforce a prohibition on most abortions after about six weeks, six in ten Texas voters support abortion being "available in all or most cases."). Though the Court does not base its decision on public opinion, it is important to note that Mississippi's claim that HB 1510 is in line with the wishes of its voters is insincere and not supported by any reliable data.

11. Brief for Respondents, *supra* note 4, at 43.

12. *Id.* at 50.

13. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 854 (1992).

14. *Id.* In order to maintain respect for precedent while ensuring that we are able to correct our past missteps, the doctrine of *stare decisis* provides several factors for the Court to weigh when determining whether to affirm or overrule a prior decision. *Id.* Those factors include (i) whether a prior holding has become unworkable; (ii) whether overruling a prior decision would result in societal instability or serious inequity to those who have relied upon it; (iii) the strength of the prior decision's reasoning and whether the rule of law has developed to the point where the prior ruling has been "discounted by society"; and (iv) whether the factual bases for a prior decision have changed so as to render the prior ruling irrelevant or an

credibility if we failed to recognize that the law has been used to create and perpetuate systems of oppression in ways that are wholly inconsistent with human rights principles and the promises of our founding documents.[15] Indeed, this Court has been instrumental in upholding and enforcing such laws, having taken as true—and enshrined into law—racist and prejudicial ideas about certain marginalized groups.[16]

In addition to perpetuating explicit discrimination, this Court has a long history of implicitly—or, in many cases, complicitly—creating and preserving discrimination in the law.[17] The Court's interpretation of the Reconstruction Amendments is a perfect example of these complicit biases at work. Since they were first ratified, this Court has, in many ways, failed to give the Reconstruction Amendments the sweeping, affirmative powers they may have—and indeed were intended to have—had. For example, in *Slaughter-House Cases*, the first time we interpreted these Amendments, we expressed doubt that "any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever…come within the purview of th[e Equal Protection Clause]," thereby restricting the Clause's reach to only a small subset of discriminatory actions.[18] The Court did this knowing full well that discrimination comes in many forms—not just explicit state-sanctioned racism. By contrast, one prominent

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unjustifiable method for dealing with the issue it addressed. *Id.* at 855.

Applying these factors to the central holdings of *Roe* and *Casey*, we find that *stare decisis* requires that they be upheld. First, there is nothing unworkable about the "undue burden" standard we set out in *Casey*. It sets forth a predictable yet flexible standard that allows for the balancing of interests and can be applied on a case-by-case basis. *See* Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228, 2335 (2022) (Breyer, J., Sotomayor, J., & Kagan, J., dissenting). Second, *Roe* and *Casey* have created "overwhelming" reliance interests. *See id.* at 2343-2344 (noting that "all women now of childbearing age have grown up expecting that they would be able to avail themselves of *Roe's* and *Casey's* protections."). Overruling them would therefore create profound disruption and inequities. Furthermore, as we will discuss in more detail in this opinion, we stand by the strength of *Roe* and *Casey*'s reasoning; if anything, developments in the legal and factual bases for those decisions have further reinforced their holdings. Far from supporting their overturning, *stare decisis* therefore requires that we uphold these decisions.

15. *See, e.g.*, Peggy Cooper Davis, *Loving v. Virginia*, *in* CRITICAL RACE JUDGMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW 444–45 (Bennett Capers, et. al., eds., 2022); Francisco Valdes, *The Slaughter-House Cases*, *in* CRITICAL RACE JUDGMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW 124 (Bennett Capers et. al., eds., 2022).
16. *See, e.g.*, Johnson v. M'Intosh, 21 U.S. 543, 590 (1823) (justifying colonizers' "absolute title" to the land by characterizing Native Americans as "fierce savages . . . whose subsistence was drawn chiefly from the forest"); *Dred Scott v. Sandford*, 60 U.S. 383, 417 (1857) ("it is not a power to raise to the rank of a citizen any one born in the United States, who . . . belongs to an inferior and subordinate class"); *Ping v. U.S.*, 130 U.S. 581, 608 (1889) (favorably comparing the exclusion of Chinese immigrants to the exclusion of "paupers, criminals, and persons afflicted with incurable diseases").
17. *See* Michele Goodwin, *Complicit Bias and the Supreme* Court, 137 HARV. L. REV. F. 119, 127–28 (arguing that the Supreme Court acts with "complicit bias" where the Court (1) is "aware of a past, present, or future harm and does not intercede, with apparent knowledge that the impact will prejudice another"; (2) "shows an inclination to protect an individual or group based on relationship, affinity, or group characteristics"; and (3) "furthers the harm through silence and inaction."
18. Slaughter-House Cases, 83 U.S. 36, 81 (1872).

constitutional scholar concluded that the Equal Protection Clause was meant to have the dual effect of "impos[ing] on state and federal governments an absolute prohibition on the *denial* of equal protection to any person subject to their laws and jurisdiction," and "additionally impos[ing] on the same authorities a positive duty of *protection* against unlawfulness, whether private or public, which the states and federal governments now owe, equally, to all persons under their jurisdiction."[19] The result is that this Court's jurisprudence, particularly under the Reconstruction Amendments, has become "inhospitable" to claims arising out of laws or policies that, while not explicitly prejudicial, are the result of decades of systemic oppression.[20]

We must be mindful of the effects of the Court's biases, both on our past jurisprudence and this Court's reasoning in the case at hand.[21] For these reasons, any decision to uphold past precedent, regardless of how many times it has been reaffirmed, cannot be based solely on the principle of *stare decisis*. We therefore accept this invitation to revisit *Roe* and *Casey*, and take this opportunity to reconsider and expand on the jurisprudence on which they stand.[22]

This case requires us to consider the specific question of whether the Constitution, properly understood, confers a right to obtain an abortion. Though abortion is not explicitly mentioned, that does not end our analysis. It is well established that the Constitution, particularly with the addition of the Reconstruction Amendments, protects rights that are implicit in its meaning, even if those rights are not explicitly enumerated.[23]

Fundamental rights derive from the founding claims to the "natural law of liberty" embedded in the Declaration of Independence.[24] The identification and protection of fundamental rights "is an enduring part of the judicial duty to

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19. *See* Valdes, *supra* note 15, at 140 (emphasis in original).
20. Khiara M. Bridges, *Elision and Erasure: Race, Class and Gender in Harris v. McRae*, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES 117, 124 (Melissa Murray, et al., eds., 2019) (using as an example *Harris v. McRae*, where the plaintiffs, challenging a law prohibiting federal funds from paying for abortions, chose not to argue that the law in question constitutes discrimination on the basis of race or poverty in part because the Court's jurisprudence on race and class had become "inhospitable" to such claims).
21. Biases, while to some extent unavoidable, are disfavored in the law "because they introduce errors in judgment." Goodwin, *supra* note 17, at 140. Informed in no small part by such biases, this Court has, far too many times, struck down or undermined laws intended to protect vulnerable groups. *Id.* at 142.
22. *Contra* Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228, 2301 (2022) (Thomas, J., concurring) (inviting the Court to "reconsider all of this Court's substantive due process precedents").
23. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923) (finding that parents have a right to control their children's upbringing and education); Griswold v. Connecticut, 381 U.S. 479 (1965) (finding a right to use contraception); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (recognizing procreation as one of the "basic civil rights of man"); Lawrence v. Texas, 539 U.S. 558 (2003) (finding a right to have consensual sexual relations with the person of one's choosing); Loving v. Virginia, 388 U.S. 1 (1967) (rejecting prohibitions on interracial marriage); Obergefell v. Hodges, 576 U.S. 644 (2015) (recognizing a right to same-sex marriage).
24. *See* Cheryl Harris, *Dred Scott v. Sanford, in* CRITICAL RACE JUDGMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW 305, 319 (Bennett Capers, et. al., eds., 2022).

interpret the Constitution."[25] This duty is not effectuated using any strict "formula," but rather by the exercise of "reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect."[26] One justification for this method of reasoning is that, as we have explained, "[t]he nature of injustice is that we may not always see it in our own times."[27] Indeed, the Founders and those who wrote and ratified the Reconstruction Amendments recognized this reality, and so they built into our Constitution the flexibility to "protect[] the right of all persons to enjoy liberty," even as we continue to learn its meaning.[28] Accordingly, our analysis must be guided by history and tradition only insofar as we must respect our history and learn from it.[29] However, we must be careful to avoid upholding laws simply because they reflect the way things have been done in the past, for, as we know, "if rights were defined by those who exercised them in the past, then received practice could serve as their own continued justification and new groups could not invoke rights once denied."[30]

We must be particularly mindful of our history when interpreting the Reconstruction Amendments, for their objectives were directly informed by the context in which they were drafted. The Reconstruction Amendments were ratified in response to the institution of chattel slavery and the Civil War.[31] They reflected an acknowledgement that our country's practices were in direct conflict with its founding promises, and took an affirmative step toward bringing the two in alignment.[32] Taken together, these Amendments—the Thirteenth Amendment, which prohibited slavery and any "badges and incidents" of the institution; the Fourteenth Amendment, which created a national citizenship vested with new rights of due process and equal protection upon which States could not infringe; and the Fifteenth Amendment, which granted freed men the right to vote—were not designed only to end the institution of slavery. These amendments prevent the law from being used to establish any "caste system" in the future, reinforce the original text of the Constitution, and expand protections of freedom and liberty for *all* people.[33]

Guided by these principles, we conclude that any law that imposes a

25. *Obergefell*, 576 U.S. at 663.
26. *Id.* at 664.
27. *Id.*
28. *Id.*
29. *Id*.
30. *Id.* at 671.
31. *See* Harris, *supra* note 24, at 319; *see also* Michele Goodwin, *No, Justice Alito, Reproductive Justice Is in the Constitution,* N.Y. TIMES, June 26, 2022, at A23, https://www.nytimes.com/2022/06/26/opinion/justice-alito-reproductive-justice-constitution-abortion.html?smid=url-share.
32. Harris, *supra* note 24, at 319; Goodwin, *supra* note 31, at A23.
33. *See* Slaughter-House Cases, 83 U.S. at 71–72 (observing the "pervading purpose" of the Reconstruction Amendments was the "freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."); Valdes, *supra* note 15, at 124–25.

condition of involuntary servitude or any other burden on a group that was similarly imposed on enslaved people pursuant to the institution of chattel slavery violates the Thirteenth Amendment. Additionally, any law that denies a fundamental liberty or imposes a burden on a particular group in a way that functions to oppress or subordinate that group violates the Due Process and Equal Protection clauses of the Fourteenth Amendment. Finally, when assessing the effects of the law at issue, we must consider the context and history of the law itself, including its proffered and actual effects.[34] Bearing in mind that there may be overlapping systems of oppression at work, we must evaluate the effects of the law from the perspective of those for whom the law is *most* burdensome.[35]

III. SLAVERY, SUBORDINATION, AND REPRODUCTIVE AUTONOMY

There is no question that the denial of reproductive autonomy was a key feature of the institution of chattel slavery, and that while the methods and goals may have changed, Black women's reproductive freedoms in particular have continued to be the subject of relentless state regulation and control.[36] Slavery's defining feature was its denial of Black people's humanity. Indeed, in order to relegate Black people to the status of property, the institution of slavery depended on the destruction of "any notion of Black personhood."[37] Denying enslaved people autonomy over their intimate lives was a key feature of these efforts.[38] For example, enslaved people were prohibited from entering into contracts, including marriage contracts.[39] Those who defied these rules and formed familial relationships received no protections, and many suffered forced separation when one partner was sold or loaned to other plantations.[40] Children were likewise regarded as the property of the enslaver rather than as a dependent of their parents and were frequently forcibly separated from their families.[41]

34. *See* Valdes, *supra* note 15, at 135–36.

35. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 883, 894 (1992) ("The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."). Though white women have historically experienced state-sponsored efforts to control their reproductive lives, such regulations are most insidious and burdensome for Black women. *See, e.g.*, Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,* 1989 U. CHI. LEGAL F. 139, 154 (observing that feminist theory purporting to reflect *women's* experiences tends to center the experience of *white* women, thereby ignoring the fact that Black women suffer oppression not just as a function of their sex but also their perceived race. This allows white feminists to ignore not only the way their own race mitigates their experience of sexism, but also "often privileges them over and contributes to the domination of other women.").

36. *See* Brief for Howard University, *supra* note 3, at 3.

37. *Id.* at 4; Civil Rights Cases, 109 U.S. 3, 36 (1883) (Harlan, J., dissenting) (noting that the institution of slavery "rested wholly upon the inferiority, as a race, of those held in bondage").

38. *See* Melissa Murray, *Roe v. Wade*, in CRITICAL RACE JUDGMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW 523, 527 (Bennett Capers et. al., eds., 2022); Davis, *supra* note 15, at 445.

39. *See* Murray, *supra* note 38, at 527; Davis, *supra* note 15, at 445.

40. Murray, *supra* note 38, at 527–28.

41. *See* Brief for Howard University, *supra* note 3, at 7.

After the importation of enslaved people was outlawed in 1808, the United States could no longer rely on the international slave trade for its supply of slave labor, and so the institution became dependent on the reproductive capabilities of enslaved women.[42] Enslaved women's value was therefore measured by their ability to reproduce, and their masters acted accordingly: enslaved women's sexual partners were controlled (and often forced on them, either in the form of rape by their enslavers or by being forced to "breed" with other enslaved people); pregnancy was rewarded; and failure to bear children was punished.[43] Enslavers received support from the newly professionalized medical field, which supported efforts to limit women's ability to control their fertility by launching a campaign to criminalize contraception and abortion nation-wide.[44] All of this was sanctioned and enabled by American law.[45]

Enslaved women resisted efforts to control their fertility, going to great lengths to avoid or end pregnancy using homemade contraceptives and abortifacients.[46] Given that the institution of slavery depended on their ability to reproduce, these efforts to control their fertility were a key method of resisting their enslavement and undermining the institution itself.[47] In short, state-sanctioned denial of reproductive autonomy was a critical tool of white supremacy and there can be no question that it constitutes a "badge and incident" of slavery.[48]

Even after they were freed from literal bondage, Black women continued to face sexual coercion, violence, and attempts to control their reproductive lives as part of the backlash to Reconstruction and the end of slavery.[49] Meanwhile, efforts to maintain white supremacy gave rise to negative eugenics policies, or the "weeding out of undesirable social elements by discouraging or preventing the birth of children with 'bad' genetic profiles."[50] Fueled by racist stereotypes about

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42. *Id.* at 5–6; Murray, *supra* note 38, at 529–30.
43. Brief for Howard University, *supra* note 3, at 5–6 (quoting Dorothy Roberts, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 41 (1997)).
44. *See* LORETTA J. ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION 24 (2017).
45. *See, e.g.*, State v. Mann, 13 N.C. 263 (1829) (holding that it is "the imperative duty of the Judges to recognize the full dominion of the owner over the slave," on the ground that "this dominion is essential to the value of slaves as property, to the security of the master, and the public tranquility greatly dependent upon their subordination," as well as for the "general protection and comfort of the slaves themselves"); Ross & Solinger, *supra* note 44, at 18 (explaining that enslaved women "did not have any of the sexual, relational, or maternal rights that white females could generally claim"); Dorothy Roberts, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 34 (1997) (discussing one of America's first laws, which provided that children who were born to enslaved mothers and fathered by white men inherited the slave status of their mother).
46. *See* Murray, *supra* note 38, at 530.
47. *Id.*
48. *Id.* at 530–31; *See* Civil Rights Cases, 109 U.S. at 20 (noting that "the power vested in Congress to enforce the [Thirteenth Amendment] by appropriate legislation clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery").
49. *See* Brief for Howard University, *supra* note 3, at 8–9.
50. *See id.* at 11 (quoting Harriet A. Washington, MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE

the inferiority of Black people and Black women's unfitness for motherhood, thousands of Black women were forcibly sterilized between the late 1800s and late 1900s.[51] Forced sterilization was in fact so common in the state of Mississippi that it earned the nickname "the Mississippi appendectomy."[52] Again, these efforts were sanctioned and enabled by American law.[53]

Though restrictions on Black women's fertility are subtler and less overtly racist now than in the past, Black women continue to face a combination of systemic barriers and restrictions on access to care and resources. This effectively denies them the ability to control their reproductive lives. The advent of birth control in the early twentieth century represented a critical step for Black women trying to claim control over their own bodies.[54] Birth control and the ability to safely terminate a pregnancy presented Black women not only with the ability to resist white supremacist efforts to control their bodies, but also to protect themselves against high maternal mortality rates and decide for themselves how and when to become parents.[55] As we acknowledged in *Casey*, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[56] This is especially true of Black women. It follows that the effect of denying access to these critical tools is to deny women of such control.

In Mississippi in particular, the State's restrictions on access to care and resources have impaired Black women's ability to control their reproductive lives, often with deadly consequences. For example, Mississippi's maternal and infant mortality rates are shockingly high, with Black women and infants facing significantly higher mortality rates than their white counterparts.[57] Yet far from

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51. *See* Brief for Howard University*, supra* note 3, at 11–12; *see also*, Ross & Solinger, *supra* note 44, at 51–52 (observing that while Black women were being forcibly sterilized, white women faced barriers to voluntary sterilization as part of a broader social effort to *encourage* them to reproduce, with the implication that more *white* children were good for society).
52. *See* Brief for Howard University, *supra* note 3, at 11.
53. *See*, *e.g.*, *id.* at 12 (quoting President Theodore Roosevelt's comment that "race purity must be maintained"); *see also* Buck v. Bell, 274 U.S. 200, 207 (1927) (rejecting a constitutional challenge to the forced sterilization of an institutionalized rape victim, reasoning that "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind . . . Three generations of imbeciles are enough.").
54. *See* Ross & Solinger, *supra* note 44, at 33 (showing that birth control represented a tool of empowerment even as it was weaponized to reduce Black fertility in service of the "public good").
55. Brief for Howard University, *supra* note 3, at 3.
56. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 883, 856 (1992).
57. *See* MISS. STATE DEPT. OF HEALTH, MISS. MATERNAL MORTALITY REPORT 10, 12, 16 (April 2019), https://www.mspqc.org/wp-content/uploads/2020/10/Mississippi-Maternal-Mortality-Report-2013-2016.pdf) (showing that between 2013 and 2016, the Mississippi pregnancy-related maternal mortality rate was 22.1 deaths per 100,000 live births, and Black women suffered a maternal mortality rate nearly three times that of white women, in addition to accounting for "nearly 80 percent of pregnancy related cardiac deaths" in the state); MISS. STATE DEPT. OF HEALTH, 2019 & 2020 INFANT MORTALITY REPORT 10, 13 (2020) https://www.supremecourt.gov/opinions/URLs_Cited/OT2021/19-1392/19-1392-19.pdf, (showing that between 2018 and 2020, Mississippi had an average infant mortality rate of 8.43

expanding access to healthcare, Mississippi has taken steps to deny such access by imposing strict requirements for Medicaid and refusing to expand the program under the Affordable Care Act.[58] In fact, though 86 percent of pregnancy-related deaths in Mississippi occur postpartum, Mississippi *rejected* federal funding that would have provided a year's worth of Medicaid coverage to mothers after giving birth.[59] Many women who choose to terminate their pregnancies are low-income mothers who are concerned about the cost of providing for another child.[60] Given the high cost of childcare, a predictable effect of being denied an abortion is an increased likelihood of remaining in or falling into poverty.[61] However, far from reaching out a helping hand in its efforts to encourage women to continue their pregnancies, Mississippi actually *penalizes* families for having too many children by imposing a cap on the number of children in calculating increases in public assistance benefits.[62] Due to the effects of systemic racism, policies denying access to public assistance disproportionately burden people of color.[63]

IV. HB 1510 AND THE RECONSTRUCTION AMENDMENTS

Beginning when they were first brought to this country in 1619 and continuing until this day, Black women have consistently and systematically been deprived of all control over their reproductive lives at the hands of the State. They have been denied the ability to choose not to have children, the ability to voluntarily have children, and the ability to have and raise their children safely and with dignity. Regardless of states' justifications for these various policies, the effect of these denials has invariably been to subordinate Black women. HB 1510, which restricts women's ability to control their fertility, is simply a continuation of this method of oppression.

We hereby expand our past holdings in *Roe* and *Casey* and conclude that the Constitution protects the right to reproductive autonomy, or the ability to freely exercise control over one's reproductive health and capabilities, without undue State interference. Our precedents firmly establish that the Constitution's Due Process Clause protects a right to privacy and autonomy with respect to personal

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infant deaths per 1,000 live births, but when broken down by race, Black infants faced a mortality rate of 11.7 deaths per 1,000 live births—nearly twice as high as the mortality rate of white infants (6.2 deaths per 1,000 live births)).

58. *Id.*; *see also* Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228, 2339 (2022) (Breyer, J., Sotomayor, J., & Kagan, J., dissenting).

59. *Dobbs*, 142 S.Ct. at 2340 (Breyer, J., Sotomayor, J., & Kagan, J., dissenting).

60. *See* Brief of Equal Protection Constitutional Law Scholars as Amicus Curiae at 26, Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228 (2022) (No. 19-1392) [hereinafter "Brief of Equal Protection Scholars"].

61. *See* Jennifer Ludden, *Women who are denied abortions risk falling deeper into poverty. So do their kids*, NPR (May 26, 2022), https://www.npr.org/2022/05/26/1100587366/banning-abortion-roe-economic-consequences [https://perma.cc/R7P2-29FZ].

62. Brief of Equal Protection Scholars, *supra* note 60, at 26.

63. *See* Suzanne Wikle et al., *States Can Reduce Medicaid's Administrative Burdens to Advance Health and Racial Equity*, CENTER ON BUDGET AND POLICY PRIORITIES (July 19, 2022), https://www.cbpp.org/research/health/states-can-reduce-medicaids-administrative-burdens-to-advance-health-and-racial.

decision-making.[64] The exercise of reproductive autonomy involves making "the most intimate and personal choices a person can make in a lifetime," choices we have recognized as "central to personal dignity and autonomy" and accordingly "central to the liberty protected by the Fourteenth Amendment."[65]

Additionally, in light of our analysis of the purpose and function of the Reconstruction Amendments, and taking into account our historical findings, reasoned judgment leads us to conclude that there is additional protection for reproductive autonomy in the Constitution beyond what our precedents have previously recognized. We hold that because HB 1510 restricts women's ability to control their fertility, echoing the ways in which Black women's ability to control their fertility was restricted in furtherance of the institution of slavery, it is a "badge and incident" of slavery and accordingly violates the Thirteenth Amendment. Additionally, because it effectively denies women their right to reproductive autonomy in a way that has historically been used to subordinate women, especially Black women, based on both their sex and their race,[66] HB 1510 violates the Equal Protection Clause of the Fourteenth Amendment. Finally, just as we held in *Roe* and *Casey*, HB 1510 denies women a fundamental liberty, their right to an abortion, in direct contravention to the Fourteenth Amendment's Due Process Clause.

Respondent's argument that HB 1510 is justified by the State's legitimate interest in protecting "unborn human life" does not withstand scrutiny. *Roe* and *Casey* recognized that there are important and potentially conflicting interests at stake in the question of whether to protect the ability to terminate one's pregnancy, and so they struck a balance, as courts often do.[67] The Court acknowledged that pregnancy is a unique condition whereby, over the course of approximately nine months, a fertilized egg develops into what is, at birth, unquestionably a "person" in every sense of the word.[68] As pregnancy progresses, the fetus's "interest[s]" become "significantly involved" to the point where, under some circumstances, those interests have the potential to directly conflict with the interests of the pregnant person.[69] However, until the point of viability, the fetus is entirely

64. *See supra* note 2 and accompanying text.

65. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 883, 851 (1992).

66. *See generally* Crenshaw, *supra* note 35 (discussing the impact of overlapping identities of gender and race in the context of discrimination).

67. *See* Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228, 2321-2323 (2022) (Breyer, J., Sotomayor, J., & Kagan, J., dissenting).

68. *See* Roe v. Wade, 410 U.S. 113, 159 (1973).

69. *Id.* An extreme example of these interests conflicting is when a pregnant person with cancer depends on chemotherapy to save her life, but that chemotherapy would compromise her pregnancy. *See* NATIONAL ADVOCATES FOR PREGNANT WOMEN, WHEN FETUSES GAIN PERSONHOOD: UNDERSTANDING THE IMPACT ON IVF, CONTRACEPTION, MEDICAL TREATMENT, CRIMINAL LAW, CHILD SUPPORT, AND BEYOND 22 (2022), https://www.nationaladvocatesforpregnantwomen.org/wp-content/uploads/2022/08/Fetal-Personhood-Issue-8.17.22.pdf [hereinafter "National Advocates"]; *see also* Ariana Eunjung Cha & Emily Wax-Thibodeaux, *Abortion foes push to narrow 'life of mother' exceptions*, WASHINGTON POST, May 13, 2022, https://www.washingtonpost.com/health/2022/05/13/abortion-ban-exceptions-mothers-life/ [https://perma.cc/Q98H-RC3K].

dependent on the pregnant person's body for its existence and survival. As such, any legal "interests" of the fetus are entirely hypothetical, as they are conditioned on a series of events that must take place for the pregnancy to successfully continue to term but are by no means certain—just one of which is the pregnant person choosing not to terminate.

That is why in *Roe* we drew the line at which states may regulate the practice of ordinary abortions[70] at the point of viability: because that is when the fetus is conceivably capable of independent existence outside the mother's body.[71] In other words, that is when the fetus's "interests" can plausibly be protected without subordinating the rights of the pregnant person. We recognize that the viability line is dependent on a number of factors, and we note here that those factors will vary from pregnancy to pregnancy and change with the development and availability of medical technology.[72] Crucially, we noted in *Roe* that viability requires the possibility of "meaningful life," not fleeting survival.[73] Accordingly, we must emphasize that the determination of whether a pregnancy is "viable" must be made on a case-by-case basis by the medical professionals attending to the pregnant person at hand.

With these considerations in mind, we hold that before the point of viability, any restrictions on the ability to access abortion care that place the fetus's hypothetical interests before the very real interests of the pregnant person pose an "undue burden" and are accordingly invalid.[74] States wishing to protect fetal life may regulate ordinary abortions only *after* the point of viability.[75] However, under

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70. We use the term "ordinary" abortion to describe those for which there is no medical necessity, given that this category includes the vast majority of abortions and avoids the moral connotations of the term "elective" abortion. *See, e.g.*, Katie Watson, *Why We Should Stop Using the Term "Elective Abortion,"* AM. MED. ASSOC. J. OF ETHICS 2018, https://journalofethics.ama-assn.org/article/why-we-should-stop-using-term-elective-abortion/2018-12#:~:text=The%20term%20elective%20abortion%20or,2 [https://perma.cc/6NHA-CUCM].

71. *Roe*, 410 U.S. at 163.

72. *Id.* at 160; *see also Abortions Later in Pregnancy*, KAISER FAMILY FOUNDATION (Dec. 5, 2019), https://www.kff.org/womens-health-policy/fact-sheet/abortions-later-in-pregnancy/ [https://perma.cc/U8H7-XKB3] [hereinafter "Abortions Later in Pregnancy"] (noting that "[v]iability depends on many factors, including gestational age, fetal weight and sex, and medical interventions available"). Viability can also depend on the hospital at which the infant is delivered. *See id.* (showing that according to a study of 24 academic hospitals, treatments for infants born at 22 weeks ranged from 0 to 100 percent depending on the hospital, which shows that "the criteria used to determine viability at one hospital may not be the same as another").

73. *Roe*, 410 U.S. at 163.

74. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 883, 846, 874 (1992).

75. We recognize that some people seek ordinary abortions later in their pregnancy due to a variety of systemic barriers to obtaining abortion earlier in pregnancy, and that bright-line legislative restrictions run the risk of disregarding the unique patient needs and variables that inevitably present themselves during pregnancy. *See, e.g., Abortions Later in Pregnancy*, *supra* note 72; *Facts Are Important: Understanding and Navigating Viability*, AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS (last accessed June 4, 2024), https://www.acog.org/advocacy/facts-are-important/understanding-and-navigating-viability [https://perma.cc/S2MT-Z5SK]. In our efforts to balance the interests of the pregnant person with those of the viable fetal life, our holding that *any* restriction on abortion access before the

no circumstances may states restrict or prohibit abortion care that relevant medical professionals deem necessary, or otherwise use the viability line to limit access to "evidence-based care."[76]

Furthermore, we reject the State's characterization of a pre-viability fetus as an "unborn human being" and hold that policies based on this idea of "fetal personhood,"[77] to the extent they afford legal rights to a nonviable fetus, are unconstitutional under the Thirteenth and Fourteenth Amendments. Fetal personhood policies inherently function to subordinate the pregnant person's liberty by allowing states to police a pregnant person's body and otherwise legal activity for the purposes of protecting the fetus's hypothetical interests—sometimes with devastating consequences.[78] Such arbitrary subordination constitutes a deprivation of liberty (and, in extreme cases, life) without due process of law, and so it violates the Fourteenth Amendment. Furthermore, such a policy reflects the State's judgment that the pregnant person is worthy of protection only insofar as they can support the life of the fetus. This is analogous to the way slave states used to police Black women's bodies based on the State's judgment that Black women were only valuable insofar as they could reproduce. Accordingly, such a policy also violates the Thirteenth Amendment.

V. HOLDING

We hold that the central holdings of *Roe* and *Casey* are not just affirmed but expanded. The fundamental right to reproductive autonomy includes the right to choose not to have a child, the right to have a child at the time of one's choosing, and the right to do so safely and with dignity. Denial of reproductive autonomy was an essential tool used in the perpetuation of chattel slavery and is accordingly inconsistent with the Reconstruction Amendments' effort to abolish slavery and its badges and incidents. HB 1510 impermissibly infringes on the inalienable

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point of viability, as well as our emphasis that viability and the necessity of post-viability abortions must be determined by medical professionals on a case-by-case basis, aim to remove some of those barriers.

76. *Id.*; *see also Casey*, 505 U.S. at 879 (noting an exception to the viability line "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother") (quoting *Roe v. Wade*, 410 U.S. at 164-65). This includes situations where abortion is deemed necessary to preserve the life or health of the pregnant person; cases in which there are serious fetal anomalies, and any other situation in which a medical professional concludes abortion care is indicated. We emphasize that these determinations must be made not by the States but by qualified medical professionals in consultation with their patients.

77. *See,* Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L. J. 13, 62 (2012) (arguing that legal personhood should begin at conception because there is "no ontological transformation that occurs at the point of birth, or at some mid-point in pregnancy . . . or at any other point subsequent to conception.").

78. *See e.g.,* National Advocates for Pregnant Women, *supra* note 69, at 14 (discussing a Wisconsin law that defines "unborn child" as a "human being from the time of fertilization to the time of birth" and allows the state to detain a pregnant person "on the suspicion that a person is pregnant and has consumed or *may* consume alcohol or a controlled substance during their pregnancy."); *and* 2 n.1 (describing a situation in which a pregnant woman was arrested for attempted feticide after falling down the stairs. She was reported to the police by medical staff after she confided that she had considered getting an abortion earlier in her pregnancy.).

freedoms protected by these Amendments and is accordingly unconstitutional.