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GENDERED AND RACIALIZED BODIES IN *DOBBS V. JACKSON WOMEN'S  
HEALTH ORGANIZATION*

by

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B.A. University of Central Florida, 2020

A thesis submitted in partial fulfillment of the requirements  
for the degree of Master of Arts  
in the Department of Sociology  
in the College of Sciences  
at the University of Central Florida  
Orlando, FL

Spring Term  
2023

## ABSTRACT

In June 2022 the US Supreme Court overturned *Roe v. Wade*, abandoning nearly 50 years of precedent, and removing federal protections for abortion access. In doing so, the Court drew on a lineage of explicit and implicit discourses that have constructed abortions, abortion providers, and pregnant and fetal bodies in ways that make overturning *Roe* seem inevitable. This thesis takes a reproductive justice perspective while conducting a feminist critical discourse analysis of the majority and concurring opinions in *Dobbs*. Two main findings stand out. First, the decision relies on originalist constructions of abortions, abortion providers, pregnant people, and fetuses to justify overturning *Roe*. These constructions have been carefully cultivated within originalist legal theory since at least the 1990s, designed specifically to “erode” federal protections for abortion. Second, the majority and concurring opinions rely on the argument that abortion is akin to racism, and that the *Dobbs* Court is, accordingly, akin to historically anti-racist Courts such as the *Brown v. Board of Education* Court. These findings have several implications. First, the institutionalization of originalism is significant since this legal theory is rooted in a history of racism and sexism. Second, the Court relies on a post-racial epistemology to grant themselves racial authority. This allows the Court to police racialized and pregnant bodies while seeming to eschew racist and sexist ideologies. Finally, these findings also have implications for understanding other types of contemporary attacks on civil liberties.

## ACKNOWLEDGMENTS

I would like to thank my committee, Shannon K. Carter, Amanda Koontz, and Angela Vergara, for their insightful feedback and support throughout the process of writing this thesis. I would also like to thank Adrienne Mathews for her generosity with resources about, and helpful comments on, originalism. Finally, I would like to thank my family for their continued support and love during this process. It is not easy to read documents like this and they were always there for me when I was having a particularly tough day.

## TABLE OF CONTENTS

INTRODUCTION .....	1
LITERATURE REVIEW .....	4
History of Anti-Abortion Legislation .....	4
Discursive Constructions of Abortion .....	10
Discursive Constructions of Pregnant People and Fetuses .....	11
Originalism .....	16
The Abortion as Racism Argument .....	17
THEORY .....	20
METHODOLOGY .....	24
Methodological Approach .....	24
Data Collection and Analysis.....	26
Strengths and Limitations .....	28
Reflexivity.....	29
ANALYSIS.....	31
Part I: Originalism as a Long-Term Strategy.....	31
Originalism’s Perspective on Abortion.....	32
Originalist Constructions in Dobbs.....	33
Abortion as a Moral Issue? .....	38

Part II: The Racist and Sexist Framework Created and Recreated in <i>Dobbs</i> .....	40
Abortion as Racism in Dobbs .....	40
DISCUSSION .....	45
The Implications of Originalism in Dobbs .....	45
Who Gets to Decide? Racial Authority and Post-Racial Epistemology in <i>Dobbs</i> .....	46
Racial Authority and Post-Racial Epistemologies .....	49
What Next? Implications for a Post- <i>Dobbs</i> Present .....	50
REFERENCES .....	54

## INTRODUCTION

On May 2<sup>nd</sup>, 2022, Politico published a leaked draft of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization (Dobbs)* in which a majority of the Court voted to overturn the precedent set in *Roe v. Wade (Roe)* (Gerstein and Ward 2022). Protests erupted immediately throughout the country (Silverman, Moyer, and Hein 2022). However, the Court released the final decision on June 24<sup>th</sup>, 2022, removing federal protections for abortion access and allowing states to decide whether to ban or protect abortion access (ACLU 2022). Several states with “trigger bans” quickly implemented total or near total abortion bans, however providers in many states quickly filed lawsuits to block some of these bans (Jaffe 2022a). The Biden administration has also spoken out against the bans and passed two executive orders intended to make access to medication abortion and abortion tourism easier for people in states where abortion is banned (Jaffe 2022a; Watson 2022). Attempts to pass a federal bill guaranteeing abortion access have stalled in the Senate. The landscape for abortion access is changing more rapidly than perhaps it ever has, and the question remains as to what a post-*Roe* nation will look like.

There has been concern that the Supreme Court would overturn *Roe* since the Court heard the arguments in *Dobbs*. Scholars have been speculating on this topic since before the *Dobbs* decision was leaked, and a growing literature documents scholars' concerns regarding *Dobbs*' potential impact. In states that pass abortion bans, obstetrics and gynecology residents will potentially lack access to abortion training, with implications for future abortion accessibility (Giglio 2022; Khefets, Miller, and Amutah-Onukagha 2022; Vinakar et al 2022). The literature also forecasts major implications for public health and human rights. *Dobbs* will make it more difficult for physicians to provide lifesaving healthcare for pregnant people due to concerns that

they may harm the fetus, and some estimates argue that a nationwide abortion ban would increase the maternal death rate by 21% overall, and 33% for Black people (Harris 2022; Jaffe 2022b; Khefets et al. 2022; Lagu, DeJong, and Delk 2022). Scholars also argue that the decision has implications beyond abortion access. The Court ignored statistical evidence about the importance of abortion access and in doing so acted in the Justices' own political interests as a tool of patriarchy (Frankenberg and Nicola 2022; Slusky 2022). Additionally, any pregnant person in a post-*Roe* society will be “vulnerable to legal surveillance, civil detentions, forced interventions, and criminal prosecution” in ways that will disproportionately harm pregnant people of color and perpetuate structural racism (Paltrow, Harris, and Marshall 2022:3). In these ways, *Dobbs* has, and will continue to have, powered impacts.

A related body of research documents the ways in which discourses in anti-abortion legislation construct pregnant and fetal bodies that serve anti-abortion purposes. Anti-abortion discourses use abortion stigma as a form of power that grants control over pregnant and “potentially pregnant” bodies (Kumar, Hessini, and Mitchell 2009; Millar 2020). Racialized and gendered anti-abortion discourses construct certain pregnant bodies who get abortions as legitimate and others as criminal in ways that reinscribe structural racism (Cannold 2002; Denbow 2016; Doan and Schwarz 2020; Martinot 2007; Roberti 2021). Anti-abortion discourses also construct fetal bodies as legal persons, using racialized discourses in flexible ways that meet the anti-abortion needs of any specific context (Cromer 2019; Evans and Narasimhan 2020; Frank 2014; Leach 2022). However, to date this author knows of no research that has reconciled these two bodies of literature. This research attempts to contribute to filling this gap, examining the ways in which discourses in *Dobbs* construct abortion and pregnant and fetal bodies.



This thesis has four main sections. First, the literature review summarizes the existing scholarship on anti-abortion discourses in legislation. It discusses the legislative and historical context of *Dobbs*, and discursive constructions of abortion, pregnant people, and fetuses, arguing that abortion constitutes a saturated site of power (Collins 2019). Second, the theory section outlines reproductive justice as the theoretical framework for the thesis. It discusses the history and central tenets of reproductive justice and explains how this theory's emphasis on power, privilege, and oppression guided the data collection and analysis. Third, the methodology section describes the chosen methodology for the thesis, namely, feminist critical discourse analysis, and explains the specific steps of data collection and analysis. Finally, the analysis lays out two related arguments about the racialized and gendered discourses that frame and structure the arguments in *Dobbs*. This thesis argues that *Dobbs* draws on a specifically racialized and gendered legal theory, originalism, to frame and justify overturning *Roe* and *Casey*; that the use of this legal theory provides evidence of the systematic and planned nature of the decision in *Dobbs*; and that the decision ultimately recreates and embeds a specifically racist and sexist framework into Supreme Court case law.

## LITERATURE REVIEW

Examining anti-abortion legislation lends theoretical insight into intersecting systems of power because, as I argue here, abortion is a *saturated site of power* (Collins 2019). Collins suggests that “saturated sites of power or conjunctures where systems of power meet provide a starting place and a lingua franca for analyzing power itself that are simultaneously grounded in actual social processes and include space for theoretical analysis” (2019:235). The following discussion on constructions of abortion suggest that abortion is a saturated site of power. Medical, legal, political, social, racial, gendered, sexualized, and religious discourses all converge within abortion discourse, creating an analytical space where seemingly disparate communities converge. As these communities stigmatize and delegitimize abortion, they construct it as a dangerous procedure in need of hyper-regulation by the state (Bayefsky, Bartz and Watson 2020). Doing so primarily functions to control pregnant bodies (Kumar et al. 2009; Millar 2020). Controlling pregnant bodies is central to oppressive systems – it grants the dominant group power over the reproduction of its own race as well as subjugated races, while simultaneously allowing control over “unruly” bodies with uteruses (Balsamo 1996; Collins 2019). Power systems are flexible and able to articulate with each other in shifting ways that lends them stability over time; here, this is expressed in the ways in which ongoing oppressive racial and gender projects become reincarnated in contemporary anti-abortion legislation (Collins 2019:70-72).

### History of Anti-Abortion Legislation

The history of abortion legislation highlights the ways in which abortion functions as a saturated site of power “in actual social processes” (Collins 2019:235). The most well-known

piece of legislation on abortion is *Roe v. Wade (Roe)*. This 1973 Supreme Court decision protected a person's right to privacy, allowing pregnant people to obtain abortions without state interference (*Roe 1973*). Additionally, the Court institutionalized the trimester framework for pregnancy that completely banned restrictions to abortion access in the first trimester; restrictions in the second and third trimesters were to be submitted to a "strict scrutiny" standard of constitutionality (*Roe 1973*). This important milestone in access to reproductive services was quickly followed by attempts to restrict access to abortion, particularly for marginalized pregnant people. First, the Hyde Amendment (Hyde), passed in 1976 and renewed annually, allows states to defund abortion under Medicaid and Medicare, and defunds abortions that would have been funded under many other federally funded programs (Adashi and Occhiogrosso 2017; Salganicoff, Sobel, and Ramaswamy 2021). These programs include the Peace Corps, the Federal Bureau of Prisons, Immigration and Customs Enforcement (ICE), and the Indian Health Service (IHS) (Adashi and Occhiogrosso 2017; Salganicoff et al. 2021). Hyde currently impacts pregnant people in 34 states as well as the District of Columbia and reduces the accessibility of abortion by making it more difficult and expensive to obtain (Higgins et al. 2021; Roberts et al. 2019; Salganicoff et al. 2021; Upadhyay et al. 2021).

Hyde has specifically racialized impacts, pointing to the ways in which intersecting power structures reinforce each other in anti-abortion legislation. Hyde makes abortions much more difficult to obtain, specifically for Indigenous pregnant people on reservations, by defunding abortions through the IHS (Gurr 2011). This is related to the ongoing project of assimilation and genocide perpetrated by the US government towards Native American peoples. Reduced access to abortion combined with increased access to sterilization functions as a state-level form of coercion towards sterilization, harkening back to eugenic projects of mass

sterilization (Smith 2002). Here, we can see multiple systems of power, namely patriarchy and settler colonialism, overlapping, interacting with, and reinforcing each other, creating specific oppressions for specifically situated groups (Collins 2019). This points to the ways in which legislation articulates systems of power and highlights the practical implications of legislative discourses.

The next restriction to abortion access came with the Supreme Court's 1992 decision in *Planned Parenthood v. Casey* (*Casey*). This decision replaced the *Roe* Court's strict scrutiny standard with an "undue burden" level of scrutiny. Essentially, restrictions to abortion under *Casey* are allowable during *any portion of the pregnancy* if they do not pose an undue burden on the person seeking an abortion (*Casey* 1992). This decision did not overturn *Roe* entirely, however, it ultimately proved to be a substantial blow to abortion access. Specifically, several state legislatures skirted the undue burden requirement by imposing medically unnecessary requirements on abortion clinics (Wilson 2016; Young 2014). These requirements frequently function to close clinics entirely (Wilson 2016; Young 2014). These laws, called targeted regulation of abortion provider (TRAP) laws, were and continue to be incredibly widespread; as of April 2022, 23 states have implemented TRAP laws (Guttmacher Institute 2022).

The *Casey* decision created TRAP laws and in doing so, created another space where power systems converge. Doan and Schwarz (2020) argue that the discourses in *Casey* construct pregnant people as women in need of protection by the state – restrictions to abortion become intelligible as the state protecting fragile women from the danger of potential regret and grief following her abortion. Defining the pregnant body as female, unruly and potentially in danger of hysterics following the procedure she wanted justifies state control over pregnant people's reproductive health (Balsamo 1996). This form of paternalism is characteristic of struggles over

abortion access, with legal and medical arenas vying for control over pregnant people's reproductive decisions (Doan and Schwarz 2020; Swanson 2015). TRAP laws exemplify the practical ramifications of this discursive construction of the pregnant body. These discursive constructions also highlight the ways in which power congeals and operates within anti-abortion legislation.

TRAP laws did not go unchallenged. In 2013, the Texas state legislature passed HB2 which required abortion physicians to have admitting privileges in a nearby hospital and mandated that abortion clinics meet ambulatory surgical center facility standards (Oyez 2022). A group of abortion providers challenged HB2, bringing it to the Supreme Court in 2016 (Oyez 2022). The Supreme Court's landmark ruling in *Whole Woman's Health v. Hellerstedt* (*Hellerstedt*) set legal precedent that TRAP laws do pose an undue burden on a person seeking an abortion, invalidating one primary legislative anti-abortion tactic (Toti 2016). However, the way in which the Court constructed pregnant people and fetuses in its decision may have created discursive room for anti-abortion policies that seek to protect fetuses (Morrison 2016; Yang and Kozhimannil 2017).

Indeed, there has been an increasing tendency for state legislatures to ban abortion as early as six weeks gestation, pointing to the idea that a fetal heartbeat can be detected by this point (Strand 2021). For example, the Supreme Court failed in December 2021 to overturn a six-week abortion ban in Texas, and Oklahoma passed a law on April 12<sup>th</sup>, 2022 that bans nearly all abortions (LeBlanc and Stracqualursi 2022; Oxner and Klibanoff 2021). However, the six-week mark is essentially arbitrary. At six weeks gestation there is no heart, only cardiac cells which will eventually become a heart, and it is difficult to identify fetal cardiac activity (ACOG 2017).

Additionally, many people do not even realize they are pregnant before the six-week mark (ACOG 2017).

The past two years have seen further restrictions to abortion, culminating in the Supreme Court's decision in *Dobbs v. Jackson (Dobbs)*. The state of emergency warranted by the onset of the COVID-19 pandemic in Spring 2020 created room for twelve states to ban abortion as an “elective” or “non-essential” procedure (NWLC 2021). The bans presented barriers to abortion access by making abortions more expensive to obtain, increasing travel times, and pushing many abortions into the second trimester (Dahl et al. 2021; Fang and Perler 2021; Hill et al. 2021; Roberts et al. 2021). These laws trivialized the importance of abortion, perpetuated common anti-abortion constructions of motherhood and fetal personhood, and presented abortion as a risk to public health during COVID-19 (Carson and Carter forthcoming). Lower-level courts blocked several of these bans, and the rest expired along with other COVID-19 restrictions (Sobel et al. 2020). These temporary bans were quickly followed by several attempted permanent bans. The Supreme Court upheld Mississippi's permanent ban in *Dobbs*, overturning the precedent set in *Roe* and allowing states to restrict or ban abortions at their discretion (ACLU 2022). As of writing, thirteen states have totally banned abortion, five states have implemented partial bans, and eight states have blocked abortion bans (NYT 2023). This highlights the precarious nature of abortion access as this paper is being written. This drastic shift exemplifies the saturated nature of abortion as a site of power.

Abortion restrictions place a multitude of barriers on people seeking abortions. Barriers make abortion more expensive, confusing, and logistically difficult to obtain (Baum et al. 2016). Consequently, barriers increase the likelihood of people attempting riskier methods of abortion, increase risky sex practices among teens, and increase the risk of preterm birth and low birth

weight newborns (Clark et al. 2020; Klick and Stratmann 2007; Redd et al. 2021; Sudhinaraset et al. 2020). Although abortion has not yet been criminalized, the new and uncertain legislative landscape under *Dobbs* makes this a potentiality. The criminalization of abortion would negatively impact children born under the bans' socioeconomic standing, increase the number of women in prisons, and increase maternal mortality rates (Hajdu and Hajdu 2021; Kelly et al. 2017; Stevenson 2021).

All these potential and actual impacts disproportionately affect young adults and teens, low-income pregnant people, and pregnant people of color, especially Black pregnant people (Baum et al. 2016; Carson 2021; Clark et al 2020; Dehlendorf and Weitz 2011; Jarman 2015; Jones, Lindberg, and Witwer 2020; Jorawar and Yeung 2014; Joyce, Kaestner, and Colman 2006; Liu et al. 2021; Smith, Sundstrom, and Delay 2020; Stevenson 2021; Sudhinaraset et al. 2020; Whitney et al. 2021). Three examples demonstrate the disproportionate impact to pregnant people of color. First, COVID-19 abortion bans increased the travel time and cost associated with accessing abortion in ways that disproportionately impacted Black and Hispanic pregnant people (Jones et al. 2020). Second, sex-selective abortion bans perpetuate stereotypes about Asian American and Pacific Islander pregnant people (Jorawar and Yeung 2014). Finally, abortion bans impact reproductive health access, human rights, and economic outcomes for immigrants (NAPAWF 2018). This brief review highlights the practical consequences of the legislation discussed here. Abortion is thus a saturated site of power, and abortion bans act within a systematic project of reproductive oppression against pregnant people of color (Carson 2021).

## Discursive Constructions of Abortion

Reading abortion as a saturated site of power allows us to shift our analytical lens to understand how this site operates in powered ways. One way to examine this is through the lens of discourses. It is therefore valuable to examine the discursive construction of abortion. First, anti-abortion discourses delegitimize abortion and abortion providers. Abortion providers face what Harris and colleagues term the “legitimacy paradox” stemming from anti-abortion stereotypes and hyperregulation of abortion which depict abortion providers as “illegitimate, deviant, or substandard doctors” despite their years of training and professional experience (2013:11). Abortion itself is frequently depicted as “dirty work” because of its association with blood and fetal parts as well as its historical connections with crime and murder (Harris et al. 2011). These constructions have roots in the American Medical Association’s efforts to criminalize abortion during the 1800s, at least partially to gain control over an area of healthcare that had historically been the domain of midwives and homeopaths (Mohr 1978). Abortion providers experience the consequences of this delegitimizing; they often feel unable to speak about their work openly and are frequently marginalized within healthcare (Harris et al. 2013; 2011). Contemporary deployment of these stereotypes within anti-abortion legislation and discourses more broadly continues efforts to delegitimize and ultimately criminalize abortion.

Second, and relatedly, abortion is deeply stigmatized in the US. Despite the broad acceptance that abortion is stigmatized in the US, there is little consistency in how scholars define stigmatization (Kumar 2013). However, this may simply reflect the many stigmas placed on abortion. Abortion is variously stigmatized as elective, deviant, a rejection of motherhood, morally wrong, bad for one’s reproductive health, and irresponsible (Gelman et al. 2017; Smith et al. 2018). Individual level stigma is related to isolation, fear of judgement, and negative



reactions from the self and one's community (Cockrill et al. 2013; Cowan 2017). Abortion stigma has several negative outcomes. These include increasing the cost of abortion (Moore et al. 2021), increasing negative attitudes towards the legality of abortion (Patev, Hood, and Hall 2019), and reduced reporting of abortion at the individual level (Maddow-Zimet, Lindberg, and Castle 2021). Negative emotional outcomes include making the decision to get an abortion more difficult (Rocca et al. 2020), increasing stress, especially stress related to having to maintain secrecy (Hanschmidt et al. 2016; Major and Gramzow 1999; O'Donnell, O'Carroll, and Toole 2018), and forcing abortion attorneys and people who get abortions to develop coping mechanisms to manage stigma (Cockrill and Nack 2013; Coleman-Minahan et al. 2021). Several factors lead to abortion stigma, including Catholicism, legal restrictions to abortion, and beliefs that abortion is dirty and that fetuses are people with rights (Cockrill et al. 2013; Cutler et al. 2021; Norris et al. 2011). Medical and popular discourses stretch the timeframe in which people need to care for their fetus and potential fetus, creating a "pre-pregnant" body that must be prepared to carry a child and can therefore be more easily controlled (Waggoner 2017). Indeed, scholars emphasize that stigma surrounding abortion is ultimately a form of coercive power that works to control pregnant and "potentially pregnant" bodies (Kumar et al. 2009; Millar 2020). Thus, examining the discursive construction of abortion reveals how it operates as a site of power, creating new identities and bodies.

### Discursive Constructions of Pregnant People and Fetuses

As the above discussion implies, another way that abortion functions as a site of power is by constructing pregnant and fetal bodies in specific ways that maintain white privilege and cisheteropatriarchy. Examining the racialized and gendered discourses surrounding abortion

highlights this process. First, there are several recurring racialized discourses surrounding pregnant people. Several of these relate to controlling images that construct Black mothers as Welfare Queens and Jezebels (Collins 2000). For example, medical discourses often construct pregnant people of color, especially Black pregnant people, as hyper-fertile, shrewd and wily, uneducated and yet able to “work” the system (Bridges 2011; Collins 2000). Media images of teen pregnancy and abortion also reinforce hegemonic racial ideologies. For example, TV shows and the news construct Black pregnant and parenting teenagers as irresponsible and Latinx pregnant people as restricted by their Catholicism (Griffin 1992; Herold, Sisson, and Sherman 2020; Springer 2010). Conversely, TV shows obscure the importance of race for white pregnant people (Herold et al. 2020). Indeed, colorblind discourses that perpetuate racism under the guise of race neutrality (Bonilla-Silva 2015) frequently appear in discourses surrounding pregnant people. For example, medical discourses use poverty to homogenize and minimize the issues of a very heterogenous pregnant population, masking racist rhetoric in the process (Bridges 2011). News reports on teen pregnancy use images of white pregnant teenagers to make it seem as if teen pregnancy is a universal problem while simultaneously perpetuating discourses that reinforce racist notions about Black pregnant teenagers (Vinson 2012). These racialized constructions of pregnant people within US society generally contextualize specific anti-abortion discourses surrounding pregnant people.

Anti-abortion discourses perpetuate a consistent, if flexible, construction of pregnant people. This construction ultimately serves to bolster anti-abortion arguments and maintain white privilege and cisheteropatriarchy. Anti-abortion discourses consistently construct pregnant people as mothers, blurring the lines between womanhood and motherhood so that to be a pregnant person is to be a woman, and to be a woman is to be a mother (Doan and Schwarz

2020; Ntontis 2020). However, mothers only become legitimate as such if they fit or can perform a specifically gendered (feminine), racialized (white), and (hetero) sexualized version of motherhood/womanhood (Dubriwny and Siegfried 2021; Leask 2013). Even then, getting an abortion threatens the stability of this construction of motherhood/womanhood. Pregnant people are only able to maintain it if they are aborting a fetus who is predicted to have disabilities, i.e., abortion becomes an acceptable act for white, heterosexual, feminine women/mothers to do when their fetus has disabilities (Leask 2013; McKinney 2019).

Relatedly, there is a racialized dichotomy in discourses surrounding people who get abortions. On the one hand, anti-abortion discourses construct white people who get abortions as victimized women who are psychologically and physically harmed by the abortion and by abortion providers (Cannold 2002; Doan and Schwarz 2020; Roberti 2021). On the other hand, anti-abortion discourses construct people of color who get abortions as mothers who are harming their fetus (Denbow 2016; Doan and Schwarz 2020; Martinot 2007). This construction has historically led to the criminalization of Black pregnant people's reproduction (Martinot 2007; Paltrow and Flavin 2013). Thus, anti-abortion discourses uphold cisheteropatriarchy by recreating gendered norms of motherhood. They also uphold white supremacy by constructing white pregnant people as fragile victims, and pregnant people of color as dangerous and criminal.

Gendered and racialized discourses surrounding fetuses also construct new fetal bodies. Fetuses constitute an extremely contested site where the boundaries between human and non-human become politically charged. Anti-abortion discourses have historically mobilized images of the fetus as a person with moral and legal rights (Kettell 2010; Myrsiades 2002; Roberti 2021). The fetus drifts into the realm of personhood through popular discourses which perpetuate tropes of fetal humanness, and political discourses where politicians speak through the

mouthpiece of the public fetus (Tan 2004; Lynch 2009; Rowland 2017; Ruddick 2007; Wise 2018). However, fetal personhood is flexible. The fetus is “material” in research settings, “human” in fetal surgery settings, and more human even than the pregnant person in some legal settings (Casper 1994; Weitz and Yanow 2008). In many discourses, the fetus and the “mother” are “antagonistic forces,” their supposedly conflicting needs, yet intertwined bodies, threatening the stability of society (Griffin 1992; Maraesa and Fordyce 2014). Thus, discourses surrounding abortion and the fetus construct a fetal body which is flexible enough to meet the needs of a given context.

The fetus is also racialized. Anti-abortion discourses have a long history of comparing fetuses to enslaved Africans, embryos to marginalized Black people, and abortion to racial genocide (Cromer 2019; Denbow 2016; Hart 2014). More recently, white anti-abortion groups have begun conflating racial justice with fetal personhood (Cromer 2019). Within these constructions, the fetus is a Black child. Longstanding discourses surrounding Black children have severed the notion of genealogy from Black bodies, creating Black fetuses that lack a history and are considered unruly (Soderberg 2019). Thus, anti-abortion discourses construct a vulnerable yet unruly Black fetus who needs to be saved from abortion. This is a strategic construction because it creates a Black body that can be controlled by white anti-abortion groups.

However, there are competing and contradictory constructions of fetuses. White anti-abortion groups during the mid-20<sup>th</sup> century realized that their audience held racist stereotypes about Black people as breeders and worried that they would change their minds to *support* abortion as a tool of racial genocide (Frank 2014:366). Therefore, anti-abortion groups ensured that literature was racially segregated. When an anti-abortion campaign was going to be widespread, they defaulted to white babies (Frank 2014:366). In doing so, they constructed an

ubiquitous image of the fetus as a white child (Frank 2014:366). This is seemingly contradictory to anti-abortion constructions of a Black fetal body. However, it exemplifies the point that fetal constructions are flexible enough to meet the needs of any given context.

This flexibility extends even to the most sacred anti-abortion construction: fetal personhood. Specifically, the anti-abortion emphasis on fetal personhood is flexible and negotiable in anti-immigrant contexts. Fetuses become sites of struggle over the definition of who counts as a US citizen (Wang 2017). The conundrum for anti-abortion and anti-immigrant groups is: if a fetus is a person and crosses the border into the US, what rights does it have as a potential US citizen? Leach (2022) argues that racism allows fetal personhood discourses to reconcile themselves with anti-immigrant discourses. Debilitation discourses justify potential harm to the detained Latinx fetus by constructing immigrants as disposable, and paralegality discourses allow flexibility in fetal citizenship laws at the border (Leach 2022). These contradictions suggest that anti-abortion discourses racialize or de-racialize fetuses as necessary to obtain anti-abortion goals. Thus, discursive constructions of fetuses operate in powered ways, replicating privilege for some and oppression for others.

*Dobbs v. Jackson* is situated in this discursive context. As such, discursive constructions in prior anti-abortion legislation shape and inform the discursive construction of abortion, fetuses, and pregnant people in *Dobbs*. Viewing abortion as a saturated site of power allows us to see how legislative discourses surrounding abortion have been able to create new pregnant and fetal bodies. These bodies are racialized and gendered in specific ways that maintain white supremacy and cisheteropatriarchy. It is likely that the patterns discussed here will recur in *Dobbs* and future anti-abortion legislation, with slight changes. It is valuable to track and work to

counter these changes because they have practical implications that disproportionately impact and oppress marginalized pregnant people.

### Originalism

Originalism is a legal theory that argues that the constitution should be interpreted according to the “framer’s intent,” meaning that the constitution and constitutional amendments should be interpreted according to the intentions and cultural norms of the time that they were written (Cornell Law 2022). This is obviously concerning, as scholars argue that “taken to its logical conclusion, originalism requires us to reify the historical context, and thus the legal inferiority of women and Black Americans at the time of the framing, ratification, and reconstruction of the Constitution” (Liebell 2020: 208).

Indeed, racist conservatism is embedded in the very foundations of originalism. Typical originalist accounts agree that originalism was devised in the academy during the 1970s as a natural progression of the idea that judges should look only to the text of the constitution for guidance rather than elsewhere (TerBeek 2021). However, TerBeek’s extensive archival research reveals that “originalism grew directly out of political resistance to *Brown v. Board of Education* by conservative governing elites, intellectuals, and activists in the 1950s and 1960s” (2021: 821). This shifts the context of originalism – instead of being formulated as a neutral theory of constitutional interpretation, it was formulated as a direct backlash to desegregation (Liebell 2020; TerBeek 2021).

Today, originalism is largely touted by members of the Federalist Society, a conservative think-tank that acts as a central networking hub for prominent conservative actors and up-and-coming conservative thinkers alike (Hollis-Brusky 2015). The Federalist Society is organized

around originalism as one of its most important central unifying principles, and provides intellectual capital for conservative politicians, judges, academics, and activists (Hollis-Brusky 2015). Current Supreme Court Justices with ties to the Federalist Society include Justices Alito, Thomas, Kavanaugh, Roberts, Gorsuch, and Barrett (The Harvard Gazette 2021). However, it is important to note that the Supreme Court tends to act as an institutionalizing force for originalism, legitimating rather than creating this legal theory (TerBeek 2021). The creation process happens externally, in places like the Federalist Society, who then provide the intellectual capital to Federalist Society members within institutions such as the Supreme Court so that they can legitimize and further institutionalize this legal theory in a continuous feedback loop (Harris-Brusky 2015; TerBeek 2021). This, I argue, is the legal theory grounding the majority decision in *Dobbs* and which has permeated anti-abortion discourses in legislation and litigation at least since *Casey*.

### The Abortion as Racism Argument

Finally, there is a longstanding argument that abortion is comparable to racism. Anti-abortion groups attempting to reach out to communities of color have, since at least the 1970s, argued that abortion is a form of eugenics and/or racial genocide (Luna 2018). This argument draws on the very real history of racial genocide and eugenics in the US, as well as Planned Parenthood founder Margaret Sanger's use of the eugenic logic of population control (Roberts 1999). Because of this history, certain prominent civil rights leaders have openly professed anti-abortion sentiments, and activists, many of whom are Black women, have founded several organizations dedicated to campaigning against abortion (Hughes 2006; Prisoock 2003). The African American anti-abortion movement frequently expresses concerns that efforts to increase

access to abortion are part of a larger conspiracy to victimize and ultimately wipe out Black people in the US (Prisock 2003). Within this discourse, fetuses are often constructed as in danger and in need of protection, while the pregnant people of color who seek out abortions are constructed as women who are misguided or “duped” into perpetuating racial genocide (Luna 2018; Norwood 2021). As such, themes that consistently crop up within the African American anti-abortion movement include racism, racial genocide, and blaming Black women.

This argument also crops up within white legal and academic spaces, although it looks slightly different. Immediately following *Roe*, white legal academics began comparing *Roe* to *Dred Scott v. Sanford (Dred Scott)* and *Plessy v. Ferguson (Plessy)*, arguing that abortion is shameful and degrading in much the same way that slavery was degrading to human beings (Hughes 2006). They, like the African American anti-abortion movement, argued that it was necessary to restrict abortion to protect unborn Black children (Hughes 2006). However, the comparisons between abortion and slavery go further, likening anti-abortion activists to abolitionists. For example, Ronald Reagan’s 1984 book *Abortion and the Conscience of the Nation* compared Reagan’s anti-abortion efforts with Abraham Lincoln’s efforts to free enslaved Black people (Hughes 2006). These legal comparisons came mostly from white, largely Catholic, legal academics who had a long history of being anti-abortion, including Robert Byrn, Jack Wilke, and Walter R. Trinkaus (Hughes 2006). The framework for these arguments differs from the framework that Black anti-abortion activists tend to use. Namely, Black anti-abortion activists seem genuinely concerned about eugenics and racial genocide and frequently center racism as a system of oppression in their arguments (Prisock 2003). Conversely, white anti-abortion legal academics tend to use the abortion/slavery comparison as more of a rhetorical strategy, mobilizing racialized paternalism and ignoring robust analyses of racial oppression in



favor of surface-level comparisons. This is an important difference as it highlights a key point – when white legal academics mobilize the abortion as racism argument, they are not actively critiquing racial oppression in the US, they are instead using a rhetorical strategy to support a broader argument.

The abortion as racism discourse is patriarchal in ways that ultimately harm pregnant people of color the most. This discourse undermines Black pregnant people’s reproductive autonomy by casting them as the “mothers of the race,” unable to make decisions about their reproductive and personal lives because they have a supposed duty to reproduce (Dobbins-Harris 2018). The notion that Black pregnant people perpetuate, or are duped into perpetuating, racial genocide when they get abortions also feeds racist stereotypes about Black people as criminals, murderers, or ignorant victims (Dobbins-Harris 2018; Luna 2018; Norwood 2021). Further, there is a tendency to blame Black pregnant people’s abortions on the white feminist movement, implying that Black pregnant people would not get abortions without the influence of white feminism (Dobbins-Harris 2018). This further undermines Black pregnant people’s critical thinking skills and decision-making capacity, while also pitting Black feminists and white feminists against each other in an area where they have mutual interests and the potential for coalition. This ultimately weakens all feminist efforts and in doing so, strengthens patriarchy. In sum, the abortion as racism discourse perpetuates misogynoir, creates division between feminists, and ultimately works to bolster patriarchy.

## THEORY

This thesis is rooted in a reproductive justice theoretical framework. *Reproductive justice* encompasses a scholarly theory as well as a social movement that advocates for a holistic understanding of reproduction beyond the “right to choose” to have an abortion, fundamentally asserting that the ability to have children, not have children, and parent one’s children is a matter of human rights (Ross and Solinger 2017). The term was invented by 12 women of color scholar activists, Loretta J. Ross, Toni M. Bond Leonard, Reverend Alma Crawford, Evelyn S. Field, Terri James, Bisola Marignay, Cassandra McConnell, Cynthia Newbille, Elizabeth Terry, ‘Able’ Mable Thomas, Winnette P. Willis, and Kim Youngblood in 1994 in response to the Clinton administration’s lack of action on reproductive health issues, specifically abortion, in its plan for health care reform (IV4RJ 2022; SisterSong 2022; Ross and Solinger 2017). Following a meeting where they coined the term reproductive justice, these women launched an ad campaign supported by nearly 850 Black women that articulated a set of demands for health care reform that centered women of color’s reproductive health needs (Ross and Solinger 2017). SisterSong, a coalitional reproductive justice activist organization, formed out of this conceptual and activist work (SisterSong 2022). Other organizations such as Planned Parenthood, NARAL Pro-Choice, the National Organization for Women (NOW), the National Latina Institute for Reproductive Health, the Black Women’s Health Imperative, and the National Asian Pacific American Women’s Forum quickly recognized the scholarly and practical value of this new concept, beginning the process of institutionalizing and mainstreaming the idea of reproductive justice in 2003 (Ross and Solinger 2017).

At the same time as it was becoming an activist movement, reproductive justice was developing as a scholarly concept and theory within the academy, breaking from the hegemonic

dominance of white, eugenicist theories of reproduction. White feminist scholars and feminist scholars of color had analyzed issues surrounding reproductive health since the inception of their respective scholarly endeavors, albeit with disparate ideologies and goals; take, for example, Sojourner Truth’s intersectional analysis of Black womanhood and motherhood, and Charlotte Perkins Gilman’s insistence that women are central to the “improvement” of their respective races due to their reproductive capacities (Gilman [1922] 1976). Indeed, the eugenicist tendencies within white women’s scholarship surrounding reproductive health have been definitional to the field, permeating the neoliberal choice rhetoric that has historically shaped conceptualizations of reproductive health (Mann and Grzanka 2018; Ross and Solinger 2017; Smith 2017). Reproductive justice draws from the conceptual work of women of color scholars like Truth<sup>1</sup> by rejecting the eugenicist tendencies in much scholarship surrounding reproductive health, centering theoretical, conceptual, and empirical work that highlights the lived experiences of marginalized groups, particularly women of color, and historicizing and contextualizing those experiences within systems of power and resistance (Ross and Solinger 2017).

SisterSong defines seven central tenets of reproductive justice. First, reproductive justice as defined above is considered a human right; its creative context, namely, a response to national and international lack of attention to reproductive issues, necessitated a framework situated within human rights discourses to gain international and national recognition and action (SisterSong 2022; Ross and Solinger 2017). Thus, having or not having children, as well as the ability to parent one’s children, are human rights that must be protected as part of the project to achieve social justice (Ross and Solinger 2017). Second, reproductive justice highlights *access*

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<sup>1</sup> Much work needs to be done to rediscover and analyze women of color’s historical scholarship on reproductive issues. To this author’s knowledge, there is very little secondary scholarship analyzing or discussing 18<sup>th</sup>, 19<sup>th</sup>, and early 20<sup>th</sup> century women of color’s scholarship within reproductive arenas.

rather than *choice* (SisterSong 2022). The rhetoric surrounding the “choice” to have an abortion situates abortion within an individualistic, capitalistic framework similar to the free market that ultimately ignores macro social factors that impact pregnant people’s ability to “choose” when and how to have children (Smith 2017). Therefore, reproductive justice focuses on issues of access, which are more closely aligned with issues of social justice. Third, abortion is important, but not singularly important within reproductive justice – other issues that are salient to people of color such as coerced sterilization, controlling images and coercive policies surrounding people of color’s sexuality and parenthood, and the ongoing legacy of eugenics are also central within this framework (Ross 2017).

Fourth, a reproductive justice theoretical framework focuses on power systems (SisterSong 2022). It situates reproductive health within a broader social context of, fifth, intersecting power systems, identifying systems of reproductive privilege and oppression as inherently connected to more general systems of power (Carson 2021; McFadden 2017; O’Leary and Simmons 2017; Roth 2017). Sixth, reproductive justice analyses work to center individuals that are marginalized in society – the “mothers” of the movement identified the concept when they actively centered themselves and their reproductive health needs in their analysis, and subsequent scholars continue this work (O’Connell 2017; Ross and Solinger 2017). Finally, reproductive justice is a coalitional knowledge and activist project, drawing and connecting insights from distinct yet supportive scholarly and activist communities (SisterSong 2017).

The emphasis on power, privilege, and oppression within these central tenets is particularly important to the thesis. Discursive analyses allow insight into the knowledge/power dyad (Foucault 1976), revealing the ways in which power functions through, in this case, anti-abortion legislation. A reproductive justice theoretical framework therefore compliments the

methodology, allowing insight into systems of reproductive oppression. It is therefore valuable to take a reproductive justice lens to examine discourses surrounding abortion, pregnant people, and fetuses as doing so allows us to keep track of and resist ongoing projects of reproductive oppression.

## METHODOLOGY

This research is a feminist critical discourse analysis of the 2022 Supreme Court decision in *Dobbs v. Jackson (Dobbs)*. My focus is primarily on the ways in which anti-abortion legislation constructs abortion, fetuses, and pregnant people. Therefore, my research questions include: how are abortion, fetuses, and pregnant people constructed in *Dobbs v. Jackson*? How are these constructions related to constructions in prior anti-abortion legislation, and what are the potential implications of these constructions? It is valuable to examine the discourses within this specific court case because it is the culmination of nearly 50 years of anti-abortion discourses, and it will likely impact the trajectory of anti-abortion discourses in the foreseeable future.

### Methodological Approach

This thesis uses feminist critical discourse analysis (FCDA) to examine contemporary anti-abortion legislation. Critical discourse analysis (CDA) “is a qualitative analytical approach for critically describing, interpreting, and explaining the ways in which discourses construct, maintain, and legitimize social inequalities” (Mullet 2018:116). Feminist critical discourse analysis takes CDA’s commitment to examining social inequalities one step further by emphasizing analyses of the ways in which discourses create, reinforce, and are created by systems of power including patriarchy, white supremacy, and capitalism (Lazar 2007). FCDA involves a cyclical process of coding, literature synthesis and integration, researcher reflexivity, and contextualization that allows for flexibility in the research process and rich, multilayered analyses. It is appropriate for this thesis because the research questions focus on analyzing subject construction within written documents, necessitating a methodology that allows for

robust analyses of written discourse. Additionally, it aligns with the theoretical framework's emphasis on understanding and dismantling oppressive power structures.

There are three central concepts that need to be defined here. First, anti-abortion, as used here, refers to anything that attempts to restrict access to abortion. This applies to social movements, legislation, litigation, and individual efforts to stop others from obtaining or learning about abortions. In this framework, anti-abortion efforts are ultimately part of the larger project of patriarchy; the argument that restricting abortion saves babies' lives is not backed up by evidence and ultimately serves to distract from the broader oppressive impacts of anti-abortion efforts.

Second, discursive construction here refers to the processes of social construction that take place through powered discourses (Foucault 1976). The thesis takes a feminist social constructionist perspective to understand abortion, the pregnant body, and the fetal body, focusing on how discourses operate to construct differentially powered identities. This perspective allows insight into the "strategies of inscription and rationalization that operate on the flesh of human bodies" (Balsamo 1996:3). In this sense, bodies are not "naturally" anything; although the physical body certainly functions as a practical, natural referent for meaning making, the symbolic meaning of a person's body is always socially constructed through discourses, social acts, and experiences (Balsamo 1996). Here, the body is both a social product and a social process: it is a product in the sense that social meanings surrounding gender, race, ability, age, nation, and sexuality are inscribed onto the body, and it is a process in the sense that "it is a way of knowing and marking the world, as well as a way of knowing and marking a 'self'" (Balsamo 1996:3). Thus, the body as a social artefact is socially constructed and inscribed with meaning, particularly via the avenue of discourse.

Finally, this thesis takes a Foucauldian perspective to examine power through the lens of discourses. Foucault argues that power and knowledge are inextricably interconnected – power creates knowledge and knowledge grants power (Gutting and Oksala 2022). Discursive acts construct identities, bodies, and norms, and therefore operate as the channel through which the knowledge-power dyad functions (Foucault 1976). The thesis, therefore, focuses on the discursive constructions of gendered and racialized bodies within sites of concentrated power, specifically, anti-abortion legislation. These particular discursive constructions serve a specific purpose – they create and reinforce controlling images of gendered and racialized bodies that serve to oppress certain groups and maintain privilege for other groups (Collins 2000). The white supremacist capitalist heteropatriarchy (hooks 1984) has historically constructed pregnant people of color, people of color’s reproduction, and children of color, in ways that reinforce the existing power structure. For example, controlling images define both Black men and women as hypersexual and animalistic (Collins 2000; Roberts 1997). Eugenic practices have historically controlled people of color’s reproduction through coerced sterilization and abusive practices surrounding birth control and abortion, justified by discourses that reified notions that race is a biological fact (Roberts 1997). In both cases, these discourses contribute to ideologies of white superiority over people of color, thereby maintaining the hegemonic power structure (Collins 2000; Roberts 1997). Thus, this thesis focuses on discourses to gain insight into structures of power that construct subjects in ways that reify those structures.

### Data Collection and Analysis

This thesis focuses on analyzing the final Supreme Court decision in *Dobbs*. My sample includes the majority opinion as well as the concurring opinions from Justices Thomas,



Kavanaugh, and Roberts. I do not include an analysis of the defendant or plaintiff's arguments or of the dissenting opinion. This is partly due to the scope of this project, but it also follows from the research questions' emphasis on analyzing specifically anti-abortion discourses within standing legal precedent. As detailed below, I analyze the discourses in *Dobbs*, paying attention to gendered and racialized discourses as well as specifically anti-abortion discourses and discursive themes that are consistent or repeated through prior anti-abortion legislation. This allows me to analyze the individual discourses in *Dobbs* in the context of broader social patterns and power structures.

Data analysis was cyclical and iterative in nature. I accessed the full decision from the Supreme Court website (<https://www.supremecourt.gov/opinions/slipopinion/21>) and converted it to a Word document as necessary for ease of coding. As discussed above, the sample does not include the syllabus or the dissenting opinions; the syllabus is a brief restatement of the majority opinion and would be redundant to code, and the dissenting opinions are not anti-abortion and therefore do not relate to the research question. The sample, converted and reformatted into Word, was 50 pages, although the full PDF was 139 pages. Page numbers citing the decision in the analysis refer to the page numbers listed in the PDF of the decision as they appear downloaded from the Supreme Court, for ease of access and comparison. I coded the sample on Word using thematic coding, and maintained a memo log where initial analysis and researcher reflexivity took place.

Following coding, I organized codes into themes and subthemes, finalizing my initial analysis of the data. At first, I identified 35 individual codes. I then collapsed them into six themes – the themes with the fewest codes (“abortion providers” and “racism”) contained three codes each. The theme with the most codes (“originalism”) contained nine codes. I then

identified two additional research questions that arose out of the data collection process: *what is originalism and how is it racialized?* And, *what are the racial and gendered frameworks within the “abortion as racial genocide” argument?* I went back to the literature to answer these questions and began to flesh out my analysis through this process. This analytical work identified four subthemes, two of which are discussed in Part I and two of which are discussed in Part II.

### Strengths and Limitations

This analytic approach has several strengths. First, FCDA’s flexibility and cyclical nature allow for deep insight into the discursive patterns within the data, since the researcher(s) must constantly interpret, reinterpret, and contextualize their findings. Second, the conceptualizations of the main concepts are fairly robust, since there is a wealth of relevant literature from which to draw. Finally, FCDA’s emphasis on power systems overlaps with the central tenets of the theoretical framework which also emphasize power. This overlap between the methodology and the theoretical framework strengthens the analysis, allowing it to go beyond simple content analysis and distinguishing it from methodologies in the humanities by focusing on social structures embedded and recreated in discourse.

There are also several limitations to the research design. First, the emphasis is solely on examining discursive patterns in the data. This is valuable research, but it is distinct from the literature on the real-world impact of this decision. Second, as discussed above, the dataset does not include the dissenting opinion of three of the justices. This is potentially a limitation because it narrows the dataset, however it is also a strategic choice based on the research question’s emphasis on anti-abortion legislation specifically. Future research should compare and contrast anti-abortion and pro-abortion legislative discourses. A follow-up study will examine the

discourses in the dissenting opinion and contextualize them in the findings from this research. Third, qualitative analysis is lengthy and time consuming, and abortion law changes very quickly. Although this precedent is unlikely to change dramatically in the near future, there will likely be ongoing shifts in the legislative landscape that will impact the context of the findings. Despite these limitations, this research adds valuable insight into an important piece of legislation that will impact millions of lives.

### Reflexivity

Researcher reflexivity is one important aspect of feminist research. Therefore, I conclude the discussion of my methodology with a statement that outlines my personal context and standpoint. I am a young, middle-class, white, cisgender and heterosexual woman with a Hispanic background. These identities, and the overlapping privileges and oppressions I experience because of them, necessarily impact my research. Like many young white middle-class women, I grew up in a pro-choice household that firmly supported “a woman’s right to choose” without looking too closely at that rhetoric or the structures of power that undergird it. That interest grew and eventually inspired my undergraduate research on abortion. There, I learned to question choice rhetoric and expanded my frame of reference to include a broader array of reproductive issues that are more salient to marginalized people, especially people of color. Although my perspective has widened, I still work to pay careful attention to the issues that I include, the issues that I exclude, and the conclusions that I come to in my research, with an awareness that I am likely to overlook certain issues due to my multiply privileged identity.

I also have a very specific context that I bring to abortion research. My paternal grandmother’s brother, my great uncle, was Dr. George Tiller. Dr. Tiller was murdered by anti-

abortion extremists because he provided abortions in the third trimester. I first experienced the anti-abortion movement at ten years old when my family had to walk into Dr. Tiller's funeral with an escort due to the crowd of protesters that had gathered. I did not know my great uncle; in fact, I learned of his existence on the day we found out that he had passed away. I came to abortion research independently of that experience and family relationship, motivated by a desire to understand and resist the specific oppressions that impact women of color. Therefore, I do not necessarily see my kin tie to Dr. Tiller as a motivating factor for my research. However, my research is firmly political. As I get older, I appreciate the continuity of efforts to increase abortion access in my family, albeit through different avenues. In this way, that kin tie factors into the political nature of my research.

## ANALYSIS

The *Dobbs* majority opinion drew from major anti-abortion discourses to construct abortion providers, abortions, fetuses, and pregnant people. Doing so allowed the *Dobbs* decision to align with a specific originalist strategy for overturning *Roe* and *Casey*, and further embedded a patriarchal and white supremacist framework into case law and precedent. In Part I, I argue that the *Dobbs* majority was able to overturn *Roe* and *Casey* by relying on anti-abortion discourses that have been carefully planned and cultivated specifically for the purpose of removing federal protections for abortion. In Part II, I discuss the racist and sexist framework that the *Dobbs* majority relies on, and how this framework creates and recreates patriarchy and white supremacy in concerning ways.

### Part I: Originalism as a Long-Term Strategy

One of the most shocking parts about *Dobbs* to many laypeople was simply the fact that *Roe* could be overturned. The Supreme Court had never overturned a case that granted a constitutional right before (Dwyer and DiMartino 2022) and several of the Justices who voted to overturn *Roe* had previously implied that they would not do so (Timm 2022). The Court was aware of this context and spends a large portion of the majority opinion justifying their decision to overturn this prominent precedent. I argue that the Court was able to do this by relying on years of originalist strategy designed specifically to overturn *Roe* and *Casey*. The *Dobbs* majority mobilizes targeted constructions of abortions, abortion providers, fetuses, and pregnant people that align with decades of anti-abortion discourse. These constructions have been remarkably consistent across time and a multitude of contexts, precisely because they were designed specifically to justify the decision to overturn *Roe*. Even the political discourse that abortion is a

“moral issue” with two competing sides who simply have different moral values has been carefully cultivated to support the ultimate decision to overturn *Roe*. Individual activists and politicians in the anti-abortion movement certainly believe in the immorality of abortion, however the “moral issue” discourse ultimately works as a broader political strategy that was, again, specifically designed to overturn *Roe* and *Casey*.

In the following section, I argue that originalism constructs abortions, abortion providers, fetuses, and pregnant people in ways that are specifically targeted to overturn *Roe* and *Casey*. Indeed, I argue that even the notion that abortion is a “moral issue,” which has been so central to anti-abortion arguments, has a specific purpose that serves broader originalist ends. Finally, I argue that overturning *Roe* and *Casey* is part of a long-term strategy to institutionalize originalism and roll back a multitude of progressive social changes made since the 1950s.

### *Originalism’s Perspective on Abortion*

First, the constructions of abortions, abortion providers, fetuses, and pregnant people support originalist anti-abortion strategies to overturn *Roe* and *Casey*. Steven Calabresi is a prominent law professor at Northwestern University who is one of the leading voices in originalist theory and co-founded the Federalist Society (Harris-Brusky 2015). In a 2008 article titled “How to Reverse Government Imposition of Morality: A Strategy for Eroding *Roe v. Wade*,” Calabresi argues for a gradualist strategy to overturn *Roe*, eroding it rather than trying to ban abortion immediately. Calabresi’s “erosion” strategy involved passing various laws restricting abortion that could then be litigated up to the Supreme Court, establishing a body of originalist, anti-abortion case law. Calabresi leaves the specific types of abortion restrictions up to others to decide. However, he does offer a few starting points. For example, he suggests that

states begin by instituting mandatory waiting periods and restricting sex-selective abortion, abortion that would “cause pain to the fetus,” and “intimidation” of “young women” into having abortions (2008: 90). Although Calabresi was certainly not the only person strategizing how to overturn *Roe* and *Casey*, the framework that he outlines in this paper aligns very closely with the sequence of laws and litigation that followed in the next fifteen years.

Importantly, the abortion restrictions that he discusses here draw on several important and strategic discursive constructions of abortion, pregnant people, and fetuses. First, the suggested restriction on abortion that causes pain to the fetus reifies the notion that abortion is harmful. It also implies that fetuses are fully alive and capable of feeling pain prior to late in the third trimester, which is not supported by evidence (ACOG 2023). Second, bans on sex-selective abortions rely on racial stereotypes about women of color to regulate who can or cannot access abortion (Shaw 2016). Finally, the regulation “protecting” young women from being intimidated into having abortions reinforces paternalistic notions about pregnant people’s capacity for decision-making. These constructions echo throughout much of the anti-abortion legislation passed in the years that followed, including *Dobbs*. As such, I argue that the discursive constructions of abortion providers, abortions, fetuses, and pregnant people in *Dobbs* that I outline below are based in originalist theory and strategy designed specifically to overturn *Roe* and *Casey*.

### *Originalist Constructions in Dobbs*

The basic constructions of abortion throughout the majority opinion and concurrences are relatively consistent with standard anti-abortion rhetoric. This decision does not go as far as some other pieces of anti-abortion legislation in its criticisms of abortion; however, it does draw

on anti-abortion constructions of abortion as potentially criminal, dangerous, and murder, aligning with Calabresi's suggestions. Justice Alito spends a good deal of time discussing British and American common law surrounding abortion, arguing that "[a]t common law, abortion was criminal in at least some stages of pregnancy....By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow" (majority opinion: 16). Indeed, much of this section of the decision emphasizes abortion's historical criminality, unproblematically using this history as grounds to support current restrictions on abortion. This emphasis constructs abortion as a criminal act that was wrongfully decriminalized for a relatively short period of time. Additionally, the decision feeds the notion that abortion is a dangerous procedure that kills "living" fetuses. This Court does not describe abortion in as graphic terms as some other anti-abortion legislation has, however it does consistently describe abortion as "destroying" "potential life." In one example where the court mobilizes both the "abortion is dangerous" and "abortion is murder" arguments, the Court cites the Mississippi legislature who argue that the dilation and evacuation method of abortion is "'a barbaric practice, [and] dangerous for the maternal patient'" (qtd. in majority opinion: 78). These constructions of abortion as criminal, dangerous, and murder are not unique to this legislation. However, it is important to note the Court's use of this rhetoric because, as I discuss below, it aligns both with Calabresi's suggested construction of abortion, and decades of precedent built up over time specifically to overturn *Roe* and *Casey*.

Similarly, Justices Alito and Roberts repeatedly refer to abortion providers in negative terms that suggest that the practice of abortion is shameful and demeaning to the medical profession. For example, Alito's majority opinion argues that *Roe*'s influence was too wide-reaching because it led the Court to strike down laws that "a physician performing a post-



viability abortion use the technique most likely to preserve the life of the fetus and that fetal remains be treated in a humane and sanitary manner” (majority opinion: 54, in-text citations omitted). This emphasis on preserving life and treating fetal remains humanely suggests that abortion providers are carelessly killing potentially viable fetuses without regard to the fetus’s “humanity.” The decision also consistently suggests that performing abortion is degrading to the medical profession. Both Alito and Roberts rely on the assertion in *Gonzales v. Carhart* that the government’s interest in “preserving the integrity of the medical profession” (Roberts concurring: 4, see also majority opinion: 78) extends to regulating abortion. This implies that abortion providers lack integrity, and that this lack of integrity demeans the entire medical profession. This construction of abortion providers is relatively consistent with longstanding anti-abortion constructions that stigmatize abortion providers as illegitimate (Harris et al. 2011; Harris et al. 2013; Weitz and Kimport 2015). Additionally, this construction bolsters constructions of abortion as “barbaric” and “criminal” while also reinforcing notions of fetal life and fetal personhood. As such, the construction of abortion providers in *Dobbs* feeds into and reproduces a very specific pattern which serves the overall strategy to overturn *Roe*.

The decision and concurrences are also consistent with prior anti-abortion constructions of fetuses. Specifically, Justices Alito, Kavanaugh, Thomas, and Roberts all discuss the fetus in terms of “fetal life.” For example, Alito lists “respect for and preservation of prenatal life at all stages of development,” as a legitimate state interest that would justify a state abortion restriction (majority opinion: 78). The mantras of “fetal life” (repeated 24 times), “prenatal life” (9 times), and “potential life” (23 times) are repeated so frequently throughout the decision that the notion of legitimate fetal life prior to viability becomes taken for granted. The Court argues that they do not take any particular stance on when life begins, and yet, much of the opinion is dedicated to

eroding the legitimacy of viability as a meaningful point in pregnancy. Alito's opinion first pushes legitimate "fetal life" back to quickening and then questions even that cutoff point. For example, the word viability is frequently placed in quotation marks, suggesting that its meaning is questionable. Additionally, the majority opinion spends a substantial amount of time arguing that "the viability line makes no sense," (majority opinion: 38, see also majority opinion: 50-56). In fact, the final decision is heavily dependent on establishing the importance of "fetal life" and the unimportance of any meaningful point at which "fetal life" is illegitimate.

This emphasis on "fetal life" is typical of the anti-abortion movement and is consistent with Calabresi's tentative strategy discussed above. However, here it serves two important purposes. First, doing so allows the Court to distinguish abortion from other liberties protected under the Fourteenth Amendment because abortion supposedly involves the destruction of "fetal life," or an "unborn human being," while other issues of discrimination do not (majority opinion: 5). This distinction is crucial to the final decision and is likely a culmination of the anti-abortion movement's repeated attempts to chip away at gestational age limits in recent years. That distinction is also related to the second consequence of the Court's emphasis on "fetal life." Specifically, focusing on the importance of "fetal life" allows the Court to discursively erase pregnant people from the conversation on abortion.

The decision does mention pregnant people several times. It is important to note here that the language surrounding pregnant people in the decision is always gendered. Therefore, when I refer to "pregnant people" that is my own language in an attempt to represent the point that pregnancy, abortion, and childbirth are not inherently gendered activities. The *Dobbs* majority, conversely, always uses gendered terms such as "mother" (46 times) and "woman" (307 times). There is no serious discussion of the implications of restricting abortion for pregnant people.

Indeed, the decision seems to dismiss outright the possibility that restricting abortion is discriminatory towards pregnant people, skirting the issue without ever addressing it directly. For example, when discussing the potential motivations for historical restrictions to abortion access, Justice Alito argues, “[a]re we to believe that the hundreds of lawmakers whose votes were needed to enact these laws [criminalizing abortion] were motivated by hostility to Catholics and women? There is ample evidence that the passage of these laws was instead spurred by a sincere belief that abortion kills a human being” (majority opinion: 29). This discursive framing dismisses outright the potentiality that lawmakers in the 19<sup>th</sup> and early 20<sup>th</sup> centuries could possibly have been discriminating against women or a (at the time) religious minority, without truly explaining why the Court is dismissing this potentiality. It then shifts the attention back towards “fetal life,” discursively erasing pregnant people. The Court also uses the progression of gender equality as evidence that abortion restrictions could not possibly be discriminatory. For example, Justice Alito notes that “for more than a century after 1868 – including ‘another half-century’ after women gained the constitutional right to vote in 1920... – it was firmly established that laws prohibiting abortion...were permissible exercises of state regulatory authority” (majority opinion: 36, in-text citations omitted). This suggests that it is unlikely that abortion restrictions were discriminatory towards pregnant people because women had some political power. This logic individualizes patriarchal oppression and discrimination, removing the sociohistorical context of, and the actual impact that abortion restrictions have on, pregnant people. These strategies ultimately allow the Court to erase pregnant people and their interests from the decision, even as they seemingly discuss “women’s rights.” Doing so allows the Court to ignore both legal and public arguments that abortion restrictions are oppressive and

discriminatory to pregnant people, making it much easier to overturn *Roe* and *Casey* and embedding a patriarchal framework in precedent.

To quickly review: the *Dobbs* decision constructs abortion as shameful, harmful to pregnant people and fetuses, and as murder; it constructs fetuses as living human beings; and pregnant people's interests are essentially dismissed, constructing them as invisible and therefore unimportant. Each of these constructions discussed aligns with the constructions implied in Calabresi's article wherein abortion restrictions stigmatize abortion, personify fetuses, and patronize and erase pregnant people.

#### *Abortion as a Moral Issue?*

Finally, the majority opinion reduces abortion down to a "moral issue," for which there are two equally valid competing sides. For example, the first sentence of the decision reads, "[a]bortion presents a profound moral issue on which Americans hold sharply conflicting beliefs" (majority opinion: 1). The decision bemoans *Casey's* inability to resolve this "moral issue," arguing that "[f]ar from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division" (majority opinion: 6). The decision to emphasize the moral deadlock over abortion is, I argue, an intentional and strategic choice that allows the majority to rely on originalism for the decision, thereby making the decision to overturn *Roe* almost automatic. In an article titled "Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling *Planned Parenthood of Southeastern Pennsylvania v. Casey*," Calabresi argues that if a line of precedent is "causing more trouble than will be caused by disrupting the interests of those who relied on that precedent," (2005: 314) then the Court should revert to originalism to decide the constitutionality of the precedent and

allow the political branches to legislatively resolve issues that stem from “the interests of those who relied on that precedent.” In other words, it behooves the Court to emphasize the national conflict caused by beliefs surrounding abortion because within this framework the very fact of this conflict allows the Court to use originalism when deciding whether abortion is protected by the constitution. As such, the Court emphasizes the moral conflict surrounding abortion and deemphasizes the issues that pregnant people will face without access to abortion to such an extent that pregnant people are essentially erased from the decision completely.

Additional evidence supports the argument that the Court constructs abortion as a “moral issue” for strategic political reasons. The notion that abortion is a “moral issue” implicitly assumes a normative Christian, specifically Catholic or Evangelical, moral framework (Bohrer 2021). This assumption embeds Christian morality into US case law, normalizing this framework and assuming that it naturally applies to the debate surrounding abortion. However, actual Christians have conflicting beliefs about abortions, with 45% in favor of legal abortion in all or most cases (Pew Research Center 2014). The Court thus relies on a simplified Christian moral framework to support their argument that abortion is a “moral issue,” removing nuance and applying a hegemonic moral framework to a diverse US populace who do not all necessarily adhere to Christian morality (Pew Research Center 2014). Similarly, the Court simplifies the abortion debate in the US, depicting it as an insurmountable divide in the nation. However, recent data that suggest that actual public opinion regarding abortion is relatively nuanced; a majority of people want abortion to be accessible in all or most cases, and even many of those who are opposed to abortion think it should be legal in some cases (Pew Research Center 2022). Therefore, the Court’s argument that abortion is a “moral issue” between two “sharply conflicting” groups that cannot and will not ever be resolved exaggerates the abortion debate in

the US. This exaggeration allows the Court to rely on a legal framework that is specifically racist and sexist, thereby making it very easy to overturn *Roe*.

## Part II: The Racist and Sexist Framework Created and Recreated in *Dobbs*

The above discussion of Court's use of originalism in *Dobbs* gestures towards a racist and sexist framework undergirding the decision. However, there is another, more implicit framework that utilizes racism and sexism to support the Justices' arguments. Specifically, the majority draws from the argument that abortion is akin to racism. This argument has existed at least since the decision in *Roe*, and as discussed below utilizes misogynoir to stigmatize abortions, abortion providers, and people who get abortions. The *Dobbs* decision mobilizes the "abortion as racism" argument with two interrelated consequences: first, distracting from issues of sexism that necessarily come up when discussing abortion, and second, granting the Court a certain kind of racial authority. To support this argument, I detail the ways in which the abortion/racism argument manifests in the *Dobbs* decision. I theoretically expand on the concept *racial authority* in the discussion.

### *Abortion as Racism in Dobbs*

The majority in *Dobbs* constructed a racialized and gendered framework for the decision by drawing on the "abortion as racism" argument. They did this specifically by comparing *Roe* to *Plessy*, by comparing the *Dobbs* Court to the *Brown v. Board of Education (Brown)* Court, and, to a limited extent, by drawing on what I term fetal oppression discourses. First, the Court likens the decision in *Roe* to the decision in *Plessy*. For example, Alito writing for the majority argues that "[a]n erroneous interpretation of the Constitution is always important, but some are more

damaging than others. The infamous decision in *Plessy v. Ferguson*, was one such decision....*Roe* was also egregiously wrong and deeply damaging,” (majority opinion: 44). The majority opinion thereafter consistently compares *Roe* and *Plessy*, repeating the phrase “egregiously wrong” to describe both decisions. Justice Thomas even compares *Casey* to *Dred Scott*, the only similarity between the cases being the fact that they both used substantive due process (Thomas concurring: 6). These comparisons continue the tradition of white legal academics comparing *Roe* and *Casey* with *Plessy* and *Dred Scott*.

Relatedly, the Court repeatedly compares themselves to the *Brown* Court. This is primarily discussed in terms of justifying overturning major precedent. For example, the majority opinion argues that “Some of our most important constitutional decisions have overruled prior precedents....In *Brown v. Board of Education*, the Court repudiated the ‘separate but equal’ doctrine, which had allowed States to maintain racially segregated schools and other facilities. In so doing, the Court overruled the infamous decision in *Plessy v. Ferguson*,” (majority opinion: 40). Here, the Court likens the decision to overturn the precedent in *Roe* to the decision to overturn the precedent in *Plessy*, thereby equating *Roe* with *Plessy*, and *Dobbs* with *Brown*. Again, this Court follows Reagan’s example by discursively synonymizing themselves with prominent actors that promoted racial equality.

Finally, the Court rounds out the equation of abortion with racism by drawing on *fetal oppression discourses*. Fetal oppression discourses suggest that fetuses are oppressed by abortion in a manner that is similar to the oppression that Black Americans experience under racism. For example, the Court questions the legitimacy of viability, arguing that it is at least partially spatially determined due to the quality of medical care available in urban versus rural communities. This leads to the question “can it be that a fetus that is viable in a big city in the

United States has a privileged moral status not enjoyed by an identical fetus in a remote area of a poor country?” (majority opinion: 52-53). This discourse centers the fetus as a person who either experiences privilege or oppression and needs protection from “unequal” treatment that would stem from where it “lives.” In doing so, it suggests that a fetus can be oppressed by health care disparities in a manner that is similar to the experiences of many marginalized groups in the US and globally. Justice Thomas is more explicit with his argument that fetuses experience oppression in a similar manner to racially marginalized people, likening the “more than 63 million abortions” performed since *Roe* with the “immeasurable human suffering” caused by slavery (Thomas concurring: 6-7). Altogether, the Court constructs fetuses as oppressed minorities who are being liberated from oppression in much the same way as Black people were liberated from racial segregation by the decision in *Brown*. By doing so, they are mobilizing racialized paternalism (Moore 2020), implicitly situating themselves as protectors of Black fetuses.

The Court’s concerns about discrimination and oppression are, however, difficult to take seriously when they are combined with the total erasure and disregarding of the discrimination and oppression caused by patriarchy that, in this case, disproportionately impacts pregnant people of color. As discussed above, the logic of the decision essentially erases pregnant people from the discussion of abortion. Even when the Court does address pregnant people’s potential need for abortion, they do so in a way that doesn’t address actual concerns raised by pregnant people and glosses over the consequences of lack of access to abortion for pregnant people. For example, the first time the majority opinion discusses in any real terms the possibility that restrictions to abortion could impact pregnant people, that impact is quickly disregarded because “a regulation may have a very different impact on different women for a variety of reasons”



(majority opinion: 58). The ambiguity of potential impacts is seen as enough of a reason to disregard their importance entirely. The majority opinion also waves away the argument that many people in the US rely on the availability of abortion when planning their lives, arguing that “this Court is ill-equipped to assess ‘generalized assertions about the national psyche’...Casey's notion of reliance [on abortion] thus finds little support in our cases, which instead emphasize very concrete reliance interests” (Majority opinion: 64 in-text citations omitted). Here, the Court disregards the notion that abortion allows people to plan their lives, arguing that this notion is too abstract. In this way, the Court avoids any real discussion of sexist discrimination or patriarchal oppression while seeming to address these issues.

The Court’s disregarding of sexism undermines their argument that abortion is akin to racism. It is well documented that lack of access or reduced access to abortion can be economically, emotionally, personally, and sometimes physically harmful to pregnant people (Carson 2021; Dehlendorf and Weitz 2011; Foster et al. 2018; Upadhyay et al. 2014). It is also well documented that these harms disproportionately impact and oppress pregnant people of color and that lack of access to abortion is deeply intertwined with the issues of racism that the Court highlights (Carson 2021; Ross 2017; Smith 2017). If the Court was truly concerned about racial discrimination surrounding abortion, they would need to take an intersectional perspective and incorporate the wealth of evidence that indicates that reduced access to abortion disproportionately harms pregnant people of color. Instead, the Court dismisses the possibility that abortion restrictions could be substantially harmful to anyone. This misrepresents the realities of discrimination and oppression in the US and creates a conflict between pregnant people and fetuses where there is none. In other words, the Court neglecting to mention the issues that pregnant people of color will face under abortion restrictions perpetuates misogynoir

by erasing pregnant people of color. As such, the abortion/racism argument in this context leads to the *erasure of gender issues*, reinforcing patriarchy under the guise of “anti-racism,” while also limiting the scope of anti-racism by excluding the issues that pregnant people of color face. In sum, the Court’s discussion of racial oppression lacks substance because it ignores issues that impact pregnant people of color. As such, the structure of the abortion/racism argument in *Dobbs* fits with the pattern established by white, Catholic legal academics who largely use this argument as a rhetorical strategy instead of as an actual critique of racism in the US. Consequentially, the decision fails to adequately argue that that abortion is akin to racism. This discourse instead functions to grant the Court a particular form of racial authority, discussed below.

## DISCUSSION

These findings have several implications. First, the Court's reliance on originalism is indicative of the kinds of Supreme Court decisions we can expect in the coming years. We should understand this Court within the context of conservative backlash and anticipate further restrictions to civil liberties. Second, the racialized discourses in *Dobbs* offer insight into how institutions strategically appropriate certain aspects of racially progressive rhetoric to grant themselves constructive, and therefore coercive, power. Finally, a brief examination of post-*Dobbs* challenges to abortion access highlights several key areas for political resistance and further research.

### The Implications of Originalism in Dobbs

The strategic use of originalism in *Dobbs* is concerning because it further institutionalizes and legitimizes originalism and originalist constitutional logic. Again, Supreme Court precedent does not serve to create originalist theory and instead primarily replicates and institutionalizes originalism in US case law (TerBeek 2021). Hollis-Brusky (2015) argues that originalist intellectual capital supplied by the Federalist Society creates the opportunity for constitutional change and then provides the language, concepts, and frameworks needed to justify that change. This type of intellectual capital “was most influential in cases where the Supreme Court took a big step away from their established constitutional framework” (Hollis-Brusky 2015: 4). In other words, the institutionalization of originalism stimulates a climate for major constitutional reinterpretation. This is concerning since originalism was initially created to resist the decision in *Brown* (TerBeek 2021). Indeed, scholars argue that originalism serves to embed white logic into constitutional law and interpretation behind the guise of neutrality (Liebell 2020; Moore 2014).

Originalism in practice is not always consistent with theory, particularly when it comes to interpreting the fourteenth amendment within the context of reconstruction (Greene 2012). This inconsistency has led some scholars to argue that that originalism is less of a neutral framework for constitutional interpretation, and more of a “normative claim on American identity” (Greene 2012: 3); the claim being that contemporary American identity should align with 18<sup>th</sup> century American ideals of gender and racial inequality (Liebell 2020). Indeed, the passing of the Respect for Marriage act as preemptive protection for existing same-sex and interracial marriages, and Justice Thomas’s explicit statement that “in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*” (Thomas, concurring: 3) hints at major challenges to these protections. As such, I argue that the reification of originalism in *Dobbs* will pave the way for further Supreme Court case law that undermines legal protections for marginalized groups instituted within the last 60 years.

#### Who Gets to Decide? Racial Authority and Post-Racial Epistemology in *Dobbs*

The concept *racial authority* is relatively underdeveloped and tends to be ill-defined. A review of the literature that uses this concept reveals two distinct, yet interrelated meanings implied by the term *racial authority*: *racial authority over* and *racial authority to*. *Racial authority over* generally means the power that one racial group (white people and/or colonizers) has over another racial group (people of color and/or people oppressed under colonialism). For example, postbellum notions that white men were “naturally fit” for leadership while Black people were “naturally subservient” rationalized white racial authority over newly freed Black people (Lessig 2011). As another example, Krik (2022) argues that British nurses in Mandate

Palestine (1918-1948) acted as imperial agents for Britain by exercising racial authority over indigenous Palestinians working with, and being cared for by, these nurses. As such, *racial authority over* describes hierarchical relationships between a privileged racial class and an oppressed racial class.

Relatedly, *racial authority to* describes the ability to decide and define race-related issues such as what race is and what constitutes racism. For this definition, I draw heavily from Johnston-Guerrero (2017) who provides the most complete definition of this type of racial authority in the literature I reviewed. Johnston-Guerrero (2017) argues that racial authority has two main dimensions which exist as a continuum, a) the holder of authority, and b) the source of the authority. Holders of authority can be the self or some other person, and sources of authority can be experience or expertise/science (Johnston-Guerrero 2017). People of color often use self-authorship as a source of experience that grants them *racial authority to* – they have the personal experience with being seen as “a race” that allows them to articulate, theorize, and define race and racism (Johnston-Guerrero 2017). White people, conversely, often have difficulty recognizing themselves as racialized and frequently cannot see racism until it is specifically pointed out to them (Frankenberg 1993; McIntosh 1989). Although this does not mean that white people are incapable of articulating and defining race and racism, it does suggest that white people tend to have less *racial authority to*, due to their lack of experience seeing race and racism.

*Racial authority to* is ultimately very powerful – it can be especially empowering for people of color as people of color’s self-authorship and self-definition can weaken white people’s *racial authority over* racially marginalized people (Collins 2000). However, white people and white institutions recognize the power inherent within *racial authority to* and

frequently attempt to claim this type of racial authority to bolster their *racial authority over*. This can manifest in different ways, but one way that is becoming more frequent involves state- and organization-sponsored diversity equity and inclusion (DEI) initiatives. For example, state-sponsored Vaisakhi celebrations in Vancouver extend Canada's white racial authority over the Vancouver Sikh population (Buffam 2019). The state gains racial authority to define racialization by promoting itself as supportive of Sikh cultural practices; in doing so the state gains increased racial authority over the Vancouver Sikh population, delineating them as a racialized group in a specific area while expanding state surveillance and state violence in the form of increased policing (Buffam 2019). Organizations often do something similar. For example, universities will frequently create diversity initiatives or work groups whose task is to increase diversity, equity, and inclusion in the university (Ahmed 2019). Universities will then use the existence of this initiative or group to promote themselves publicly as a diverse and inclusive environment; meanwhile, initiatives are consistently underfunded and under-supported, unable to make major changes due to internal institutional resistance (Ahmed 2019). In this way, universities gain racial authority to define what racism is and how to address it, while also strengthening their racial authority over racially oppressed students and faculty by stalling progress on organizational racial equity. This is not to say that governments or organizations should stop promoting DEI. However, it is to say that DEI programs that are purely or mostly performative do very little to decrease racial oppression and may actually bolster white privilege by granting white institutions increased racial authority to define race and racism, thereby strengthening their racial authority over oppressed groups.

As these examples suggest, white institutions attempt to gain increased *racial authority over* by claiming *racial authority to*. However, the source for their *racial authority to* is

frequently ill-defined. Historically white supremacist states and organizations do not have the personal experience with being defined as racially other that would grant them the legitimate self-authorship necessary to define and theorize race and racism (Johnston-Guerrero 2017). Relying on external sources of authority, specifically scientific research on race and racism, gives states and organizations their best opportunity to actually make positive social change, however as the examples above demonstrate, this is rare. As discussed below, state institutions instead utilize an amorphous and source-less post-racial epistemology that grants them racial authority to define the bounds of racism, thereby according them increased racial authority over marginalized groups.

### *Racial Authority and Post-Racial Epistemologies*

The *Dobbs* majority relies on this amorphous and source-less post-racial epistemology to gain racial authority to define the scope of racism in the US. A post-racial epistemology assumes that racism is no longer a factor that actively hinders people of color, and that the civil rights movement of the 1960s and 70s provided the ultimate solution to racism in the US (Goldberg 2015). Although the *Dobbs* majority asserts that slavery and racial segregation are wrong, the Justices also completely ignore the ways in which patriarchy and racism intersect to harm pregnant people of color who lack access to abortion. Additionally, the *Dobbs* majority makes no truly critical arguments about racial discrimination in the US, instead using the abortion/racism-anti-abortion/abolitionists argument to delegitimize *Roe* and *Casey* and legitimize the *Dobbs* decision. Relatedly, the discussions of *Plessy*, *Dred Scot*, and *Brown* are decontextualized, with no examination of the racial logics that were at stake in each decision; doing so might have revealed that reducing access to abortion is a form of reproductive oppression that is inherently

linked with the racist ideologies in *Plessy* and *Dred Scot* (Carson 2021). But the Court refused to rely on external scientific research on race and racism in the US, relying instead on taken-for-granted assumptions about these cases. Indeed, the *Dobbs* majority simply uses these cases as isolated moral signifiers to support an anti-abortion stance. The Court then uses this moral signaling to gain *racial authority to*. Specifically, the Court mobilizes a supposedly universally understood, but never explicitly stated, definition of racism that encompasses only overtly racist acts that happened long ago and does not include contemporary manifestations of racism. This definition implies that racism is a thing of the past, erasing contemporary manifestations of racism, including the ways in which lack of access to abortion functions as reproductive oppression for pregnant people of color. This allows the Court to seem as if they are addressing racism, when in fact they are minimizing its contemporary importance and redirecting its focus towards a “new class,” namely, fetuses. In this way, the Court grants themselves racial authority to define racism, positioning themselves first as liberators of an oppressed class and then using the discursive power associated with that positionality to set the definition and scope of racism in the US. In doing so, the state gains increased racial authority over pregnant people of color via abortion bans (and any future Supreme Court decisions that point to *Dobbs* as precedent for restricting civil liberties).

### What Next? Implications for a Post-*Dobbs* Present

Nearly a year after the *Dobbs* decision was released, we have a better understanding of what a post-*Dobbs* future looks like. However, the landscape is still evolving, and the findings presented here suggest several consequences of this decision that will continue to be relevant. First, the impact of originalism cannot be understated. As a scholar physically located in Florida,



where attacks on abortion access are increasingly paired with attacks on transgender healthcare, intellectual freedom, and Critical Race Theory, I find it difficult to disentangle *Dobbs* from its particular sociohistorical context. Indeed, I argue that these types of decisions are likely linked by a shared logic, both in terms of the overt legal theory and the implicit racial logic structuring these bills and court decisions. Future research should examine bills and court decisions limiting transgender healthcare and Critical Race Theory, keeping the findings from this research in mind. Social scientists, particularly those outside of legal studies and political science where originalism is better known, need to take originalism seriously. Specifically, we need to work to examine the social and structural implications of the ways in which this legal theory is becoming embedded within the state.

We should also anticipate further efforts to restrict abortion access entirely; attempts to restrict abortion will not stop at the state level. For example, there is currently a pending ruling on a lawsuit against the Food and Drug Administration (FDA) attempting to reverse the FDA's approval of mifepristone (Roubein 2023). Mifepristone is one of two drugs used for medication abortion and although the second drug, misoprostol, is effective on its own, removing access to mifepristone will still severely impact abortion access (Roubein 2023). We should also anticipate federal bills attempting to ban abortion. One bill, HR8814 or the "Protecting Pain-Capable Unborn Children from Late-Term Abortions Act" (note the fetal personhood language), was introduced in Congress in September 2022 and is currently in committee. Similar bills have been introduced before, but none have yet been passed by both chambers of Congress. Although the anti-abortion movement's ideal end goal is likely an all-encompassing federal ban, it is more probable that restrictions to abortion access will follow the same "erosion" strategy that has

characterized the past 50 years. We need to take this strategy seriously, because historically it has impacted and harmed pregnant people of color the most (Carson 2021).

Indeed, this decision will have, and is currently having, material and discursive implications for pregnant people, particularly pregnant people of color. In the first two months following *Dobbs*, over 10,000 people were unable to access their needed abortion and as of January 2023, 29% of people with uteruses of reproductive age are completely or nearly completely unable to access abortion (Fuentes 2023). It is still relatively early to measure the exact material ramifications of *Dobbs*. However, this extreme reduction in access to abortion has likely impacted pregnant people of color and low-income pregnant people the most, due to existing structural inequalities in maternal mortality and access to reproductive healthcare (Fuentes 2023).

In addition, it is important to pay attention to the discursive constructions of pregnant people discussed above, and the ways in which state institutions are granting themselves racial authority. The use of a post-racial epistemology to grant state institutions the power to racialize certain groups while appearing to use racially progressive language is particularly insidious: it is difficult to see, yet it gives the state a massive amount of discursive power that it can use to control and police the bodies that it racializes (Buffam 2019; Krik 2022). Future research should work to examine this discourse in other types of bills and court cases, as well as within other types of institutions. Scholars and activists should also continue to work to problematize and call-out neoliberal, post-racial, and colorblind discourses. The contemporary landscape seems very bleak. However, the exciting thing about understanding power as dispersed through discourses is realizing that those of us being constructed in oppressive ways have the ability to counter those constructions. We can take active, practical steps to resist the ramifications of, and

mitigate the harm from, *Dobbs*, while simultaneously using our self-authorship to create resistant narratives about ourselves.

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