ABORTION RIGHTS AND FEDERALISM: SOME LESSONS FROM THE NINETEENTH CENTURY UNITED STATES

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The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*[1] has prompted frequent allusions to slavery and the antebellum United States. There's been talk of a new "Underground Railroad" and of clandestine networks helping people flee their home states in search of the freedom to end a pregnancy.[2] Some have predicted that *Dobbs* will result in interstate conflicts of a magnitude not seen since before the Civil War.[3]

Historical comparisons require considerable care, with attention to differences as well as similarities. The inability to access abortion is degrading and oppressive, but it is quite unlike the horrors of chattel slavery, in which enslavers tortured and murdered enslaved people with impunity, sold children and adults away from loving families, and required enslaved status to be passed from one generation to the next.

Yet, like antebellum slavery, abortion is a question of fundamental individual rights, an issue of critical national importance and a matter of great moral significance, marked by bitter divisions in public opinion. As in the battle over slavery, the fight over reproductive freedom raises questions about federal and state authority—in other words, who gets to

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1. 597 U.S. ___, 142 S.Ct. 2228 (2022).

2. Elaine Kamarck, *The Supreme Court's Abortion Opinion—Just the Beginning of the Battle*, BROOKINGS INST., June 24, 2022.

3. Jacob Bogage & Christopher Rowland, *Chasm Opens Between States on Abortion Pills and Out-of-State Care*, WASH. POST, June 25, 2022.

make the rules. In the nineteenth century, the conflict over slavery helped produce an empowered federal government that, as it happened, passed the 1873 Comstock Act, making it a federal offense to distribute information about, or devices associated with, contraception and abortion.

The *Dobbs* decision, which gives states complete control over abortion laws, has unleashed conflicts that resemble the battles that arose when enslaved people fled slave states for free states, and enslavers, in turn, mobilized state and federal power to get them back. The history of those struggles reminds us of the corrosive impact of interstate conflict and of the importance of federal protections for freedom and individual rights. The history of the United States in the nineteenth century also reminds us that when we bring the power of the federal government to bear on an issue, it must be done with respect for people's dignity and capacity for moral decision-making.

In the late 18th and early 19th century, northern states abolished slavery, and a long border emerged within the United States, between free states and slave states. It also became clear that some Americans were strongly committed to enslaving people while others found the practice morally abhorrent. Enslaved people themselves brought the clashing views into relief as they regularly made the decision to try to escape bondage and arrived in states where slavery was outlawed.

In 1793, Congress passed a law intended to enforce the Constitution's Fugitive Slave Clause, which recognized that enslavers had some power to claim enslaved people who managed to get to free states. But that law left open many questions, including how enslavers' claims would be adjudicated and the extent to which free states could establish their own procedures for such cases.

Over time, as the abolition movement grew, northerners insisted that slaveowners had no business sending agents to enforce slavery beyond the borders of their own states, and free states enacted a variety of policies to constrain enslavers' power. Known as "personal liberty laws," these included state-level provisions to protect free Black people from kidnapping, strict standards of evidence for enslavers' claims, and jury trials for adjudicating claims rather than cursory proceedings before a single local official.

Infuriated enslavers demanded better treatment from white Americans in the free states. The governments of slave states sometimes sent delegations to free states to demand repeal of personal liberty laws. And free states vacillated in their policies, often changing course when a

new political party took power in the legislature. The relative safety of Black people living in the North was in constant flux as a result.[4]

Many looked to the federal government to resolve the conflicts and uncertainty. The U.S. Supreme Court entered the debate in the 1842 case of *Prigg v. Pennsylvania*.[5] There, the Court declared that enforcement of the Constitution's Fugitive Slave Clause was a matter of exclusive federal jurisdiction, invaliding many personal liberty laws and opening the door for a much more stringent federal fugitive slave law.

But *Prigg* also made space for free state local officials to refuse to cooperate with enslavers, and this they certainly did. In the 1840s, many free states passed new personal liberty laws designed to protect their African American residents, whether or not they were indeed fugitives from slavery. Some of those laws declared that state and local officials were not permitted to cooperate in fugitive slave renditions.[6]

As part of the broader Compromise of 1850, Congress weighed in heavily on the side of enslavers, adopting a new Fugitive Slave Act that created a cadre of federal commissioners to oversee claims to human property in the free states. The new law demanded cooperation from local officials and required that "all good citizens" participate when asked.

The 1850 law's vast expansion of federal power in the states showed that slaveowners were not principled promoters of "states' rights." To the contrary, they and their supporters advocated federal power of unprecedented reach when it served their purposes. Thousands of Black northerners choose to flee the country rather than face capture and enslavement under the repressive new regime.[7]

In the free states, broad-based resistance grew in the late 1850s. States passed new personal liberty laws in defiance of the Fugitive Slave Act, while local officials and everyday people stood up against efforts to enforce the oppressive law. They continued to do so even after the Supreme Court reinforced in *Ableman v. Booth* (1859) that the Fugitive Slave Act was constitutional and federal authorities had exclusive jurisdiction in such matters.[8]

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4. A major source on developments described above is Thomas D. Morris, *Free Men All: The Personal Liberty Laws of the North, 1780-1861* (1974).

5. 41 U.S. 539 (1842).

6. MORRIS, *supra* note 4, at 107-19.

7. MORRIS, *supra* note 4, at 130-65. For escaping slaves and struggles over enforcement of the 1850 act, see R. J. M. Blackett, *The Captive's Quest for Freedom: Fugitive Slaves, the 1850 Fugitive Slave Act, and the Politics of Slavery* (2018).

8. 62 U.S. 506 (1859). For *Ableman v. Booth* and its context, see H. Robert Baker, *The Rescue of Joshua Glover: A Fugitive Slave, the Constitution, and the Coming of the Civil War* (2006).

Northerners' growing refusal to tolerate slavecatchers and cooperate with federal law contributed to the coming of the Civil War (1861-1865) and the war, in turn, resulted in the abolition of slavery. The Thirteenth, Fourteenth, and Fifteenth Amendments, adopted after the war, were an effort to set the nation on a new constitutional footing.[9]

The Reconstruction amendments for the first time put the force of the federal government on the side of freedom, not slavery. In fact, the first federal civil rights statute, the Civil Rights Act of 1866, used the same enforcement mechanisms as the Fugitive Slave Act had, this time in the service of protecting, rather than denying, people's basic rights to own property and testify in court.[10]

The capacious language of Section One of the Fourteenth Amendment promised that states could not deny people due process or equal protection of the law, and could not deny citizens the privileges or immunities of citizenship. Americans have never agreed on precisely what those broad phrases encompassed, but combined with Section Five, which gave Congress enforcement power, they promised an array of new individual rights, backed by the power of the federal government.

Today it is possible to read the Thirteenth and Fourteenth Amendments as charters for reproductive freedom.[11] At the time, however, as Justice Alito recognized in the *Dobbs* decision, the amendments did nothing to stanch an anti-abortion movement that was already under way before the Civil War began and gathered momentum after it. Pressured by organized physicians, in the 1860s state legislatures began passing increasingly stringent laws that made intentional termination of pregnancy a crime.[12] What Justice Alito did not acknowledge was that enforcement of the new laws remained lax and practitioners who were prosecuted were rarely convicted, patterns that suggest that most Americans retained their longstanding belief that

9. For a recent overview of the amendments, see Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (2019).

10. GEORGE A. RUTHERGLEN, CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866, 59-60 (2012).

11. *See, e.g.,* David H. Gans, *Reproductive Originalism: Why the Fourteenth Amendment's Original Meaning Protects the Right to Abortion*, 75 SMU L. REV. F. 191 (2022); Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NORTHWESTERN L. REV. 480 (1990).

12. JANET FARRELL BRODIE, CONTRACEPTION AND ABORTION IN NINETEENTH-CENTURY AMERICA 266-75 (1994); JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900, 200-45 (1978).

women were entitled to decide whether to continue a pregnancy, particularly before they felt fetal movement (known as "quickening").[13]

Still, reformers who arrayed themselves against women's autonomy over their reproductive lives were nothing if not determined. Anthony Comstock of New York, an anti-vice crusader, relentlessly lobbied Congress to use its power over the U.S. Post Office to make it a federal offense to possess, sell, or give away "any article whatever, for the prevention of conception, or for causing unlawful abortion."[14] One senator advocated excepting physicians from the prohibition, but that proposal was quickly quashed.[15]

As historian Susan Pearson has written, for many moral reformers like Comstock, "the lesson of the war had less to do with the triumph of freedom and individual rights over slavery and subjection than with the triumph of morality over sin . . . Inspired by the Thirteenth Amendment's use of federal power to abolish an odious institution that had been a creature of state law, reformers sought to overturn the assumption that morals legislation was solely within the purview of the states."[16]

The Comstock Act, then, was the product of an era in which reformers were inspired by the newly expansive visions of federal power of the Fugitive Slave Act, the Civil Rights Act, and the Reconstruction amendments. Many of those reformers, including Comstock and anti-abortion crusader Horatio Storer, were motivated by concerns about both declining birth rates among Protestant white women and women's growing bids for greater freedom and autonomy.[17]

The federal Comstock Act–and similar "mini" Comstock laws passed at the state level–led to arrests and convictions creating the chilling effect that reformers desired. As historian Janet Farrell Brodie demonstrated, over time it became increasingly difficult to find products associated with birth control and abortion; authors removed passages about those topics from their published writing.[18]

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13. Patricia Cline Cohen, *The Dobbs Decision Looks to History to Rescind Roe*, WASH. POST, June 24, 2022.

14. An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use, 42nd Congress, Mar. 1873, *available at* https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=017/llsl017.db&recNum=0639/.

15. BRODIE, *supra* note 12, at 264.

16. Susan Pearson, *A New Birth of Regulation: The State of the State After the Civil War*, 5 J. CIVIL WAR ERA 422, 425 (2015).

17. BRODIE, *supra* note 12, at 268-72; Brief for *Amici Curiae* American Historical Association and Organization of American Historians in Support of Respondents at 20-26, *Dobbs v. Jackson Women's Health Org.*, *available at* https://www.supremecourt.gov/DocketPDF/19/19-1392/193000/20210920150703691_19-1392_Amici%20Brief.pdf.

18. BRODIE, *supra* note 12, at 253.

Courts repeatedly upheld the Comstock Act without regard for the Reconstruction amendments' potential power to redefine personal liberty and equality. The prevailing view among judges at the time was that the amendments offered no protection for people's right to freely access information or to make informed decisions about when to bear children and under what conditions. Of course it is worth noting, as the dissenters in *Dobbs* did, that in the decades after the Civil War, women were almost never permitted to vote despite an ongoing and growing campaign for that right. Men alone ratified amendments, passed laws, and determined how to interpret them.[19]

Beginning in the 1910s and with growing force in the 1930s, however, federal courts narrowed the scope of the Comstock Act, as a December 2022 memorandum from the Biden administration's Office of Legal Counsel demonstrates. Early-twentieth-century judges recognized that there were important reasons to circulate the kinds of information and products the Comstock Act had tried to suppress, including reasons associated with health care and physicians' authority. They construed the Comstock Act's ban on mailing devices and information associated with contraception and abortion to apply only to people who intended those materials to be used unlawfully.[20]

In the 1960s and 1970s, the Court began to find in the US Constitution rights of personal liberty that conflicted with the nineteenth-century tradition of morals legislation. In *Roe v. Wade* (1973), the Court found in the Fourteenth Amendment's Due Process Clause a constitutional right to terminate a pregnancy under some conditions.[21] In *Dobbs*, the Court reversed course, declaring that no such right existed and that states get to decide whether residents can access abortion at all and, if so, under what conditions.

This decision has created a landscape in which we see parallels to the fight over slavery and fugitive slave laws, and in which the 1873 Comstock Act is once again in play. In places where abortion is already severely restricted or banned, state legislators and lobbyists have proposed punishing people who travel out of state for abortion care. Referring to such proposals, the vice president and senior counsel for the Thomas More Society, a conservative legal organization, said last summer: "Just

19. *Dobbs*, 142 S.Ct. at 2324.

20. Memorandum Opinion for the General Counsel, United States Postal Service, Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortion, Dec. 23, 2022.

21. 410 U.S. 113 (1973).

because you jump across a state line doesn't mean your home state doesn't have jurisdiction."[22]

More immediately, Republican-led state legislatures have revived state-level Comstockery with legislation that criminalizes the circulation and delivery of abortion pills. In response, states that support reproductive rights including Connecticut, California, Illinois, New Jersey and Delaware have created protections for abortion providers against out-of-state suits and prosecutions.[23] These are today's personal liberty laws.

Meanwhile, after the Biden administration announced that the government would permit retail pharmacies to dispense the abortion medication mifepristone, twenty Republican state attorneys general informed several national drugstore chains that the Comstock Act is still in force and that they could be prosecuted for making "abortion pills" available.[24] The Biden Justice Department produced a detailed document demonstrating that for almost a century, federal courts have held that under the Comstock Act, mailers of birth control and abortion materials can be prosecuted only if they intend those materials to be used unlawfully.[25] Yet Walgreens executives were evidently cowed, announcing in early March that the company would not sell mifepristone in states where the attorneys general objected, even though medication abortion remains legal in some of those states.[26]

As the recent interchanges over the Comstock Act indicate, power at the federal level remains important. Antiabortion activists have claimed in a federal lawsuit that the Food and Drug Administration's approval of mifepristone, an abortion-inducing drug, is invalid and should be overturned. And although the November 2022 midterm elections indicated that most American voters support the right to access abortion, some anti-abortion stalwarts continue to insist that the next step is restrictive federal legislation.[27]

The history of the United States in the nineteenth century reminds us that arguments for "states' rights," or for federal power, have no intrinsic

22. Caroline Kitchener & Devlin Barrett, *Antiabortion Lawmakers Want to Block Patients From Crossing State Lines*, WASH. POST, June 30, 2022.

23. After Roe Fell: Abortion Laws By State, CENTER FOR REPRODUCTIVE RIGHTS, at https://reproductiverights.org/maps/abortion-laws-by-state/ (last visited Feb. 27, 2023).

24. *Attorney General Bailey Directs Letter to CVS and Walgreens Over Distribution of Abortion Pills*, Feb 1, 2023, at https://ago.mo.gov/home/news/2023/02/01/attorney-general-bailey-directs-letter-to-cvs-and-walgreens-over-distribution-of-abortion-pills; Alice Miranda Ollstin, *Walgreens Won't Distribute Abortion Pills in States Where GOP AGs Object*, POLITICO, Mar. 2, 2023.

25. Memorandum Opinion, *supra* note 20.

26. Ollstin, *supra* note 24.

27. Sara Burnett & Jill Colvin, *Abortion Foes: 2024 GOP Hopefuls Must Back Federal Limits*, AP, Feb. 1, 2023.

political or moral valence. Northerners adopted state-level personal liberty laws to mitigate oppressive aspects of the Constitution and federal law. Enslavers extended their jurisdiction beyond state lines and put unprecedented federal power in the service of human bondage. Morals reformers likewise enlisted the federal government to help them obstruct Americans' access to information and products that would enable them to decide when to have children and when to prevent or terminate pregnancies. Congress and the federal courts accepted such measures, just as by the late-nineteenth century they accepted violent infringements on African Americans' newly created constitutional rights.

Yet the complex history of rights and repression at both state and federal levels does not suggest that the best option for this country is to leave questions of fundamental rights in the hands of the states. Neither the Fugitive Slave Act nor the Comstock Act recognized the moral decision-making power of adult human beings; they are blots on our history. By contrast, federal guarantees of individual rights strengthen democracy and tamp down conflicts among the states. The United States has been at its best when, as in the Reconstruction amendments and federal civil rights laws, it offered federal guarantees of freedom, dignity and equality to all people.