RACING *DOBBS*

KATHERINE FRANKE* & RIA TABACCO MAR**

INTRODUCTION

In *Dobbs v. Jackson Women's Health Organization*, the U.S. Supreme Court reversed *Roe v. Wade*'s limits on a state's ability to restrict, and indeed completely outlaw, abortion. The case raises fundamentally important questions about rights to reproductive autonomy, bodily integrity, sex equality, privacy, and health.

Upon closer examination, *Dobbs* is also about race and the nation's racial history, as the two papers published here argue. In *Dreding Dobbs*, Professor Katherine Franke suggests that *Dobbs* should be read alongside the Supreme Court's 1857 decision in *Dred Scott v. Sandford*, in which the Court held that Black people—even free or freed Black people—were not U.S. citizens. Franke reasons that *Dred Scott* did for white supremacy—defining the United States as a white nation—what *Dobbs* does for patriarchy— masculinizing the Constitution as a compact among men. In fact, Franke argues, *Dred Scott* and *Dobbs* are both cases about reproductive justice in the shadow of slavery.

In *What "Every One Knows" About Dobbs—and Plessy*, Ria Tabacco Mar draws important connections between *Dobbs* and the Supreme Court's 1896 decision in *Plessy v. Ferguson*, the case in which the Court found that racial segregation of Black Americans did not violate the Fourteenth Amendment's Equal Protection Clause. In both *Plessy* and *Dobbs*, Tabacco Mar argues, the Court responds to constitutional injuries with trivializing and patronizing rejoinders that deny our lived experience.

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* Katherine Franke is the James L. Dohr Professor of Law at Columbia University, and Director of the Center for Gender & Sexuality Law.

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We publish these two papers here because, when read together, they offer new and fundamentally important insights about the meaning of *Dobbs* and how the legacies of slavery and the power of white supremacy haunt constitutional litigation even in cases that do not seem to be "about race."

In September 2022, Georgetown Law School's Gender + Justice Initiative held a conference titled *After Dobbs: the Assault on Reproductive Justice and Equality*. The conference brought together some of the leading academics and advocates working on reproductive justice to reflect on the meaning of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* and on the future of reproductive rights and justice in a world in which *Roe v. Wade* has been reversed.

Katherine Franke, the James L. Dohr Professor of Law and the director of the Center for Gender and Sexuality Law at Columbia Law School, and Ria Tabacco Mar, Director of the ACLU's Women's Rights Project, were among the speakers at the *After Dobbs* conference. The essays below are edited versions of the talks they gave at that conference.

DREDING *DOBBS*

KATHERINE FRANKE

As I was reading the Supreme Court's decision in *Dobbs v. Jackson Women's Health*,[1] both in draft and in final form, I had the distinct feeling that the opinion's structure and meaning were familiar. It then dawned on me: this case shares a number of similarities with *Dred Scott v. Sandford*, the 1857 Supreme Court case that found that the drafters of the U.S. Constitution never intended Black people to be U.S. citizens.[2] Having spent some time reading both cases side-by-side, I have concluded that in important ways, *Dred Scott* did for white supremacy, defining the United States as a white nation, what *Dobbs* does for patriarchy, masculinizing the Constitution as a compact among men. What I would like to do in this essay is read *Dred Scott* and *Dobbs* in relationship to one another, as cases about reproductive justice in the shadow of slavery.

First, the similarities between *Dred Scott* and *Dobbs* are reflected in their rhetorical structure. Both cases begin with text, and then move to history and tradition. In *Dred Scott*, Justice Taney begins his consideration of whether Black people could possibly hold the status of citizen within the meaning of Article 3 of the Constitution, by looking to the Constitution's text.[3] Of course, there are three references to slavery in the Constitution, but he mentions only two—the limit on the importation of enslaved people in Article 1, and the right of enslavers to seize enslaved people who escaped to free states in Article 4[4] (Taney makes no mention of the Three-Fifths clause). Taney's reliance on the textual presence of Black people in the Constitution as enslaved beings, and thus not citizens, is to be contrasted with Justice Alito's conclusion in *Dobbs* that both women and reproductive freedom are completely absent from the Constitution's text, thus justifying the finding that *Roe* was egregiously and wrongly decided in 1973. In both cases, the text of the Constitution definitively answers the question of rights and political belonging at stake in the case.

Both opinions then turn from text to history and tradition, declaring that the viability

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1 Dobbs v. Jackson Women's Health (*Dobbs)*, 597 U.S. 215 (2022).

2 Dred Scott v. Sandford (*Dredd Scott*), 60 U.S. 393 (1857).

3 "There are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed." *Dred Scott*, 60 U.S. at 411.

4 *Id.*

of the rights asserted must be answered by imaginatively reconstructing and then ventriloquizing constitutional meaning understood by the framers at the time the relevant language of the Constitution was written. Taney, like Alito, cherry picks colonial history to conclude, in terms too offensive to repeat once again here, that Black citizenship was unthinkable to the "great men—high in literary acquirements,"[5] who wrote the Declaration of Independence and the Constitution. Alito similarly ignores significant evidence supporting bodily autonomy in colonial history to conclude that history and tradition supported the denial of reproduction autonomy to pregnant people. Both cases evidence a disdain for the claim of rights alleged, relying on text, history, and tradition to ridicule the very idea of full citizenship for Black people or women. Interestingly, Taney does so in *Dred Scott* by reference to explicit constitutional text that must be read to relegate the "unfortunate" race to an inferior civil status, while in *Dobbs*, Alito does this work by erasing women from the story entirely. The debased *presence* of Black people in *Dred Scott* is mirrored by the insulting *absence* of women in *Dobbs*.

Pushing the comparison between the two cases a step further, it is not unreasonable to understand *Dred Scott* as a case that uses reproductive injustice to exonerate the institution of slavery. Taney turns to the history and traditions of eighteenth century colonial and state regulation of Black people to make the point that the term "We the people" meant white people only and assigned to Black people "the degraded condition" as an "unhappy race."[6]

Interestingly, to make the point, Taney singles out laws that prohibited interracial marriage and regulated interracial sex, defining the civil status of any children born to parents of different races as slaves. Sexual and reproductive injustice served as the predicate for and evidence of the notion that in the eighteenth century, Black people were understood by white lawmakers to be essentially inferior to white people. Recognizing Black people as holding any claim to U.S. citizenship was unthinkable, if not ludicrous. In this sense, *Dred Scott* shows us how the use of white supremacist values to underwrite the regulation of sex and sexuality can serve to legitimize the classification of Black people as an inferior caste under the Constitution. As such, *Dred Scott* is as much about the use of reproductive injustice to dehumanize Black people as it is about the constitutionality of the Missouri Compromise or federalism.

The *Dobbs* Court can also be understood to consider the constitutionality of reproductive rights in the shadow of slavery. Justice Alito justifies the outcome of the case, at least in

5 *Dred Scott*, 60 U.S. at 410.

6 *Dred Scott*, 60 U.S. at 409.

part, by reference to state laws that regulated abortion at the time of the ratification of the 14th Amendment, including an 1848 Virginia law that distinguished between free and enslaved people with respect to criminal penalties that could attach to the performance of an abortion—they applied only to abortions performed by free persons, acknowledging that the criminal laws of the time did not reach enslaved people, given that any discipline for their conduct lay exclusively in the jurisdiction of the people who enslaved them.[7]

Perhaps the most telling aspect of the holding in *Dobbs* that links it undeniably to *Dred Scott* is the notion that whatever rights people seeking access to abortion might have, they are to be found in state law and state citizenship, not the federal Constitution or federal citizenship. In this sense, both in *Dobbs* and *Dred Scott*, the federal Constitution was not implicated in, nor concerned with, the rights asserted by the plaintiffs. Rather, any rights they may have are secured as a matter of state citizenship.

Indeed, both cases declare a kind of neutrality with respect to the rights claimed by the parties. Remember, Justice Kavanaugh carried the water most muscularly, for the notion that judicial neutrality was required when it came to the question of whether abortion had any constitutional relevance. No, he argued, it did not. But unlike his colleague Clarence Thomas who specifically mentioned *Dred Scott* in his opinion for the Court, Kavanaugh could have borrowed the following language from Taney's opinion in *Dred Scott*: "It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power."[8]

In the end, Justice Breyer came closest to connecting the dots between *Dred Scott* and *Dobbs* in his dissent in *Dobbs* when he wrote, "Whatever the exact scope of the coming laws, one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens."[9] Justice Breyer and his fellow dissenters recognized that what was at stake in *Dobbs* was not merely an abstract right to reproductive autonomy, but the core of women's status as citizens.

7 "Any free person who shall administer to, or cause to be taken, by a woman, any drug or other thing, or use any means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and shall thereby destroy such child, or produce such abortion or miscarriage, shall be confined in the penitentiary not less than one, or more than five years. No person, by reason of any act mentioned in this section, shall be punishable where such act is done in good faith, with the intention of saving the life of such woman or child." 1848 Va. Acts p. 96, citing *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), slip op. at 85, Appendix A.

8 *Dred Scott*, 60 U.S. at 405.

9 *Dobbs*, 597 U.S. at 362 (Breyer, J., Dissenting).

The enduring jurisprudential legacy of *Dred Scott*, including the way it wove reproductive injustice into a larger story of Black inferiority, continues to haunt the Court, most recently in *Dobbs*. As Justice Thomas notes in *Dobbs*, the *Dred Scott* case was overturned "on the battlefields of the Civil War," not by the Supreme Court itself.[10] The white supremacist reasoning that infused every paragraph of Justice Taney's opinion has never been repudiated by the Court in the way that *Plessy*'s reasoning was disclaimed in *Brown v. Board of Education*.

The enduring afterlife of slavery, mixed with the values of heteropatriarchy, form the backdrop against which restrictions on the reproductive health of people who are pregnant in Mississippi have been degraded, and were fought out in the *Dobbs* case. It is well known that Black women are the most directly and negatively impacted by the Mississippi law at issue in *Dobbs*. Of course, Black men also bear the ongoing burden of the afterlife of slavery in this country, but when *Dobbs* is read against the enduring legacy of *Dred Scott*, it is abundantly clear how those legacies are uniquely written on and through Black women's bodies.

10 *Id.* at 336 (Thomas, J., Concurring).

WHAT "EVERY ONE KNOWS" ABOUT *DOBBS*—AND *PLESSY*

RIA TABACCO MAR

I appreciated the invitation to consider the *Dobbs* opinion together because I saw it as an opportunity to speak with you about something that has been bothering me since the day the case was argued. I think it has been bothering many of us. And that is the way the opinion invokes both the *Plessy* decision and the *Brown* decision.[11] I recall listening to the audio of the argument and hearing several Justices compare *Roe* to *Plessy*, laying the groundwork for the argument that overturning *Roe* was comparable to overturning *Plessy* in *Brown*. It instinctively struck me as wrong. It instinctively struck many as wrong. Since that day, I have read many interesting think pieces about what, precisely, was wrong with that comparison. Yet I still have the unsettling feeling that I have not quite fully wrapped my mind around it. I wanted to take today's prompt as an opportunity to name a few things that I have been grappling with and to hear from others how you have been thinking about it, too.

Shortly after *Dobbs* was argued, we saw a terrific statement from Sherrilyn Ifill, who was then President and Director-Counsel of the NAACP Legal Defense & Educational Fund. She made the point that *Roe* was fundamentally about recognizing the equality and dignity of all people.[12] So was *Brown*. *Plessy*, of course, was the inverse, in the sense that if you consider what the outcome means in terms of people's dignity and autonomy, the outcome of *Dobbs* is the antithesis of what *Brown* stood for. Then, there is also the idea that time (and the Court) march forward with an expansion of rights and that, in fact, *Dobbs* is more aptly characterized as a return to *Plessy*, rather than the reverse.[13]

I was rereading the work of Professor Richard Delgado on the practical reality of

11 Plessy v. Ferguson (*Plessy*), 163 U.S. 537 (1896); Brown v. Board of Education (*Brown*), 349 U.S. 294 (1955).

12 *LDF Issues Statement on Misleading References to Brown v. Board of Education by Supreme Court Justices*, NAACP LEGAL DEFENSE FUND: NEWS (Dec. 2, 2021), https://www.naacpldf.org/wp-content/uploads/Statement-on-SCOTUS-Comparison-of-Roe-and-Plessy.pdf [https://perma.cc/AFU2-TBDS].

13 David Cole, *Opinion: The Alito Opinion Would Be Like Plessy Overturning Brown v. Board of Education*, WASH.POST (May 5, 2022), https://www.washingtonpost.com/opinions/2022/05/05/reversals-usually-expand-rights-alitos-ruling-would-deny-them/ [https://perma.cc/S48S-4H33].

Brown[14] and began to see that it is not only that the outcomes of *Plessy* and *Dobbs* impact real people's lives in a similar way; it is that the reasoning of the *Dobbs* opinions bears striking similarity to the reasoning of the *Plessy* decision. Rereading *Plessy* after reading *Dobbs*, it is quite striking. I find that every time I reread *Plessy*, I find contemporary relevance, and I invite everyone to reread the decision often, but reading it through the lens of *Dobbs* was particularly disturbing.

The first similarity can best be summarized as: *I'm sorry you feel that way.* I am referring, of course, to the most famous (or infamous) quote from *Plessy*, in which the Court says, essentially, *Folks, if you think separate but equal is discriminatory, that's your own damn fault.* Here is how the Court put it:

> We consider the underlying fallacy of the plaintiff's argument [recall that the argument is that separate but equal is inherently discriminatory] to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.[15]

Again, here is the Supreme Court saying, *I'm sorry you feel that way.* And we see that in *Dobbs*, particularly where the Court attempts to rebut the idea that restrictions on abortion are a form of sex discrimination. This "unrealistic refusal to see discrimination" where it exists—Professor Delgado calls it "crabbed neutrality"—we see here, too. The Court says, *Well, some people think restrictions on abortion are sex discrimination. The Solicitor General of the United States, and a long list of constitutional law scholars, say it's discrimination. But if you think that, it's because you don't understand.* Again, the familiar refrain. *I'm sorry you feel that way.*

I'm sorry you feel that way represents a stubborn refusal to see how discrimination operates or what discrimination means. Anybody who looks beyond the words of either the *Plessy* or *Dobbs* opinions understands what is happening, as Justice Harlan called out in his dissent from *Plessy*. Justice Harlan put it best when he wrote, "Every one knows."[16] "Every one knows," he says, that what this is really about is white supremacy. "Every one knows"

14 Richard Delgado & Jean Stefanic. *The Social Construction of* Brown v. Board of Education*: Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547 (1995).

15 *Plessy*, 163 U.S. at 551.

16 *Id.* at 557 (Harlan, J., dissenting).

is a useful rubric for understanding the *Dobbs* opinion. So, too, "every one knows" that it is impossible to separate pregnancy, reproduction, parenting from patriarchy, from misogyny, from restrictions on our bodily autonomy. Everyone knows—and yet the Court tells us that if we *think* we know, well, we are wrong. *I'm sorry you feel that way.*

The second point can be summed up as: *Haven't we done enough for you people?* This closely mirrors an idea that slightly predates *Plessy* that we see in the Civil Rights Cases. There, the Supreme Court said, *Well, we emancipated you from slavery, and now we've done enough. You certainly can't expect to receive equal treatment in places of public accommodation*. That, the Court suggests, would be akin to "special rights":

> When a man has emerged from slavery, and, by the aid of beneficent legislation, has shaken off the inseparable concomitants of that state [recall the year is 1883], there must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws [ah, that old special favorite, the recently enslaved Black person in America], and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected.[17]

That is to say, *Haven't we done enough for you people?*

I heard this refrain during oral argument in *Dobbs*, when Justice Barrett suggested that abortion was no longer necessary for women's economic security and freedom. We saw Justice Alito pick up on that theme and embrace it in the opinion, wherein he lists what he calls "modern developments" that he claims wash away the financial and physical implications of being pregnant.[18] So, he says, now "federal and state laws ban discrimination on the basis of pregnancy." (No thanks to the Supreme Court, which has repeatedly said that federal sex discrimination law does *not* ban discrimination based on pregnancy, forcing Congress to legislatively overrule the Court where it can.) "Leave for pregnancy and childbirth are now guaranteed by law in many cases," he says. "Costs of medical care associated with pregnancy are covered by insurance or government assistance."[19] He does

17 Civil Rights Cases, 109 U.S. 3, 25 (1883).

18 Ria Tabacco Mar, *Justice Alito's Rosy View of Pregnancy in America is Fantasy*, WASH.POST: OUTLOOK (May 6, 2022), https://www.washingtonpost.com/outlook/2022/05/06/alito-pregnancy-abortion-paid-leave/ [https://perma.cc/92Z3-3BCJ].

19 *Dobbs*, 597 U.S. at 258.