FREEDOM AND FAMILIES: RECONSTRUCTION REPUBLICANS AND THE QUESTION OF WOMEN'S REPRODUCTIVE AUTONOMY

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In *Dobbs*, the Supreme Court rooted its conclusion that the Constitution confers no right to terminate a pregnancy on a claim about the American past: "[T]he right to abortion is not deeply rooted in the Nation's history and tradition."[1] According to the opinion written by Justice Samuel Alito, "the most important historical fact" concerning the history of abortion is "how the States regulated abortion when the Fourteenth Amendment was adopted."[2] The Amendment was adopted in 1868, and by that year, Alito claimed, three-fourths of U.S. states had adopted strict abortion criminalization statutes; the opinion included an appendix purporting to support that claim with excerpts from the relevant laws.[3] Scholars have challenged Alito's count, arguing that abortion criminalization laws were neither as consistent nor as pervasive as Alito claimed.[4] Still, the Justice's general point was not inaccurate and is not contested by historians. The canonical history of abortion regulation in the nineteenth century, James Mohr's 1978 *Abortion in America: The Origin and Evolution of National Policy, 1800–1900*, charted the wave of anti-abortion activism that

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[1] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 216 (2022). The Court claimed that in the absence of an enumerated right to end a pregnancy, the "history and tradition" test, derived from *Glucksberg*, would constrain the Court from simply choosing its own policy preferences. *Id.* at 231, 240.

[2] *Id.* at 272.

[3] *See id.* at 248. The opinion did spend some time on the common law and earlier eras of British and U.S. history, but the crux of the historical analysis was abortion criminalization in the mid-nineteenth century. *See id.* at 247, 272. For the appendix of state laws, see *id.* at 302–30.

[4] For instance, unearthing evidence beyond that used by Alito and placing the statutes in context, Aaron Tang argued that many of the states Alito counted as by 1868 having "enacted statutes making abortion a crime even if it was performed before quickening," had not in fact done so. Aaron Tang, *After* Dobbs*: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091, 1128–49 (2023); Aaron Tang, *Lessons from* Lawrence*: How "History" Gave us* Dobbs*—And How History Can Help Overrule It*, 133 YALE L.J. F. 65, 77–84 (2024) [hereinafter Tang, *Lessons from* Lawrence].

swept through the country immediately after the Civil War.[5] The movement, led by a cadre of professional physicians, lobbied for ever-harsher criminalization statutes, many of which departed from the common law by criminalizing abortion from the beginning of pregnancy.[6] Ample historical evidence shows that a subset of elite white male Americans, in the 1860s and later, did indeed seek to criminalize abortion and that they frequently succeeded in persuading state legislatures to pass statutes they favored.[7]

At the same time, however, historians have provided plenty of evidence showing that Alito's perspective on the history of abortion in the mid-nineteenth century United States is highly selective, including in an amicus brief in *Dobbs*.[8] Since the 1970s, historians—including James Mohr himself—have questioned how much the physicians' crusade and the new state statutes tell us about the practice of abortion in the nineteenth century.[9] They have demonstrated that prosecutors rarely attempted to enforce the new laws, and that when they did, they often failed to convict.[10] They have shown that late-nineteenth-century anti-abortion activists regularly voiced frustration that women continued to get abortions and responded by devising ever-more stringent efforts to stop them.[11] Although it's impossible to know how widespread abortion was in the nineteenth century, both lines of analysis suggest that many nineteenth-century American women sought and secured abortions; many people provided them; and many more assisted with funds, research, and physical and moral support.[12] Such evidence could readily lead to the conclusion that abortion is certainly part of the "history and traditions" of the United States, even if no such "right" was recognized by the courts until much later.

Historians have also shown that "voluntary motherhood" was an important part of women's rights organizing in the mid-nineteenth century.[13] While feminists of the time did not explicitly advocate a right to terminate a pregnancy, in part because

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[5] *See* JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGIN AND EVOLUTION OF NATIONAL POLICY, 1800–1900, at 200–25 (1978).

[6] *See id.* at 200.

[7] *See id.* at 203–06.

[8] Brief for American Historical Association and Organization of American Historians as Amici Curiae Supporting Respondents at 18, 22–23, *Dobbs*, 597 U.S. 215 (No. 19-1392) [hereinafter Brief for American Historical Association].

[9] *See* MOHR, *supra* note 5, at 244–45.

[10] Brief for American Historical Association, *supra* note 8, at 29.

[11] *Id.* at 3–4; LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES 1867–1973, at 19–45 (1997) (detailing various accounts of women receiving abortions); Faye E. Dudden, *Women's Rights Advocates and Abortion Laws*, 31 J. WOMEN'S HIST. 102, 112, 115 (2019); Tang, *Lessons from* Lawrence, *supra* note 4, at 85–87 (drawing in part on unpublished research by historian Patricia Cline Cohen).

[12] *See* Brief for American Historical Association, *supra* note 8, at 27–30.

[13] LINDA GORDON, THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA 55 (2002).

abortion remained quite dangerous, they regularly argued that married women should be entitled to decide how many pregnancies they carried and how many children they bore—a principle that most obviously meant wives must be permitted to decline sex with their husbands but could also imply that girls and women should have access to accurate information about their bodies, sex, and pregnancy, and also that married women should have ready access to contraception.[14] All these lines of analysis demonstrate that the Court's use of abortion criminalization statutes as the main evidence of the nation's "history and traditions" represents not the result of comprehensive historical inquiry, but a choice to elevate the voices and actions of the elite white men who lobbied for abortion criminalization and the state legislators who passed the laws.[15] We might also question why Alito did not consider the half century between *Roe v. Wade* and *Dobbs* part of the nation's history and traditions. How long ago does something have to have happened to be considered "history" or "tradition"?

Although the kinds of inquiry summarized above are all important for clarifying the history of abortion in nineteenth-century United States, another relevant historical question about the era of the Fourteenth Amendment has gone uninvestigated by Alito and in the broader discussion of *Dobbs*: What did prominent supporters of the Amendment think about abortion or, in the absence of evidence on that specific question, what did they think about women's relationship to the Amendment's promises of liberty and equality, or about women in their capacities as people who could get pregnant and become mothers? Alito claimed that the most important historical fact concerning the constitutionality of abortion was the extent of state-level criminalization at the time the Fourteenth Amendment was adopted, but his opinion spent virtually no time on the Amendment or its authors and supporters.[16] As Reva B. Siegel pointed out, he did not undertake the kind of analysis many originalists would have expected.[17] The opinion never discussed the Fourteenth Amendment's larger historical context or animating aims or purposes.[18] "*Dobbs* does not instruct us about the original public meaning or even the expected application of the Fourteenth Amendment's liberty guarantee . . . . ," Siegel wrote.[19]

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[14] *See id.* at 61–69; Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 262, 308–14 (1992); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1413–14, 1416 (2000); Dudden, *supra* note 11, at 105, 113–14.

[15] *See* Dobbs v. Jackson's Women's Health Org., 597 U.S. 215, 231 (2022); *supra* notes 4–14 and accompanying text.

[16] *See Dobbs*, 597 U.S. at 272.

[17] *See* Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1173 (2023).

[18] *See id.* at 1170.

[19] *Id.* at 1192. Siegel discussed disagreements among self-described originalists about whether *Dobbs* was originalist. *Id.* She characterized the decision as "a species of family-values traditionalism that movement originalists have practiced since the Reagan era." *Id.*

This Essay takes up those questions by investigating the historical milieu in which the Fourteenth Amendment was debated and adopted. During the Civil War and Reconstruction, the U.S. Congress evidently did not discuss the issue of abortion.[20] But federal lawmakers regularly expressed their visions for American families, gender roles, and human reproduction as they forged the innovative federal policies that characterized the period.[21] In this Essay, I examine how leading Republican men who supported the Fourteenth Amendment (and other Reconstruction measures) discussed such matters. I draw on my own research in primary sources and on an extensive scholarly literature on family-related public policy during Reconstruction, much of which was produced by historians in the 1990s and early 2000s but has not made its way into the constitutional law field.[22] I emphasize that elite supporters of the Fourteenth Amendment advocated male supremacy within families, doggedly promoted marriage among formerly enslaved people, expressed concern about the sexual vulnerability and chastity of Black women, and spoke against the principle of equality between men and women. Republicans' views on

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[20] *See id.* at 1199.

[21] As Reva Siegel's comment above suggests, constitutional law scholars, lawyers, and judges often turn to lawmakers' debates and contemporaneous political rhetoric to understand the context for constitutional measures, and to investigate how people might have understood those measures' meanings and expected applications at the time they were adopted. *Id.* at 1192. That approach aligns with what Jack Balkin has called a "thick" method of ascertaining original public meaning as conventionally defined in the legal academy. JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION 60–61 (2024) [hereinafter MEMORY AND AUTHORITY]. Whatever the method may be called, I agree that it can be useful for elucidating, in broad brushstrokes, what powerful people were thinking in a given moment.

[22] *See generally* LAURA F. EDWARDS, GENDERED STRIFE AND CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION (1997); AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION (1998); NANCY BERCAW, GENDERED FREEDOMS: RACE, RIGHTS, AND THE POLITICS OF HOUSEHOLD IN THE DELTA, 1861–1875 (2003); CAROL FAULKNER, WOMEN'S RADICAL RECONSTRUCTION: THE FREEDMEN'S AID MOVEMENT (2004); MARY FARMER-KAISER, FREEDWOMEN AND THE FREEDMEN'S BUREAU: RACE, GENDER, AND PUBLIC POLICY IN THE AGE OF EMANCIPATION (2010); TERA W. HUNTER, BOUND IN WEDLOCK: SLAVE AND FREE BLACK MARRIAGE IN THE NINETEENTH CENTURY (2017). In the constitutional law field, scholars interested in such questions regularly cite to Peggy Cooper Davis's important book, PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES (1997). See, for example, Siegel, *supra* 17, at 1201–02; Serena Mayeri, *The Critical Role of History After* Dobbs, 2 J. AM. CONST. HIST. 171, 198–99 (2024). My findings are compatible with Davis's argument that Reconstruction Republicans paid significant attention to questions of family autonomy or "family rights," but I dig deeper into whether such rights would have translated into a women's right to decide when to carry a pregnancy and deliver a child. Davis offered two modes of inquiry, "doctrinal stories" and "motivating stories." Below see *infra* notes 90–91 and accompanying text, where I allude to her "doctrinal stories." Below see *infra* at notes 92–95 and accompanying text, where I discuss her "motivating stories."

Black families and on sex equality, I argue, make it virtually inconceivable that they would have believed that the liberty promised to women in the Fourteenth Amendment included the right to end a pregnancy.[23]

My aim here is to draw attention to the serious limitations inherent in using nineteenth-century U.S. history as a guide for twenty-first-century constitutional decision-making. The Reconstruction Republicans are often lauded for their relatively egalitarian views on slavery and race; their plan for remaking the nation is regularly described as the "Second Founding." Reconstruction Republicans advocated slavery's abolition, adopted policies designed to mitigate white supremacy and advance the interests of Black Americans, and pressed the federal government to enforce new protections for individual rights, particularly when contesting white supremacy.[24] Their views on sex and gender are much less inspiring, however. Most of these Republicans were stalwart believers in male supremacy and regularly engaged in what we today recognize as sex stereotyping.[25] The historians' brief in *Dobbs* argued that the mid-nineteenth-century movement to criminalize abortion was motivated by racist and sexist sensibilities that are now considered "constitutionally impermissible."[26] This Essay likewise shows that even as Reconstruction Republicans sought to address what they viewed as the wrongs of slavery and the challenges formerly enslaved people faced as they emerged into freedom, in most

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[23] I do not, however, agree with the Court's conclusion in *Dobbs*, that "the Fourteenth Amendment clearly does not protect the right to an abortion," since it is certainly possible to construe—as many have—the Amendment's sweeping language about liberty and equality to apply in situations beyond or different from what its framers would have imagined. *See* Dobbs v. Jackson's Women's Health Org., 597 U.S. 215, 216 (2022).

[24] *See generally* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019). That judges of many political and methodological orientations find useful the idea of Reconstruction as a "second founding" is evident in the Court's opinions in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (2023), in which the Roberts majority opinion, Thomas concurrence, and Sotomayor and Jackson dissents all used the term and discussed the transformative impact of the Civil War and Reconstruction on matters associated with race and racial inequality. *See* 600 U.S. 181, 230 (2023); *id.* at 231 (Thomas, J., concurring); *id.* at 320–21 (Sotomayor, J., dissenting); *id.* at 387 (Jackson, J., dissenting).

[25] I am certainly not the first person to recognize this. Laura F. Edwards summarized that the Fourteenth and Fifteenth Amendments affirmed "the states' denial of rights to women," and Eric Foner observed that "most Republicans saw abolition not as reorienting traditional family relations but as restoring to blacks the natural right to family life so grievously undermined by slavery." LAURA F. EDWARDS, A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS 111 (2015); FONER, *supra* note 24, at 45.

[26] Brief for American Historical Association, *supra* note 8, at 20–21. For more on the point that the Court largely ignored equal protection issues in *Dobbs*, both in its exploration of the past and in its analysis of the present-day impact of ending the right to abortion, see Cary Franklin, *History and Tradition's Equality Problem*, 133 YALE L.J. F. 946, 971–77, 980–86 (2024).

cases their actions were informed by a world-view wrought with patriarchal views, as well as gender and racial stereotypes.

The evidence presented here reminds us that the Civil War and Reconstruction did not have the same transformative impact on questions associated with sex as they did on questions of race. As the war ended, Republicans passed federal civil rights statutes and three constitutional amendments designed to abolish slavery and undermine some of the racist practices with which it was associated.[27] Republicans made no such reformist approach to the issue of gender inequality, although women's rights activists attempted to push them in that direction. Constitutional law's complicity with, and reinforcement of, sex stereotypes began to erode not in the Reconstruction era but in the twentieth century. The first milestone was the ratification of the Nineteenth Amendment, which barred sex discrimination in the right to vote.[28] In the 1960s, a century after the Fourteenth Amendment's ratification, the Supreme Court began using the Amendment to recognize new forms of liberty and equality, particularly for women and sexual minorities, in areas that came to include contraception, abortion, marriage, employment, and other economic relationships.[29] Those late-twentieth-century developments in constitutional law reflected the increasingly widespread view that women's (and men's) opportunities should not be limited based on stereotypes about proper gender roles and behaviors. In *Dobbs*, the Court sought to turn back the clock, claiming that what it viewed as nineteenth-century "history and tradition" served as an antidote to the supposed "freewheeling judicial policymaking" of its predecessors.[30] At the same time, some liberal commentators now argue for the possibility of a "progressive originalism," or the idea that self-described originalist approaches need not yield backward-looking or conservative results.[31] In the context of such extensive discussions of the

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[27] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 66–67, 243–45, 251–61, 445–49 (1988).

[28] U.S. CONST. amend XIX.

[29] The literature is voluminous. See, for example, Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 947–1046 (2002); SERENA MAYERI, FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 58–75 (2011).

[30] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 240 (2022).

[31] Lawrence B. Solum, *Progressives Need to Support Justice Ketanji Brown Jackson*, BALKINIZATION (Dec. 9, 2022, 9:00 AM), https://balkin.blogspot.com/2020/06/mcclain-symposium-10.html [https://perma.cc/UQ6S-KLXN]; Mark Joseph Stern, *Hear Ketanji Brown Jackson Use Progressive Originalism to Refute Alabama's Attack on the Voting Rights Act*, SLATE (Oct. 4, 2022, 1:23 PM), https://slate.com/news-and-politics/2022/10/ketanji-brown-jackson-voting-rights-originalism.html [https://perma.cc/HE42-RTTJ]. For an illuminating critique of progressives' turn to originalism, see Farah Peterson, *The Fourteenth Amendment and the Vénus Noir*, 66 WM. & MARY L. REV. 191, 200–08 (2024). Discussing *Students for Fair Admissions* (2023), in which Justice Sotomayor wrote what Peterson viewed as a persuasive dissent grounded in evidence from the period in which the Fourteenth Amendment

uses of history in constitutional interpretation, then, including Jack Balkin's wonderfully illuminating *Memory and Authority*, it seems especially important to reckon with the Reconstruction Republicans' views on women, gender, and families.

This Essay proceeds in three Parts. In the first, I illuminate how congressional Republicans discussed women, gender, and families in the context of policymaking associated with abolishing slavery. Many Republicans worried that enslaved people's family relationships had been damaged by the imposition of slavery and sought to impose on freedpeople what they saw as normative family values, including by encouraging heterosexual marriage and by insisting on patriarchal gender roles within families. Second, I show that Republicans were at pains to demonstrate that when they talked about equality, they meant race but not gender. Finally, I reflect on the limits of relying on elite discourse for understanding the past and discuss synergies between the work of some constitutional law scholars and that of historians working to deepen our collective understanding of the history of women, gender, and families in the nineteenth-century United States.

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This Part argues that during the Civil War and Reconstruction, leading Republicans cared significantly about family rights and family autonomy for freedpeople, but it casts doubt on the idea that we can move easily from there to a claim about women's reproductive autonomy. When it came to individual rights, the main goal of the Reconstruction-era Republicans was to mitigate status hierarchies associated with slavery and racism. Although some prewar radical abolitionists had arrived at a human rights vision that included a thoroughgoing critique of patriarchy, the vast majority of elected Republicans were not among that group.[32] And so, during and after the Civil War, most did not believe they were embarking on an effort to reform patriarchy or gender relations. To the contrary, they believed Black families had been damaged by slavery and that the federal government should adopt measures that pushed Black Americans to establish the kinds of families most white northerners prized: male-headed families in which women, children, and the elderly were understood as dependents (even if some of those dependents also worked for wages)—families that protected the chastity and purity of their female members. The

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was passed and ratified, Peterson observed that "it was pure chance that the history of the Fourteenth Amendment supported the progressive argument," and noted that in the *Brown* litigation, historical inquiry had delivered mixed results for supporters of desegregation. *Id.* at 206.

[32] *See* DAVIS, *supra* note 22, at 24–27, 42–48; MANISHA SINHA, THE SLAVE'S CAUSE: A HISTORY OF ABOLITION 266–98 (2016). On antebellum abolitionists and racial equality activists who did not publicly critique existing gender relations, see KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION 206–07 (2021).

family of the Republican imaginary was a domain of gender- and age-specific obligations and dependencies, and Republicans viewed that family as essential for regularizing social relations and scaffolding an emerging free labor system in the South.[33]

In short, the Republicans' reformist vision for the South and the nation as a whole leaned toward racial equality and sexual inequality. The text of the Reconstruction amendments made new promises of individual rights backed by federal power, but that text emerged from a world-view that envisioned virtuous, male-headed families as the foundation of society, with those families defined internally not by equal rights but by hierarchy and gendered visions of reciprocity. Taking the helm of the Freedmen's Bureau in the spring of 1865, Major General Oliver O. Howard issued orders that established the contours of the agency's work. The two essential tenets of the Republicans' vision of freedom were expressed in part eight of those orders: "Negroes must be free to choose their own employers, and be paid for their labor," and "[t]he unity of families and all the rights of the family relation will be carefully guarded."[34] The individualism of the labor contract (people were "free to choose their own employers") was inseparable from the corporatism (or "unity") of the family. The quotes from Howard support the claim, made by constitutional scholar Peggy Cooper Davis, that Reconstruction Republicans strongly supported "rights of family," or "family liberty," for formerly enslaved people.[35] As Davis pointed out, however, the principle that women had a right to decide when to carry pregnancies or bear children did not necessarily flow from the belief that Black people were entitled to the same "rights of family" as white people had long enjoyed.[36]

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[33] In an authoritative description of the relationship of free labor policy to family policy in early Reconstruction, Farmer-Kaiser wrote that Freedmen's Bureau "policy makers . . . held firm to a purpose focused on using the northern ideologies of free labor and domesticity to transform the South." FARMER-KAISER, *supra* note 22, at 22. Stanley connected Civil War–era federal policy to abolitionist preoccupations with Black women's sexual victimization by white men during slavery. STANLEY, *supra* note 22, at 25–29. For more on the Bureau's concern with freedpeople's families, see also EDWARDS, *supra* note 22, at 24–65; STANLEY, *supra* note 22, at ix–xv, 1–59.

[34] H.R. EXEC. DOC. NO. 39-70, at 102 (1866). On the Bureau's early and intensive focus on marriage, see FARMER-KAISER, *supra* note 22, at 28–32.

[35] *See* DAVIS, *supra* note 22, at 9, 10.

[36] *Id.* at 169 ("Members of the Reconstruction Congress rose to advocate protection of the right to marry and the right to parent, but not to advocate protection of procreative liberty."). Offering an "original meaning" argument that "[t]he right to abortion flows logically from [the] fundamental rights that the Fourteenth Amendment was written to protect," David H. Gans made a similar argument about family autonomy, or what he called "rights of heart and home." David H. Gans, *Reproductive Originalism: Why the Fourteenth Amendment's Original Meaning Protects the Right to Abortion*, 75 SMU L. REV. F. 191, 191, 198 (2022). Tellingly, however, none of the quotes Gans used from Reconstruction Republicans suggested a vision of reproductive autonomy for women, and many discussed family rights explicitly in terms of the rights of men, particularly as husbands and fathers. *See id.* at 198. An exemplary

As I show below, marriage was at the heart of Republicans' expectations for freedpeople's future, and marriage was, legally and culturally, a male-dominated institution. Under the legal principle of coverture, married women were supposed to surrender their property to their husbands and give up much of their legal personhood as well. It was almost universally accepted that when women consented to marry, they also gave irrevocable consent to sex with their husbands, a principle in law and custom that had significant impact on when and how often married women became pregnant, and on women's sense of sexual and emotional well-being.[37] During the Civil War and Reconstruction, leading Republicans in Washington believed families were crucial sites for inculcating cultural values, particularly about sexuality, childbearing, and proper gender roles. They pushed freedpeople to create male-headed households glued together by legal marriage and by other hierarchical relationships that cast family members in distinctive roles depending on their sex, age, and ability. They wanted to see freedpeople build families in which able-bodied men, particularly husbands, acted as supervisors and breadwinners. They envisioned able-bodied women as subordinate to men within the family, as mothers, caretakers of the home and its dependents, and often as breadwinners too.

Concerns about Black families were on leading Republicans' agenda from the beginning of the Civil War, when enslaved people began to seize their own freedom by escaping into the encampments of U.S. soldiers.[38] As historian Tera W. Hunter

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quote of this nature was Republican Representative John Farnsworth asking rhetorically, "What vested rights so high or so sacred as a man's right to himself, to his wife and children, to his liberty, and to the fruits of his own industry?" *Id.* at 201. To be sure, people in the nineteenth century often used the terms "man" and "men" to refer to all people regardless of their sex, but here the gendered meaning is clear. The quote highlights a man's right "to his wife" and it makes no mention of a woman's right to her husband. For other examples from Gans, see additional quotes at *id.* at 201, 203. For more on how Republicans emphasized men's rights within the family, see *infra* notes 38–41.

[37] *See, e.g.*, NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 11–12, 64–68 (2000); LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 11–15 (1998); Elizabeth B. Clark, *Marital Bonds: Slavery and Divorce in Nineteenth-Century America*, 8 LAW & HIST. REV. 25, 30–34 (1990); Hasday, *supra* note 14, at 1385–406. Historians have shown that the principles of women's subordination within marriage, including coverture, often did not reflect actual practice, and also that the legal regulation of marriage changed across the nineteenth century. For an overview of that history, see Norma Basch, *Marriage and Domestic Relations*, *in* 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE LONG NINETEENTH CENTURY (1789–1920) 245, 248–49 (Michael Grossberg & Christopher Tomlins eds., 2008). For married women claiming property despite the ostensible strictures of coverture, see LAURA F. EDWARDS, ONLY THE CLOTHES ON HER BACK: CLOTHING AND THE HIDDEN HISTORY OF POWER IN THE NINETEENTH-CENTURY UNITED STATES (2022). As Basch wrote, by the end of the nineteenth century, despite an increasing tendency to treat married women as legal individuals, "[t]he legal system now regarded wives primarily as mothers whose well-being was dependent on their husbands" and "many elements of coverture survived." Basch, *supra* note 37, at 276, 278.

[38] HUNTER, *supra* note 22, at 126–35.

has shown, in the summer of 1862, congressional Republicans discussed the familial relations of enslaved people. Soldiers and officers of the U.S. Army and Navy, entering slaveholding jurisdictions, had immediately encountered freedom seekers fleeing to their lines in family groups.[39] Congressional Republicans rightly recognized this and hypothesized that Black men would be more likely to enlist as soldiers if the government promised freedom for their wives and children.[40] As Hunter wrote, "Securing and consolidating families drove [enslaved persons'] ambitions for freedom from the very start of the war and continued to press on the federal government as they offered their services and demanded treatment commensurate with the sacrifices they made, for citizenship, equality, and justice."[41]

In the winter of 1863, after President Lincoln issued the Emancipation Proclamation, the Secretary of War, Edwin Stanton, sent a three-man committee to tour the South and report on the processes of emancipation as they were unfolding.[42] The American Freedmen's Inquiry Commission (AFIC) had a great deal to say about the relationship between freedom and families. The commissioners were all friends of Massachusetts Senator Charles Sumner, a Republican, and like Sumner they were closely aligned with the more progressive side of the Republican Party.[43] The commission's primary tasks were to investigate how emancipation was unfolding in the South and to make recommendations on how the government should advance the process of replacing slavery with a system of free labor.[44] The commissioners filed a preliminary report in spring 1863 and a final report a year later; both were widely circulated, and the AFIC's reports were regularly invoked during congressional discussions of what became the Freedmen's Bureau.[45]

The commissioners began their work heavily influenced by antislavery rhetoric and also by prevailing ideas about race and racial difference. They believed a free labor system could function only if supported by male-headed families where the work required to keep waged laborers alive—what we might call the "reproductive labor" of producing and cooking food, doing housework, raising children, and caring for the elderly and disabled—was provided by women and children.[46] Yet the commissioners were also inclined to believe that enslaved people's family relations had

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[39] *Id.* at 168–73.

[40] *Id.* at 168–69.

[41] *Id.* at 193.

[42] John G. Sproat, *Blueprint for Radical Reconstruction*, 1 J. S. HIST. 25, 34–35 (1957). For a more recent treatment of the establishment of the American Freedmen's Inquiry Commission, see Matthew Furrow, *Samuel Gridley Howe, the Black Population of Canada West, and the Racial Ideology of the "Blueprint for Radical Reconstruction,"* 2 J. AM. HIST. 344, 346–47 (2010), in which Furrow discusses the various strands of racial thought reflected in the commissioners' work as a group and as individuals.

[43] Sproat, *supra* note 42, at 33–34.

[44] *Id.* at 35, 38–39; *see also* FONER, *supra* note 27, 68–69.

[45] Sproat, *supra* note 42, at 35, 39, 43–44; Furrow, *supra* note 42, at 367–68.

[46] S. REP. NO. 38-53, at 64–65 (1864).

been severely damaged by slavery, and that freedpeople would need extensive tutelage to develop proper familial relations of dependency. They declared, for instance, that the "disintegration of the family relation" during slavery was "one of the most striking and most melancholy indications of this progress of barbarism."[47]

The commissioners believed the U.S. government should support the formation of what they saw as appropriate male-headed families among freedpeople, as a concomitant to the transition from slavery to free labor.[48] Promoting marriage was at the heart of their project, as it would be for the Freedmen's Bureau. The AFIC recognized that enslavers had wreaked havoc on Black families by selling husbands away from wives and children away from parents. They also understood that despite the horrible conditions imposed by enslavers, enslaved people had managed to cultivate meaningful familial relations that remained important. The commissioners and the people with whom they talked as they traveled the South observed that enslaved people, seeking liberation, often arrived at army encampments in family units that included husbands, wives, children, and elders. The commissioners proposed to begin immediately the process of promoting formal marriage and male-headed families. "[A]s soon as [enslaved persons] come under the care of the superintendent," the commissioners wrote, they should be informed of "the obligations of the married state in civilized life."[49] While "compulsion" ought not be used, a "judicious superintendent" should have no problem getting people to consent to a ceremony that both "legitimize[d]" the relations of husbands to wives and parents to children, and "impose[d] upon the husband and father the legal obligation to support his family."[50]

Echoing abolitionist rhetoric, the commissioners also emphasized that slavery had meted out particular and sexualized harms to Black women. For instance, the commissioners stated that in a society dominated by slavery, "female chastity is neither respected by custom nor protected by law."[51] Commenting specifically on what they gleaned in a visit to South Carolina and Florida, the commissioners stated that enslavers did not, as a rule, recognize or encourage marriage among the enslaved, and that such practices encouraged what they understood as sexual immorality—for instance, people having sex outside marriage. The situation particularly victimized young girls, they wrote, who "became mothers, not only without marriage, but often

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[47] *Id.* at 61. As historians have frequently pointed out, narratives, assumptions, and stereotypes about Black family "pathology" in the era of slavery and emancipation fed into policy conversations that became especially heated in the 1960s and 1970s. See, for example, HUNTER, *supra* note 22, at 18–20.

[48] COTT, *supra* note 37, at 86.

[49] S. REP. NO. 38-53, at 4 (1864).

[50] *Id.* The order continued: "This obligation, and the duties connected with the family relation of civilized life, should be carefully explained to these people, and while they remain under our care should be strictly maintained among them." *Id.* Republicans regularly invoked "civilization" in such contexts, contrasting it with what they saw as the "barbarism" of slavery. *See, e.g.*, *id.* at 25.

[51] *Id.* at 67.

without any pretence of fidelity to which even a slave could give that name."[52] Even when enslavers permitted "quasi-marriage" among enslaved people, the commissioners reported, marital relations were violated with impunity. In the commissioners' view, then, enslaved people had been forced to live in a system that imposed no moral or institutional constraints on male or female sexuality and, as a result, had learned immoral habits that northern reformers broadly considered "uncivilized" and destructive to social order.

The commissioners also emphasized slave owners' abuses of enslaved women as mothers.

> The maternal relation was often as little respected as the marital. On many plantations, where the system was most thoroughly carried out, pregnancy neither exempted from corporal punishment nor procured a diminution of the daily task; and it was a matter of occasional occurrence that the woman was overtaken by the pains of labor in the field, and the child born between the cotton rows.[53]

As additional evidence, the commission printed excerpts of Fanny Kemble's diary of living on a Georgia plantation. Kemble, an English actress, had married a wealthy American slave owner and lived on the plantation in the 1830s.[54] A tranche of her journals containing unflinching observations on slavery was published in 1863, including horrific descriptions of the reproductive travails of enslaved women.[55] Commenting on Kemble's observations, the commissioners concluded that enslaved women were subjected to "[e]xcessive child-bearing, coupled with ceaseless toil," which led to "shocking diseases and terrible suffering."[56]

The commissioners' proposed remedy for freedwomen's sexual victimization and for what they saw as freedpeople's deficiencies in family formation and morality was not, however, reproductive autonomy for Black women. It's virtually unimaginable that these antislavery white men would have responded to the conditions they observed by helping freedwomen get access to contraception or, when they needed it, abortion. To the contrary, as historians have shown, many nineteenth-century Americans—especially men—worried that deliberate limitation of pregnancy had potentially corrupting effects. Access to abortion and contraception could allow *unmarried* women to "hide their shame," as it was often said, by reducing the

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[52] *Id.* at 5. The commissioners initially confined these observations to South Carolina and Florida, but after doing more research they said their descriptions of that region were applicable to most other Southern states. *See id.* at 61.

[53] *Id.* at 6.

[54] CATHERINE CLINTON, FANNY KEMBLE'S CIVIL WARS 119–28 (2000).

[55] *Id.* at 178–79.

[56] S. REP. NO. 38-53, at 64 (1864).

chance that sex would lead to a full-term pregnancy and thereby removing a reason to refrain from extramarital sex. And access to abortion and contraception could enable *married* women to shirk their supposed responsibility to bear children within marriage, and thus to uphold what were widely seen as appropriate relations of gender and dependency. Moreover, the widespread view that by entering a marriage, wives agreed to have sex when their husbands so desired was antithetical to the idea that married women were entitled to what Peggy Cooper Davis called "procreative liberty."[57] Thus it should not surprise us that amid all the talk about the centrality of *family* to freedom, there is no evidence that Republican politicians and their allies tried to create conditions in which Black women, as women, could maximize their control over when and under what conditions they had children. Rather, from the 1863 AFIC onward, Republicans emphasized that freedpeople needed to enter into formal marriages and to be taught proper, hierarchical domestic relationships.

Congressional Republicans expressed their concern about marriage and family among enslaved people in 1864 and 1865, during debates about freeing the enslaved wives and children of Black soldiers who enlisted in "loyal" states like Kentucky.[58] In those discussions, some Republicans offered detailed descriptions of the sufferings of enslaved families and of enslaved women in particular. Senator Henry Wilson of Massachusetts even read on the Senate floor letters from Black women and men attesting to slavery's violations of Black families.[59] After extensive deliberation, Congress passed a statute, signed by President Lincoln in spring 1865, that expressed Republicans' view that heterosexual, patriarchal marriages could resolve certain public policy challenges associated with slavery and emancipation. The new law provided for the freedom of the "wife and children" of any enslaved man who enlisted in the U.S. Army or Navy. Recognizing that enslaved people had not been permitted to marry legally, the statute declared that couples would be considered married if they could show that they had previously "lived together, or associated, or cohabited."[60]

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[57] DAVIS, *supra* note 22, at 169. The aforementioned issues are discussed throughout the literature. *See* Brief for American Historical Association, *supra* note 8, at 21, 25–26; *see also* Hasday, *supra* note 14, at 1398–99; MOHR, *supra* note 5, at 166–70; NICOLA BEISEL, IMPERILED INNOCENTS: ANTHONY COMSTOCK AND FAMILY REPRODUCTION IN VICTORIAN AMERICA 30–32 (1997). As historians have pointed out, anti-abortion reformers were most vocal about their fears that white women, single and married, either were victimized by abortion or used it to escape their obligations. Elite Republicans who sought to shape how freedpeople formed families did not dwell on the issue of abortion as such, but they likewise expressed concerns about the impact of slavery on Black women's sexual virtue and condemned sex and childbearing outside marriage.

[58] HUNTER, *supra* note 22, at 174–78, 180–83. For these debates, see also Amy Dru Stanley, *Instead of Waiting for the Thirteenth Amendment: The War Power, Slave Marriage, and Inviolate Human Rights*, 115 AM. HIST. REV. 732, 755–56 (2010).

[59] HUNTER, *supra* note 22, at 180.

[60] J. Res. 29, 38th Cong., 13 Stat. 571 (2d Sess. 1865).

Agents of the Freedmen's Bureau carried forward Republican concerns about the structure of freedpeople's families. Congress created the Bureau by statute in the winter of 1865, and its leaders soon promulgated policies that reflected ideas expressed by congressional Republicans and by the American Freedmen's Inquiry Commission in 1863 and 1864. Here we will look at the marriage-related instructions issued by an assortment of Freedmen's Bureau assistant commissioners. Assistant commissioners were high-ranking officials who reported to the commissioner and were in charge of one or more states. Assistant commissioners had small staffs and were able to issue orders, which were then distributed to Bureau outposts under that assistant commissioner's authority. Statements by assistant commissioners, then, may be understood not as reflections of what the bureau actually *did*, or even of what Bureau staffers personally thought, but, rather, as official expressions of the Bureau's ideals as they were modified and articulated by individual assistant commissioners.[61]

Assistant commissioners focused extensively on promoting legal marriage among freedpeople, including by sanctioning new marriages and also by bestowing official recognition on relationships formed during slavery. As noted above, the government's goals of promoting marriage were myriad: first, to help freedpeople create (economically) autonomous families that would clarify lines of inheritance and help ensure that people who could not support themselves would be dependent on family members, not on the state; second, to heal what northern Republicans believed was the damage done by slavery to enslaved families, damage that included preventing enslaved men from embodying their proper roles as husbands and fathers, and preventing enslaved women from fulfilling their destinies as wives and mothers; and third (and relatedly) to counteract widespread disrespect for Black women's sexual virtue, which most white northerners believed began with slave owners but seeped into Black communities themselves.[62] The conjunction of all these issues is reflected the announcement of Rufus Saxton, assistant commissioner for South Carolina, Georgia, and Florida, that during slavery, "[v]irtue, purity, and honor among men and women were not required or expected."[63] He continued: "All this must change now that you are free. The domestic altar must be held sacred, and with jealous care must you guard the purity of a wife, a sister, or a daughter; and the betrayer of their honor should be punished and held up to universal condemnation."[64]

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[61] For the structure and leadership of the Bureau, see, for example, FARMER-KAISER, *supra* note 22, at 15–22.

[62] The significance of marriage in Freedmen's Bureau policy is discussed extensively in, for example, HUNTER, *supra* note 22, at 238–41; FARMER-KAISER, *supra* note 22; COTT, *supra* note 37, at 86–94.

[63] H.R. EXEC. DOC. NO. 39-70, at 93 (1866) (announcing to the "freedmen" of South Carolina, Georgia, and Florida on August 16, 1865).

[64] *Id.*

Over and over again, Bureau officials emphasized the responsibilities of freed*men* for their families. On July 1, 1865, the North Carolina assistant commissioner, Eliphelet Whittlesey, addressed freedmen as men: "Your freedom imposes upon you new duties. Some of you have families; it is your duty to support them."[65] Another assistant commissioner, Clinton Fisk, announced to the freedpeople of Kentucky and Tennessee, in December 1865, "Let each man turn his heart and his thoughts toward providing a good home for his wife and children, and to aid in the care of his aged and dependent parents . . . ."[66] The assistant commissioner in Texas went so far as to tell freedmen that they were now entitled to "purchase and own any kind of property that a white man could—his wife, his children, a horse, a cow or lands."[67] In South Carolina, Saxton published regulations designed to address as many situations as possible—including what should happen when a former spouse, sold away years earlier, returned home to find their partner married to someone else. In a section on "[r]ights of wives and children," Saxton announced that when a woman "living alone" was "claimed by two former husbands" she was "free to accept either."[68] Her "freedom" was limited, however, for if she had minor children with one of the two men, she was "required to accept the father of her children as her lawful husband."[69] These are hardly "rights" as we would now imagine them. Saxton's rules also defined when women could claim alimony from former husbands and provided that children could call on their father for protection if their mother passed away.[70] His orders concluded with the sweeping statement, "The sacred institution of marriage lies at the very foundation of all civil society."[71]

The Bureau's goal of pushing Black Southerners to embrace formal marriage was consistent with many Black Americans' own desires to legitimize family units in ways that had been explicitly prohibited during slavery. To be sure, Bureau agents often traded in stereotypes as they judged Black families and Black sexuality as damaged and requiring reform. Still, the vast majority of freedpeople would surely have agreed with government agents that freedom meant an end to having one's reproductive decisions determined or significantly influenced by people outside the family (e.g., enslavers), and that freedom also meant an end to involuntary family separations. Like many white people, many Black Americans also associated male-headed households with citizenship and inclusion in the body politic, and many freedpeople, men and women, embraced the paternalism of the normative family unit. And, as historian Laura F. Edwards summarized, "freedpeople used men's legal status as husbands, fathers, and heads of household to claim other rights."[72]

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[65] *Id.* at 2.

[66] *Id.* at 232.

[67] FARMER-KAISER, *supra* note 22, at 86.

[68] H.R. EXEC. DOC. NO. 39-70, at 110.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 111.

[72] EDWARDS, *supra* note 22, at 156. I base these generalizations on the secondary literature, including HUNTER, *supra* note 22, at 221–25.

The fact that freedpeople embraced some aspects of federal policies, and used those policies to their own ends, does not alter the overall implications of the policies. As historian Mary Farmer-Kaiser wrote, Freedmen's Bureau staffers across the agency "attempted to hold freedmen accountable for the actions of female family members while also respecting the authority of black men to maintain and control their families."[73] In the new order, Black men were expected to serve as heads and caretakers of their families, including safeguarding the sexual purity of the family's women and girls. In light of Republican policymakers' deeply held convictions about the nature and significance of marriage, and about what constituted a civilized social order—not to mention their views about the deficits that freedpeople carried with them out of slavery—it's difficult (if not impossible) to imagine that they believed freedom encompassed a right of married or single women, as individuals, to decide when to continue a pregnancy or have a child, separate and apart from the authority of their husbands and fathers.

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This Part examines how congressional Republicans self-consciously opened the door to racial equality while closing it to sex equality. As many historians have observed, the radical currents inherent in war and abolition prompted women's rights activists to urge a transformation of American democracy along lines of sex as well as race. As Congress took up questions of voting rights, some such activists sought truly "universal" suffrage for all adults.[74] But the vast majority of Republicans in Congress not only rejected arguments for women's voting rights, but also went out of their way to insist that federal pronouncements on *equality in civil rights* would not apply to issues associated specifically with women and marriage.[75] For instance, Senator Charles Sumner proposed in April 1864 a Thirteenth Amendment that declared: "All persons are equal before the law, so that no person can hold another as a slave . . . ."[76] Senator Jacob Howard of Michigan, a powerful Republican who would later introduce the Fourteenth Amendment's birthright citizenship clause, probed whether the measure implied equality between men and women: "I suppose before the law a woman would be equal to a man, a woman would be as

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[73] FARMER-KAISER, *supra* note 22, at 85. COTT, *supra* note 37, at 82 ("Republicans intended the responsibility for supporting emancipated women and children to be delegated to the male heads of their households, and for husbands and fathers to be rewarded by the love and obedience shown by their dependents. Reinforcing male responsibility for work and family through marriage seemed so important . . . also to turn ex-slaves into citizens.").

[74] *See, e.g.*, FAYE E. DUDDEN, FIGHTING CHANCE: THE STRUGGLE OVER WOMAN SUFFRAGE AND BLACK SUFFRAGE IN RECONSTRUCTION AMERICA 194 (2011); FONER, *supra* note 24, at 81–83 (2019).

[75] *See infra* notes 76–88 and accompanying text.

[76] CONG. GLOBE, 38th Cong., 1st Sess. 1483 (1864).

free as a man. A wife would be equal to her husband and as free as her husband before the law."[77] This was a highly effective critique of Sumner's proposal, as congressional Republicans were not prepared to demolish gender hierarchies in the course of abolishing slavery. The Senate Judiciary Committee rejected Sumner's proposed language and, instead, approved language for the Thirteenth Amendment that made no mention of equality.[78]

The issue arose again amid a discussion of what became the Civil Rights Act of 1866. The Senate passed a bill declaring that inhabitants of the United States of "'every race and color' were entitled to 'the same right' to enter contracts, go to court, and so forth."[79] The bill could readily have been understood to imply that all persons—women and men alike—were entitled to the exact same civil rights. Before introducing the bill in the House, however, Republican James Wilson of Iowa altered the language to clarify that the goal was to invalidate race-related laws only.[80] As Republican Samuel Shellabarger of Ohio explained during the House debate, if the proposed statute were to pass,

> [y]our State may deprive women of the right to sue or contract or testify, and children from doing the same. But if you do so, or do not do so as to one race, you shall treat the other likewise. . . . [I]f you do discriminate, it must not be "on account of race, color, or former condition of slavery." That is all.[81]

The House accepted Wilson's revision. The Republicans' aim was to bar discrimination "on account of race, color, or former condition" but to continue to allow discrimination based on sex and age.

Similarly, when John Bingham introduced in the House a draft of what became Section 1 of the Fourteenth Amendment, Robert Safford Hale, a conservative Republican from New York, complained that the measure gave Congress too much

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[77] *Id.* at 1488; *see also* MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 57 (2004).

[78] During discussions of the Thirteenth Amendment, Democrats charged that in abolishing slavery, Republicans would begin to "dissolve all of society's foundations, including the hierarchical structure of the family"; Republicans regularly assured Democrats that they had no such thing in mind. VORENBERG, *supra* note 77, at 194–95; *see also* STANLEY, *supra* note 22, at 56–58. Stanley wrote, "Pressed to state their beliefs about inequalities based on sex, radicals interpreted equal rights in a limited and formal way that barred only legal distinctions based on race. . . . the idea that contract freedom disallowed race difference but assumed sex difference won explicit congressional sanction." STANLEY, *supra* note 22, at 58. As Nancy Cott summarized, "[t]he senators and representatives who designed the amendment to eliminate slavery did not intend to revolutionize marriage law or customs—except in one respect, and that was to extend it to ex-slaves." COTT, *supra* note 37, at 80.

[79] MASUR, *supra* note 32, at 323 (quoting S. 61, 39th Cong. § 1 (1866)).

[80] *Id.*

[81] CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866).

power to override state law and marked an "utter departure from every principle ever dreamed of by the men who framed our Constitution."[82] His case in point was the question of women's equality: Wouldn't promising to all persons "[equal] protection in the rights of life, liberty, and property" override state laws that required married women to turn over their property to their husbands?[83] Thaddeus Stevens responded that the "equality" mandate would be fulfilled if all married women were treated the same, and all "*femmes sole*" were also treated the same; equality, he was saying, did not require that all general groups of people must be treated the same.[84] But another question soon followed: If it was acceptable to have laws that treated married women differently from single women, or all women differently from all men, then why wasn't it acceptable to have laws that treated Black people differently from white people? This was the next question Hale asked, responding to Stevens that if

> you shall extend to one married woman the same protection you extend to another, and not the same you extend to unmarried women or men, then by parity of reasoning it will be sufficient if you extend to one negro the same rights you do to another, but not those you extend to a white man.[85]

The next day, Bingham attempted to reassure Hale with an argument that the Amendment was intended only to give the federal government power to "punish officials of States for violation" of the Constitution as it currently existed, and that under the existing Constitution, all questions associated with property "[were] dependent exclusively upon the local law of the States, save under a direct grant of the United States."[86] Bingham implied that states' power to restrict married women's access to property would be unaffected by the Fourteenth Amendment. But he also simply evaded the question raised in the interchange between Hale and Stevens. That is: What forms of equality were being invoked by the idea of "equal protection" in a society that divided its members humanity into groups based on race, sex, age, and ability?

It is not surprising that Republicans went out of their way to deny that their pronouncements about equality applied to any categories besides race. They did this to combat their partisan opponents, the Democrats, who liked to hammer Republicans

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[82] *Id.* at 1063.

[83] *Id.* at 1063–64.

[84] *Id.* at 1064. According to Foner, Sumner struggled unsuccessfully to draft a version of the Fourteenth Amendment's Section 2 that would urge Black men's enfranchisement while avoiding the word "male" and also avoiding the implication that women were implicitly enfranchised. FONER, *supra* note 24, at 83. He was unable to do so. *Id.*

[85] CONG. GLOBE, 39th Cong., 1st Sess. 1064 (1866).

[86] *Id.* at 1089–90.

for being sex radicals, free lovers, and miscegenationists. But the move was not merely defensive or rhetorical. To the contrary, as we have seen, patriarchal families were central to most Republican legislators' world-view. Congressman John Kasson of Iowa, for example, saw the process of emancipation as part of a great Christian, civilizational movement that would secure the liberties of men as men. Kasson explained in the House in January 1865:

> [T]here are three great fundamental natural rights of human society which you cannot take away without striking a vital blow at the rights of white men as well as black. They are the rights of a husband to his wife—the marital relation; the right of father to his child—the parental relation; and the right of a man to the personal liberty with which he was endowed by nature and by God.[87]

For Kasson, a man's "rights" to a wife and child were essential "natural rights," and in this way natural rights appeared decisively male. If women had any natural rights as mothers or wives, they were not mentioned here. Kasson mentioned "personal liberty" as the third "great fundamental natural right." Some contemporaries might have believed that women—at least single women—were entitled by natural right to "personal liberty." If Kasson thought so, he did not mention it. Indeed, he did not even bother to draw a distinction between the universal rights of men, as men, and the rights to which anyone other than a man might lay claim. At best, Republicans wanted Black women to be entitled to the same respect for their dignity and virtue that white women were supposedly entitled to, and to assume the same responsibilities too. The liberty that most of these men envisioned was not in fact universal or individualistic; it was particular, gendered, and associated with what Oliver O. Howard had called the "unity" of families in which women were subordinate to men.[88]

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This Essay has emphasized how elite white Republican men of the Civil War Era viewed freedom, families, and equality. I chose this approach to bring forward aspects of the early history of the Fourteenth Amendment that have not generally been part of discussions of constitutional law, and to respond to Jack Balkin's generous suggestion that historians have something to contribute to such discussions.[89] The ideas put forward by the mid-nineteenth-century Republicans examined here, like those of their contemporaries who advocated for abortion criminalization at the state level, remind us that at the time the Fourteenth Amendment was ratified,

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[87] CONG. GLOBE, 38th Cong., 2d Sess. 13 (1865); also quoted in COTT, *supra* note 37, at 94–95.

[88] H.R. EXEC. DOC. NO. 39-70, at 102 (1866).

[89] MEMORY AND AUTHORITY, *supra* note 21, at 237–38.

most powerful Americans subscribed to strict and bifurcated visions of gender roles, in which women were expected to accept subordinate positions not only in marriage but in society more broadly. Of course, many people who were not elite Republican men also had views on families and gender and reproduction, and another approach to the history of this period would be to investigate the opinions and voices of everyday people, even women.

After the *Dobbs* leak but before the final decision was issued, Peggy Cooper Davis conceded that she had remained uncertain whether the Reconstruction Amendments, read in the context in which they were adopted, could really be understood to "protect a right to choose not to procreate."[90] As she wrote in that 2022 piece:

> When the Reconstruction Amendments are understood together, and when they are understood in the light of their connection to the eschewal of human enslavement, they are easily understood to protect certain basic rights that had been denied to enslaved people: the right to live and labor on chosen terms, to have a political voice, to move about the country freely, to marry, to procreate, and to parent in chosen ways. Do the Reconstruction Amendments also protect a right to choose not to procreate? This is a question with which I have struggled.[91]

Davis then offered a lengthy passage from her 1997 book, *Neglected Stories*, in which she quoted Black Americans writing of a desire to limit childbearing because of the cruel realities of slavery—"stories of celibacy, contraception, abortion, and infanticide."[92] She wrote that there was "no easy answer" to the "grave and weighty question" of how those stories ought to inform our present.[93] Still, in her 2022 article, she moved from that history through Justice Amy Coney Barrett's suggestion that "safe haven laws" could make abortion unnecessary, to the conclusion that as a Black woman, "I would decline any 'Safe Harbor' that the State of Mississippi might offer me. And I would feel wrongfully invaded and profoundly unfree were I forced to continue an early and unwanted pregnancy."[94]

Davis's historical argument here, and in the "motivating stories" in her book, exemplifies a form of constitutional scholarship that involves democratizing what Reva Siegel has called our "constitutional memory" by elevating non-elite people's constitutional thought and visions of governance. Siegel credited Davis as a progenitor of that method, which has been adopted by growing numbers of constitutional

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[90] Peggy Cooper Davis, *A Response to Justice Amy Coney Barrett*, HARV. L. REV. BLOG (June 14, 2022), https://harvardlawreview.org/blog/2022/06/a-response-to-justice-amy-coney-barrett/ [https://perma.cc/5WQC-ATMQ].

[91] *Id.*

[92] DAVIS, *supra* note 22, at 191.

[93] Davis, *supra* note 90.

[94] *Id.*

law scholars.[95] As Siegel wrote, "To democratize the ways we define traditions so that we incorporate the voices and views of those whose past disfranchisement we no longer seek to perpetuate, we need to enlarge the evidentiary sources of tradition."[96] In that spirit, Siegel drew attention to the history of women's suffrage organizing, in which women and male allies argued not only that women must have the right to vote, but also that women's right to vote would—and ought to—disrupt the hierarchical status relations of the family. Siegel thus modeled how we might develop new sources of "positive precedent" to contest both women's erasure in the history of constitutional law and the nation's entrenched history of sexism and patriarchy.[97]

This social-historical approach to constitutional history is consonant with a great deal of academic history writing. Few academic historians today would challenge the value of writing the histories of people who were historically marginalized or subordinated, including writing about such people's *political ideas* and *legal consciousness*. That orientation stems in part from historians' visions of basic research. As in most other fields, including the sciences, historians' research does not have to serve any particular public purpose. Many historians seek to produce new knowledge as part of a shared quest for a better understanding of the peoples and places of the past, and more generally to enhance our collective grasp of the richness and diversity of human history. More narrowly, many historians bring democratic sensibilities to their work: They seek to decenter the traditional subjects of history—the kings, judges, and presidents who traditionally dominated accounts of the past. They strive instead (or in addition) to understand the lives of everyday people—people who left behind records that are sparse, challenging, or virtually nonexistent. For many historians, that historical curiosity is premised on the conviction that all people's dignity and humanity should be recognized.

Most historians therefore will have no quarrel with the proposition that we ought to elevate the voices and perspectives of marginalized peoples, and that we should recognize them as authorities on law and governance even if they were not recognized as such in their own time. I imagine "we" historians are collectively happy to be cited in law reviews in the service of such claims. By doing the kinds of extensive, specific archival research for which law professors rarely have time or inclination, we might provide the building blocks for new constitutional narratives, and for the proffering of new, less elitist, less narrow understandings of constitutional memory.

That said, if the question is whether Reconstruction's elite framers believed that freedom for women included a right to what many now call "reproductive autonomy,"

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[95] Siegel, *supra* note 17, at 1201–02. Foner also calls for a more inclusive vision of sources of "constitutional meaning" in *Second Founding*. FONER, *supra* note 24, at xxvii–xxviii.

[96] Siegel, *supra* note 17, at 1202.

[97] Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL'Y 19, 52–57 (2022). Hasday likewise lifted up the little-known history of nineteenth-century feminists' critiques of women's sexual subordination within marriage, an issue that had implications not only for what is now called marital rape, but also for women's reproductive autonomy. *See* HASDAY, *supra* note 14, at 1417–42.

I think the answer is no. The Reconstruction framers' vision of family forms, gender roles, and women's bodies did not include a right to reproductive autonomy for women. To be sure, as Jack Balkin points out, a "framework originalist" interpretation can readily find in Section 1 of the Fourteenth Amendment words and phrases that may be understood to promise reproductive autonomy for everyone who is capable of getting pregnant.[98] But if we are asking specifically about the world-view of the people who drafted and approved the Fourteenth Amendment, the answer is quite different. Here is yet another "negative precedent" from the history of women's rights in the United States.[99] Balkin suggests a more positive spin, however. Perhaps this is also an instance in which history can remind us that recognizing "the failings of the past, the legacy of past mistakes and injustices, and the limitations of even our most honored culture heroes [is] vitally important to making sound judgements in the present."[100]

[98] MEMORY AND AUTHORITY, *supra* note 21, at 97–101; *see also* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 293–95 (2007).

[99] Siegel, *supra* note 97, at 52–57.

[100] MEMORY AND AUTHORITY, *supra* note 21, at 51.