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Originalism: Erasing Women from the Body Politic

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ABSTRACT: In *Dobbs v. Jackson Women’s Health*, the Court relied on originalism to excise women from the Constitution. Originalism is purposefully backward-looking. With cherry-picked history, the Court created a future that looks to the past: a past where unwed pregnancy is shameful and can be redeemed only by secret adoption. Yet the case has revealed originalism as a flawed method, harmed the legitimacy of the Court, and energized those supporting abortion rights.

KEYWORDS: originalism, women, abortion, reproductive rights, adoption

IN THE MOVIE *ON THE BASIS OF SEX*, the fictionalized account of the life of Ruth Bader Ginsburg’s ascendancy to feminist icon, there is a courtroom scene where a judge reminds lawyer Ginsburg that the word *woman* appears nowhere in the Constitution. She replies pithily, “Neither does *freedom*, Your Honor.” In the current US Supreme Court’s decision in *Dobbs v. Jackson Women’s Health*, the Court seems to accept as their starting point that neither *woman* nor *freedom* can be found in the US Constitution.

The genesis of the Court’s excision of women from the Constitution is their method of constitutional interpretation—originalism. “Originalism,” as conceived by the late Justice Antonin Scalia, “establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself” (864). It has been an enormously influential theory. At Justice Elena Kagan’s confirmation hearing, she quipped, “We are all originalists now.”¹ And on today’s court, there are six justices who identify themselves as originalists.

The principle of originalism requires that the judge interpret the Constitution today to mean what it meant at the time the Founders wrote it, regardless of the judge's preferred outcome in a case. Thus, originalism is presented as a value-neutral enterprise, unconnected from political aims or legal movement or conservative outcomes. But, of course, everything is value-laden, even the choice of method. Reva Siegel notes that originalism is "value-laden politics—a multi-decade political project of the conservative legal movement embedded in the Republican Party whose announced goal is reversing *Roe v. Wade*" ("Memory Games"). Thus, it is not law: it is politics.

Originalism, with its claim to restore the Founders' vision of the Constitution, is fundamentally backwards-looking, making it a particularly inapt method to elucidate the rights of those the Founders excluded from the body politic at the time of the adoption of the Constitution. The RBG movie is correct that the word *woman* does not appear in the Constitution, and appears only obliquely in the Nineteenth Amendment's adjuration (not passed until 1920) that voting cannot be "abridged . . . on account of sex." During the Revolution, Abigail Adams, wife of John Adams, wrote him a letter reminding him to "Remember the Ladies," as the new country's laws were constructed. But the Constitutional Convention did not remember the ladies, did not listen to their voices, and gave them no representation. Of course, the Constitution applies to women to the extent that their interests are coterminous with men's interests. But no one at the time of the founding would have heard particular concerns of women that were not like men's. And it is to these Founders that originalism harks back, as originalist judges seek to "ventriloquize historical sources" (Siegel, "Memory Games" 9).

Originalism insists that the current Constitution provides no more protection for rights than it did at its framing, a time when women had no vote, no right to own property, no right to custody of their own children, no right to earned wages, and, according to the Court, no right to bodily autonomy or reproductive decision-making. Our theory of government relies for legitimacy and authority on the "consent of the governed," as elucidated in the Declaration of Independence. Where is the legitimacy of an interpretive method that does not take into account that large swaths of the population at the time of the framing—women and enslaved people, in particular—had no say in the creation of the founding document? And then the interpretive method that relies on our flawed past controls our present and future: "[o]riginalism's constitutional memory claims on the past are value-laden arguments about the future, about who we are and should be as a people" (7)²

Even if originalism weren't fatally flawed as a method (it is!), the way the Court used that method in *Dobbs* to divine history and tradition at the time of the framing was profoundly flawed. First, to rely on historical fact, as the Court does with originalism, without asking "why" facts exist, is not historical method (Valsania). Two points on a timeline are meaningless without an understanding

of their context and relation. Why wasn't abortion criminalized at the start of the republic? Why did it become criminalized a century later? The Court fails to grapple with the real facts. Second, Justice Alito has been accused of cherry-picking his history (Jackson; and Ansley), ignoring the fact that abortion in seventeenth- and eighteenth-century America was not illegal when done before "quickening" (Val-sania).³ What *Dobbs* claims as a long history and tradition of outlawing abortion in the United States is simply not true. Abortion before quickening was legal in the seventeenth and eighteenth century, became illegal in the nineteenth century as distrust of women grew and as the medical establishment sought more control,⁴ and then was again made legal in the 1973 decision in *Roe v. Wade*. Not quite the long and unbroken record of abortion bans that Justice Alito claims.

As originalism dictates, "*Dobbs* locates constitutional authority in imagined communities of the past, entrenching norms, traditions, and modes of life associated with old status hierarchies" (Siegel, "Memory Games" 12). Those "imagined communities of the past," for Justice Alito, seem to be not just the nineteenth century, but also an imagined 1950s world where biology was destiny, out-of-wedlock births were shameful and could only be *redeemed* by a secret adoption placement, and the only suitable parents were heterosexual married couples. Heather Brook Adams explores, in the era following World War II, how "rhetorics of shame [of unwed mothers] functioned to maintain an ideal of morally pure motherhood recognized within the context of marriage" (91–92). She notes that shame was the most salient emotion as unwed mothers shared their stories with her (96). Adams relates the story of Lois, who explained that "they used shame on us," and reflects, "Lois's vague invocation of an agential *they* draws attention to rhetorics of shame that functioned to delimit unwed mothers' options, suggesting that this shame was communicated by specific persons (e.g., parents, religious leaders, social workers) but also that it emanated from an indirect source: the socially held standard for women's sexual purity" (96). Relying on the work of Cindy L. Griffin and Karma R. Chávez, Adams views the socially held standard for purity as "a colonial one that seeks to uphold 'a proper gender/sexuality for all members of the nation' as well as 'clear gender roles for men and for women'" (106).

Justice Alito's *Dobbs* opinion, relying on an originalist method that erases women, seeks to return us to a pre-*Roe* time when women were shamed by the transgressive act of becoming pregnant outside of marriage, required by shame to hide the pregnancy and disappear the child through adoption relinquishment. The opinion positions secret adoption as an alternative to abortion, and one that makes access to abortion unnecessary: "States have increasingly adopted 'safe haven' laws, which generally allow women to drop off babies anonymously; and that a woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home" (34n46).⁵ He then drops a footnote citing a CDC report decrying, in terms that commodify adopted persons, the fact that

“the domestic supply of infants relinquished at birth or within the first month of life and available to be adopted had become virtually nonexistent” (34n46).⁶

By focusing on the anonymity of safe-haven laws, Justice Alito shows his own view that unwed pregnancy is so shameful that mothers desire secrecy about their adoption placement decisions. It is this sort of thinking that has been used to justify sealing adoption records and original birth certificates, kept secret even from adoptees. That attitude is extended by the familiar argument to resist opening adoption records on the grounds that it will cause women to have abortions, rather than place for adoption, in order to ensure secrecy of their unwed pregnancy—as if hiding a shameful secret is the reason for abortion, rather than avoiding pregnancy. If such arguments were valid, one would expect to see a higher abortion rate in states that have unsealed or never-sealed adoption records; in fact, there are no differences in abortion rates in states with sealed adoption records and states without them (American Adoption). Yet Justice Alito accepts a vision of an idealized 1950s world where secret adoption, not abortion, allows women to avoid the shame of unwed pregnancy.

But we do not live in that pre-*Roe* world any longer, where teens and young women are successfully shamed into relinquishing children. The pregnant persons who place for adoption are now more likely to be in their twenties, not teens, and to already have children (Sisson 46–49), as are those who seek abortions (Biggs). When women who seek abortions are denied them, over ninety percent choose to parent rather than relinquish (Sisson, et al. 136–39), indicating that shame and stigma are no longer powerful enough to deter women from choosing single parenting.

Despite *Dobbs*, old status hierarchies of race, class, and gender, yearned for by the originalists like Justice Alito and the majority in *Dobbs*, seem unlikely to return. Originalism is being recognized as a radical and illegitimate way to interpret our founding document (Siegel, “Memory Games”), as in response to *Dobbs* the US Supreme Court’s stature is plummeting in the eyes of the public (Jones). And *Dobbs*’s erasure of women’s autonomy from the Constitution has strengthened public opinion on the importance of abortion rights for women’s flourishing (Lucey). Rather than ushering in a fictional “Father Knows Best” world, where shame silences women as effectively as the denial of the right to vote did at our founding, *Dobbs* is strengthening women’s determination not to be erased from the body politic.

Notes

1. Justice Kagan, however, views originalism as a starting point, not an ending point. And she dissented in *Dobbs*.
2. See also Siegel, “The Politics.”
3. “Quickening” was the point at which the movement of the fetus could be detected (approximately the fourth month of pregnancy), a standard that provided considerable

control for pregnant women, who were the only ones who could detect the movement of the fetus within them. The holding in *Roe v. Wade*, with its trimester framework disallowing all regulation of abortion within the first trimester, permitting some regulation out of concern for the health of the mother in the second trimester, and allowing states to impose considerable regulations to include abortion bans in the third trimester, is more in line with the framers' position on abortion than is *Dobbs*, which permits complete abortion bans from the moment of conception.

4. Valsania notes, "The truth is that America's founders, together with their contemporaries, had a rather democratic understanding of the female body. . . . Men's and women's composition, medical doctors argued, was identical in essence—the only difference was anatomical. . . . Just like the male, the female was thought of as fully in control of the workings of her physiology, including her sexuality. It was believed that both the man and the woman had to reach orgasm, better if simultaneously, for pregnancy to ensue. . . . Especially when sex was aimed at procreation, the woman had to be as active as the male partner. The 18th-century woman was active and in control. She trusted her bodily feelings, including her pleasures." But in the nineteenth century, however, medical discourse painted women as weak and chaste, unable to trust their own bodies, needing to rely on their medical doctors. And as a consequence, says Valsania, "Anti-abortion campaigns began in earnest in the mid-19th century. They were waged mostly by the American Medical Association, founded in 1847, and were fundamentally anti-feminist. They chastised women for shunning the Victorian 'self-sacrifice' expected of mothers."
5. Justice Amy Coney Barrett made the same suggestion about adoption during oral argument in the *Dobbs* case. She posited: "In all 50 states, you can terminate parental rights by relinquishing a child after abortion, and I think the shortest period might have been 48 hours if I'm remembering the data correctly. So it seems to me, seen in that light, both *Roe* and *Casey* emphasize the burdens of parenting, and insofar as you and many of your amici focus on the ways in which forced parenting, forced motherhood, would hinder women's access to the workplace and to equal opportunities, it's also focused on the consequences of parenting and the obligations of motherhood that flow from pregnancy. Why don't the safe haven laws take care of that problem?" Her contentions about safe-haven laws and adoption discount the burdens of pregnancy and the difficulties that birthmothers experience because of decisions about relinquishment for adoption.
6. Here we see making abortion illegal as a way to increase the "domestic supply of infants," when adoption should really be about finding families for needy children rather than creating children to satisfy the needs of prospective adoptive parents.

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