

Testimony of Professor Michele Bratcher Goodwin
Chancellor's Professor
University of California, Irvine
Senior Lecturer
Harvard Medical School, Center For Medical Ethics
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Revoking Your Rights: The Ongoing Crisis in Abortion Care Access

Committee Chairman Nadler, Ranking Member Jordan, Vice Chair Dean, and distinguished members of the House Judiciary Committee, thank you for inviting me to participate in today's hearing on Revoking Your Rights: The Ongoing Crisis in Abortion Care Access. I join you and fellow witnesses today to explain the dire consequences of current reproductive healthcare in the United States and the significant legal and medical harms that will result if *Roe v. Wade* is overturned. The current threats to reproductive freedom and liberty exemplify the dismantling of the rule of law and represent a threat to democratic principles and values.

My name is Michele Bratcher Goodwin. I am a Chancellor's Professor at the University of California, Irvine, Senior Lecturer at Harvard Medical School, and the Founding Director of the Center for Biotechnology & Global Health Policy. I write and teach in the areas of constitutional law and tort law, and bioethics, biotechnology, and health law. My scholarship is published in the *California Law Review*, *Cornell Law Review*, *Harvard Law Review*, *Michigan Law Review*, *NYU Law Review*, *Texas Law Review* and *Yale Law Journal*, among others and in books, most recently, *Policing The Womb: Invisible Women and The Criminalization of Motherhood*. Over the past twenty years, I have written about health inequities and disparities, and reproductive health, rights, and justice. This work has involved detailed research of domestic laws, policies, and cases, as well as international field research on matters of reproductive health and the rights of girls and women in India, the Philippines, Europe, Africa, and Asia.

Legal and Historical Analysis

Soon the Supreme Court will issue a ruling in *Dobbs v. Jackson Women's Health Organization*, a case that involves a Mississippi abortion ban at 15 weeks of pregnancy. If the Supreme Court allows Mississippi's ban to go into effect, it will be endorsing Mississippi's solicitation to overturn *Roe v. Wade* and *Planned Parenthood v. Casey*, the two cases underpinning the constitutional right to abortion in the U.S. If the Supreme Court dismantles *Roe v. Wade* and its legacy of jurisprudence, it will bring significant harm to all women and all people capable of pregnancy in antiabortion states, and impose a death sentence for Black and Brown women.

In this term, the Supreme Court demonstrated its willingness to selectively read and adhere to its own jurisprudence when it allowed a draconian Texas abortion ban, S.B.8 to go into effect. S.B. 8 is a ban abortion after six weeks of pregnancy, before which many women, girls, and pregnant capable people even realize they are pregnant. Ripping a page from the darkest annals of American history, the Texas law includes a bounty provision that allows local residents to sue individuals who aid, abet, or assist individuals seeking to terminate a pregnancy.¹ As with its shameful predecessors, the Fugitive Slave Acts, the bounty provision incentivizes private individuals to spy

¹ See Fugitive Slave Act of 1793, 2nd Cong. (1793); Fugitive Slave Act of 1850, 31st Cong. (1850).

upon, surveille, and interfere with individuals asserting fundamental human and constitutional rights such as bodily autonomy, privacy, and freedom.

Similar to Texas's S.B. 8 law, Mississippi's ban provides no exceptions for cases of rape or incest. Stripping away these exceptions and forcing abortion providers to close their doors exposes the illogic and cruel political nature of these bans, which showcase the dismantling of democratic norms and principles. S.B. 8 has already caused irreparable harm to the people of Texas, the effective of which will only be exacerbated if Mississippi's ban is upheld and *Roe* and *Casey* are overturned. Two dozen states will likely respond with bans, some that "trigger" if *Roe* is overturned, that will gut reproductive freedoms in those states entirely or by significant degree.

When states coerce and force women, girls, and people with the capacity for pregnancy to remain pregnant against their will, they create human chattel and incubators of them. By doing so, state lawmakers force their bodies into the service of state interests. In the end, they are coerced to fulfill the private fascinations of lawmakers whose personal interests and religious beliefs become impermissibly entangled and intertwined in their service to the state. There is a cruel irony to this, buttressed on one end by the abolition of human slavery in the U.S., and on the other end, the repeal of draft laws that forced young men to surrender their bodies to the state in order to protect our nation. Today, Texas, Mississippi, and states with "trigger" bans make clear that the essences of chattel bondage and the draft have returned, but only for women, girls, and pregnant capable people.

It was no secret the grave sexual harms and predations that Black girls and women experienced during chattel slavery, including forced reproduction under the most shameful and brutal circumstances. The writings of Harriet Jacobs,² Frederick Douglass,³ W.E.B DuBois,⁴ and even the receipts archived by President Thomas Jefferson⁵ reveal the barbarism found in exploiting Black girls and women's reproduction for the interests of others rather than their own.

Since 1865, the Congress of the United States has considered the question of Black women's freedom from coercion and condemned bodily exploitation. The specific text of the Thirteenth Amendment that abolished slavery reads "Neither slavery nor involuntary servitude... shall exist within the United States, or any place subject to their jurisdiction."⁶ Lawmakers were neither naïve to the sexual exploitation and forced pregnancies of Black women nor intended that only Black men would become freed from the bowels of slavery. In short, the originalist meaning of the Thirteenth Amendment applied equally to Black women as Black men.

Not satisfied by the Thirteenth Amendment alone making the strong case for Black people's liberty and freedom, including that of Black women and not limited to that of Black men, Congress followed in 1868 with the ratification of the Fourteenth Amendment. Textualists will find that its very first sentence states, "All persons born or naturalized in the United States ...are citizens of

² See HARRIET JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL (1861) (recording the sexual threats and exploitation that she experienced even as a pre-teen girl by the family that owned her).

³ See FREDERICK DOUGLASS, LIFE AND TIMES OF FREDERICK DOUGLASS (1966).

⁴ See W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA, 1860-1880 (August Meier ed. 1985) (1935).

⁵ Thomas Jefferson to John W. Eppes (June 30, 1820), in THOMAS JEFFERSON'S FARM BOOK: WITH COMMENTARY AND RELEVANT EXTRACTS FROM OTHER WRITINGS (Edwin Morris Betts ed., 1953).

⁶ U.S. CONST. amend. XIII.

the United States and of the State wherein they reside.”⁷ Neither the Fourteenth Amendment nor any other article or amendment in the US. Constitution makes reference to fetuses, embryos, or “unborn children.”

Notably, the Fourteenth Amendment further secures the liberty interests of Black women who had been subjected to cruelties inflicted on them physically, reproductively, and psychologically. To further aid them in being freed from the barbaric bondages of human enslavement. Congress declared that no state shall “deprive any person of life, liberty, or property, without due process of law...”⁸

Clearly, the Thirteenth and Fourteenth Amendments were not intended only for Black men in text, practice, or enforcement. Legal history demonstrates Congress did not intend that Black women would remain in the confines of human slavery. But time and again, the judiciary has overlooked this text and its application to all women and especially Black women on matters of reproductive health, rights, and justice.

Impact of Abortion Bans and Restrictions

Both the Texas and Mississippi bills emerge from male dominant legislatures that pay little attention to keeping women and girls alive during pregnancy in their states. Sadly, as history shows, the Texas and Mississippi of old, are also the Texas and Mississippi of today—states whose legacies of resistance to the equality and freedom of Black and Brown women linger today. It continues to be the case that Black women are rendered invisible and dispensable in states that historically and legislatively have shown little regard for their lives. Black women are the canaries in the coalmine, and this period marks the New Jane Crow.

Simply put, in these states, women and girls cannot trust lawmakers with their lives and state and national health data explain why. For example, in the past decade with the chilling rise of extremism in American state legislatures, buttressed by the former president’s alarming promise to only nominate antiabortion judges, a dramatic proliferation in antiabortion legislation in the United States has coincided with this nation becoming the deadliest in the “developed world” to be pregnant and attempt to give birth. This crisis in America affects all women, girls, and people of reproductive age and capacity. Yet, this crisis does not affect all women equally. For Black women, they are 3.5 times more likely to die due to maternal mortality than their white counterparts.⁹ Notably, that is the national average. In states such as Mississippi and Louisiana, these disparities horrifically compound and multiply.¹⁰

⁷ U.S. CONST. amend. XIV.

⁸ *Id.*

⁹ See News Release, Nat’l Insts. of Health, NIH-funded study highlights stark racial disparities in maternal deaths (Aug. 12, 2021), <https://www.nih.gov/news-events/news-releases/nih-funded-study-highlights-stark-racial-disparities-maternal-deaths>.

¹⁰ *2019 Health of Women and Children Report – Public Health Impact: Maternal Mortality*, AMERICA’S HEALTH RANKINGS UNITED HEALTH FOUND., https://www.americashealthrankings.org/explore/health-of-women-and-children/measure/maternal_mortality_a/state/ALL?edition-year=2019 (last visited May 13, 2022).

Thus, despite claims to the contrary, banning abortion will not help Black women. In fact, the opposite will occur. Many will die. It is no coincidence that the states with the highest maternal mortality rates also lead the nation in antiabortion legislation.¹¹

Currently, the United States ranks 55th globally in the rate of maternal mortality.¹² Rather than being in the company of peers such as Germany, France, Spain, or England, the United States ranks alongside Saudi Arabia, Bosnia, and Russia, nations marked by the oppression of women, violations of fundamental human rights, and in the case of Bosnia “the worst genocide in Europe since the second world war.”¹³ Nations where women have been stoned to death,¹⁴ received public lashings, and experienced the cruelest sexual violations.¹⁵ This is the company that the United States now keeps on matters of women’s reproductive health and affairs. A review of data collected the United States Central Intelligence Agency provides evidence that it is safer to be pregnant and give birth in Iran, Tajikistan, and Bahrain than in the United States.¹⁶

This is particularly stunning given that women are fourteen times more likely to die by carrying a pregnancy to term than by having an abortion.¹⁷ In Mississippi, a woman is 118 times more likely to die by carrying a pregnancy to term than by having an abortion.¹⁸ According to the Mississippi Maternal Mortality Report,¹⁹ Black women accounted for “nearly 80% of pregnancy-related cardiac deaths” in that state.²⁰ At present, there is only one clinic in the entire state of Mississippi to serve a population of 1.538 million women that might need to terminate a pregnancy.²¹ Given this, when Mississippi Attorney General Lynn Fitch defended the law, stating that “the Mississippi

¹¹ *Id.*

¹² *World Factbook: Country Comparisons – Maternal Mortality Ratio*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/the-world-factbook/field/maternal-mortality-ratio/country-comparison>.

¹³ Kim Willsher, *How the ‘Hanging Woman’ Revealed Truth of Bosnia’s Mass Killer*, THE GUARDIAN (June 13, 2021), <https://www.theguardian.com/world/2021/jun/13/how-the-hanging-woman-revealed-truth-of-bosnias-mass-killer>.

¹⁴ Sophie Jane Evans, *Saudi Arabia Sentences Maid to Death By Stoning For Adultery—But the Man She Slept with Will Escape with 100 Lashes*, DAILY MAIL (Nov. 28, 2015), <https://www.dailymail.co.uk/news/article-3337297/Saudi-Arabia-sentences-married-maid-death-stoning-adultery-man-slept-escape-100-lashes.html>.

¹⁵ Jerome Socolovsky, *Bosnian ‘Rape Camp’ Survivors Testify in The Hague*, WOMEN’S ENEWS (July 19, 2000), <https://womensenews.org/2000/07/bosnian-rape-camp-survivors-testify-the-hague/>.

¹⁶ *World Factbook: Country Comparisons – Maternal Mortality Ratio*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/the-world-factbook/field/maternal-mortality-ratio/country-comparison>.

¹⁷ See, e.g., Elizabeth G. Raymond et. al., *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215 (2012).

¹⁸ In Mississippi, between 2013-2016, the pregnancy-related mortality ratio for Black women was 51.9 deaths per 100,000 live births, nearly three times the White ratio of 18.9. The national legal induced abortion case-fatality rate for 2013–2017 was 0.44 legal induced abortion-related deaths per 100,000 reported legal abortions. MISS. STATE DEP’T OF HEALTH, MISS. MATERNAL MORTALITY REPORT 2013-2016 (Apr. 2019), https://msdh.ms.gov/msdhsite/_static/resources/8127.pdf; Katherine Kortzmit et al., *Abortion Surveillance—United States, 2018*, 69 MMWR SURVEILLANCE SUMMARIES 1 (Nov. 2020), <https://www.cdc.gov/mmwr/volumes/69/ss/pdfs/ss6907a1-H.pdf>.

¹⁹ MISS. STATE DEP’T OF HEALTH, MISS. MATERNAL MORTALITY REPORT 2013-2016 (2019), https://msdh.ms.gov/msdhsite/_static/resources/8127.pdf.

²⁰ *Id.*

Legislature enacted this law ...to promote women’s health and preserve the dignity and sanctity of life,”²² one must ask, whose lives matter in Mississippi?

According to the Texas Observer in 2017, Texas’ maternal mortality was the “worst in the developed world,” even while it was noted that the grave rates of death in that state after severe attacks on abortion access was “shrugged off by lawmakers.”²³ Texas competes with Mississippi and Louisiana as being the most dangerous places in the developing world for a woman to be pregnant. Louisiana has the worst maternal mortality rate (2013-2017, most recent for all states) among states at 72.0 deaths per every 100,000 live births, nearly two and a half times higher than the national average.²⁴ No word better describes the toxic mixture of antiabortion and maternal mortality than devastation—already felt in Tennessee,²⁵ Wyoming,²⁶ Kentucky,²⁷ and other states. This is an active problem, the maternal mortality rate in the United States is worse than it was in 2019.²⁸

Research shows that being denied an abortion has serious consequences for a woman’s well-being and financial security. According to The Turnaway Study, being denied an abortion results in “an almost four-fold increase in odds that a woman’s household income is below the Federal Poverty Level compared to those who receive an abortion.”²⁹ Women denied abortion care are also at increased risk of experiencing ongoing financial distress, including rising debt and eviction proceedings. Many of the states with “trigger” bans that will go into effect if *Roe v. Wade* is overturned already have disproportionately high poverty rates.

Across the United States, women of color experience the intergenerational burn of policies and practices that result in unequal wages, inequitable living conditions, the economic strains of childcare, and the inability to afford basic necessities for their families. For example, in North Dakota, Native American/ Alaska Native people are nearly four times more likely to live in poverty than White people.³⁰ One third of the Native American/ Alaska Native population in North Dakota live in poverty.³¹ In South Dakota, Hispanic people are over five and a half times more likely to

²² Lawrence Hurley, *U.S. Supreme Court Takes Up Major Challenge To Abortion Rights*, REUTERS (May 17, 2021), <https://www.reuters.com/world/us/us-supreme-court-takes-up-case-that-could-limit-abortion-rights-2021-05-17/>.

²³ Sophie Novack, *Texas’ Maternal Mortality Rate: Worst in Developed World, Shrugged Off By Lawmakers*, TEX. OBSERVER (June 5, 2017), <https://www.texasobserver.org/texas-worst-maternal-mortality-rate-developed-world-lawmakers-priorities/>.

²⁴ *2019 Health of Women and Children Report – Public Health Impact: Maternal Mortality*, AMERICA’S HEALTH RANKINGS UNITED HEALTH FOUND., https://www.americashealthrankings.org/explore/health-of-women-and-children/measure/maternal_mortality_a/state/ALL?edition-year=2019 (last visited May 13, 2022).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Donna L. Hoyert, *Maternal Mortality Rates in the United States, 2020*, NCHS HEALTH E-STATS (Feb. 2022), <https://stacks.cdc.gov/view/cdc/113967>.

²⁹ *The Harms of Denying a Woman a Wanted Abortion: Findings from the Turnaway Study*, ANSIRH, <https://sixrepro.org/wp-content/uploads/2020/10/The-Harms-of-Denying-a-Woman-a-Wanted-Abortion-Findings-from-the-Turnaway-Study.pdf>.

³⁰ *State Health Facts - Poverty Rate by Race/Ethnicity (CPS) Timeframe: 2020*, KAISER FAMILY FOUND., <https://www.kff.org/other/state-indicator/poverty-rate-by-race-ethnicity-cps/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (last visited May 14, 2022).

³¹ *Id.*

live in poverty than White people and Native American/ Alaska Native people are eleven times more likely to live in poverty than White people, with nearly 60% of the Native American/ Alaska Native population living in poverty.³² In Kentucky, Black people are nearly three times more likely to live in poverty than White people.³³ In Louisiana, the state with the highest maternal mortality rate, Black and Hispanic/Latinx people are nearly two and a half times more likely to live in poverty than White people.³⁴

In light of the foregoing, Congress must be vigilant in protecting the fundamental reproductive freedoms of all Americans and especially women, girls, and people capable of reproduction. It is clear already that the impacts of abortion bans are not equally felt or experienced in the U.S. Abortion bans and restrictions create significant burdens and barriers for people seeking care and disproportionately impact communities that already experience higher rates of maternal mortality and poverty due to systemic racism and misogyny.

Moreover, the dismantling of *Roe v. Wade* will foreshadow threats to contraceptive access, bans on sex education in schools, attacks on LGBTQ rights, marriage equality for LGBTQ couples, and discrimination related to who may adopt. And the right to abortion recognized in *Roe* is firmly grounded in the liberty to make fundamental decisions about personal autonomy and bodily integrity. This includes the rights to family and child-bearing first recognized in *Meyer v. Nebraska* (1923) and strengthened in subsequent cases including *Moore v. City of East Cleveland* (1977), the right to use contraception first recognized in *Griswold v. Connecticut* (1965) and strengthened in *Carey v. Population Services* (1977), and the right to marry recognized in *Loving v. Virginia* (1967) and subsequently extended to same-sex couples in *Obergefell v. Hodges* (2015).³⁵ If the Court were to overturn *Roe*, these essential liberty rights that we rely on could be threatened.

Simply put, it is offensively naïve to suggest that these matters can be resolved at the state level through voting, particularly when voting rights are unprotected and voters suppression dominates the political process.

The Path Forward—The Need for Congressional Action:

As a first step toward preserving women’s health and protecting their constitutional interests, Congress can enact the Women’s Health Protection Act. This Act would codify protections for abortion access in federal law and guarantee that even in a state such as Mississippi, a woman who needed an abortion could have one.

As a second step, Congress can enact a reproductive justice “New Deal.” This would protect women, girls, and members of LGBTQ communities from potential future laws that would seek to ban abortion and punish pregnant people who seek to terminate a pregnancy. It would also proactively address poverty, which tethers the most vulnerable Americans to poor housing, education, and health.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ See CTR. FOR REPRO. RIGHTS, *ROE AND INTERSECTIONAL LIBERTY DOCTRINE* (2018), <https://reproductiverights.org/wp-content/uploads/2020/12/Liberty-Roe-Timeline-spread-for-print.pdf>.

Finally, history reveals the cruelties of racism, sexism, and white supremacy in forced labor and reproduction. It is an undeniable history recorded by this very Congress. And, should the Supreme Court dismantle *Roe v. Wade*, its decision will be the modern day corollary and appendage to *Plessy v. Ferguson*, anchoring separate but equal legal discourse in matters of reproductive health, rights, and justice.