

THE LEGALIZATION OF SEXISM: HOW ORIGINALISM'S FAILURES EMPHASIZE THE NEED FOR FEMINIST LEGAL THEORY

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ABSTRACT

The 20th century saw many new rights being afforded to American women, such as the right to vote¹, the right to birth control², right to be the breadwinner³, and the right to an abortion.⁴ The Supreme Court played a key role in the progression of gender equality through various landmark decisions. However, the current Supreme Court has used interpretive approaches to the Constitution that value legal reasoning from the time of the United States' founding, resulting in the removal of some rights that people previously held; an example of this may be seen through the decision of *Dobbs v. Jackson Women's Health Organization* (2022).⁵

¹ U.S. Constitution amendment XIX §1.

² *Griswold v. Connecticut*, 381 U.S. 479 (1965).

³ *Frontiero v. Richardson*, 411 U.S.677 (1973).

⁴ *Doe v. Bolton*, 410 U.S. 179 (1973).

⁵ *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 1 (2022).

Analysis of interpretive approaches must be done to verify their applicability in current American society. American women deserve to have their rights considered in a relevant context instead of a historical perspective that misrepresents the rights fully given to them under other court decisions. Moreover, the way justices approach law should enforce gender equality as unalienable rights, which implies that a feminist quality is necessary for interpretation. The progression of rights can only be successful if previously declared rights are not overturned. The courts must use an interpretative approach to law that emphasizes modern context and social progression of gender rights.

Dobbs v. Jackson Women's Health Organization (2022)⁶ is an example of a Supreme Court decision that changes American society and the lives of American citizens. Mississippi passed a law in 2018 that restricted abortion access for women whose gestational age was 15 weeks, barring medical emergencies or fetal abnormalities. Jackson Women's Health Organization, an abortion clinic in Mississippi, sued state health officials, including Thomas Dobbs from the Mississippi

⁶ *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 1 (2022).

State Department of Health. This clinic cited that the Mississippi law was unconstitutional, basing their argument on notable precedent, such as *Roe v. Wade* (1973)⁷ and *Planned Parenthood of Southeastern, PA v. Casey* (1992).⁸ *Roe* was a case where a woman challenged a law in Texas that made abortion illegal and only gave exceptions to save the lives of mothers. She claimed the law went against her right to privacy, which is implied throughout several constitutional amendments.⁹ The premise of *Casey* was challenging restrictions in Pennsylvania law regarding a woman's access to an abortion. The court decided that any restrictive components of a law could not place an "undue burden" on women seeking an abortion.¹⁰ These cases rely heavily on principles of due process and a right to privacy from the Fourteenth Amendment of the United States Constitution.¹¹ *Dobbs* overturned judicial precedent to say that the Constitution does not afford women a right to an abortion. Justice Alito delivered the majority opinion, arguing that "the right to abortion is not deeply rooted in the Nation's

⁷ *Roe v. Wade*, 410 U.S. 113 (1973).

⁸ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

⁹ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁰ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

¹¹ U.S. Constitution amendment XIV §1.

history and tradition.”¹² The majority cited *Casey*, which argues that personal liberty covers access to greater reproductive rights, and claims that the argument found within *Casey* was too much of a judicial controversy for the rights to be guaranteed. Nonetheless, people capable of becoming pregnant in American society may have differing opinions about where abortion lies in the history and tradition of the country.

When dealing with cases that have a greater implied connection with one gender over another, such as abortion historically being a women’s issue, it is important to formally acknowledge social progress made on behalf of gender equality. Perpetuating outdated legal principles could place the Supreme Court in a dangerous place that would keep the court from protecting the rights of people of different genders. An example of this happening is shown in the *Dobbs* case. In the majority opinion for *Dobbs*, Justice Alito cites 54 examples of laws in the states and the District of Columbia where abortion is limited or outright prohibited. The purpose of citing these laws is to highlight historical examples of the way abortion has

¹² *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 2 (2022).

been legally understood in the United States; of those 54 laws, only four were enacted after the turn of the 20th century, with just two being at the time of, or later than, the ratification of the Nineteenth Amendment.¹³ The Nineteenth Amendment was the start of major social progress in the 20th century that paved the way for further gender equality. The move to cite the state laws in the majority opinion suggests a deliberate disregard of the progress in various women's movements. The Supreme Court was giving power over abortion access back to the states, but the implication of the majority opinion is to revert to the time before women received landmark freedoms.¹⁴ The type of legal thinking that led to the *Dobbs* decision is rooted in an originalist judicial interpretation. Originalism interprets the Constitution observing the framers' intentions of the law at the time that it was written. In theory, this way of interpretation sounds reasonable because it reaches into the fundamental meanings of the country's founding documents to understand how constitutional principles should be implemented.¹⁵ However, the originalist interpretation is problematic in a

¹³ Id. at 79-108.

¹⁴ Id. at 79.

¹⁵ Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 Duke L.J. 239, 242-243 (2009) (identifying originalism as a constitutional interpretation method).

modern context. American society no longer stands the same as it did when the United States ratified the Constitution. Applying originalist logic is no longer situationally relevant. Society has evolved over time, and the progression of social norms has changed how the public views what should be considered basic rights.¹⁶ Questioning whether there is an appropriate application of originalism is especially pertinent for cases revolving around gender rights. The rights afforded to women now are radically different from their rights at the founding of the United States. Many cases employing originalism as the main judicial interpretation have led to restrictions on women's rights. If originalism is not going to work, other methods of legal thinking must be explored.

Thomas Jefferson, one of the most respected Founding Fathers of the United States, reveals his lack of respect for women and their democratic participation through this quote: "Were our state a pure democracy there would still be excluded from our deliberations women, who, to prevent depravation of morals and ambiguity of issues, should not mix promiscuously

¹⁶ Id. at 245.

in gatherings of men.”¹⁷ While Jefferson was not one of the Framers of the Constitution, his thinking, shown both in the Declaration of Independence and other writings, heavily influenced the Framers. An originalist interpretation wants to consider the Constitution in the context of the United States’ founding, which includes this exclusion of women.¹⁸ Women have been integrated into a more equal position in modern society, but originalism threatens that position. The U.S. Founding Fathers were not an infallible group of people; the judicial system’s defense of their logic as supreme will risk institutionalizing gender inferiority.

The recent *Dobbs* case is not the first time that originalist interpretations have curtailed gender equality. Court case decisions that hand down unfavorable consequences for women can be seen throughout the United States’ judicial history. *Muller v. Oregon*¹⁹ was a Supreme Court case decided in 1908, which sought to determine whether it was constitutional for an Oregon law to limit the

¹⁷ Ruth Bader Ginsburg, *The Need for the Equal Rights Amendment*, 59 American Bar Association Journal 1013, 1013 (1973) (quoting Thomas Jefferson).

¹⁸ Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 Duke L.J. 239, 242-243 (2009) (identifying originalism as a constitutional interpretation method).

¹⁹ *Muller v. Oregon*, 208 U.S. 412 (1908).

maximum daily working hours for women without simultaneously setting a similar limit for men. The reasoning for *Muller* came from a consideration of the Due Process and Equal Protection Clauses under the Fourteenth Amendment.²⁰ The Supreme Court found that these clauses, based explicitly on how the Constitution was written, do not supersede what the court interpreted as the police power of the state to regulate its own interests.²¹ This decision implies that only the regulation of women is a power that belongs to the states and excludes

men from this interest. The majority opinion says that “as healthy mothers are essential to vigorous offspring; the physical wellbeing of woman is an object of public interest.”²²

When considering the *Dobbs* line of reasoning regarding the tradition of women’s place in the United States, it is easy to see how the law has historically regulated women’s bodies.

However, the average American today will likely recognize the reasoning behind the *Muller* decision as degrading and acknowledge it is no longer legally applicable

²⁰ U.S. Constitution amendment XIV §1.

²¹ *Muller v. Oregon*, 208 U.S. 412 (1908).

²² *Id.*

because the Oregon law to regulate the working hours of women does not have any standing today. Nonetheless, the *Muller* decision identifies a state interest in equating the value of a woman's existence through their ability to reproduce, which outlines a similarity to the current policies of various states.

The overturning of 50-year-old precedent regarding abortion rights maintains that the Supreme Court institutionally gives overarching power to the State for the regulation of female bodies.²³ It is inappropriate for the Supreme Court to apply outdated legal thinking when the application of such a view has modern consequences of institutionalized sexism.

Originalist ideas still have a significant impact in contemporary society, as shown through *Miller v. Albright* (1998).²⁴ Lorelyn Miller was born in the Philippines. Her mother was a Filipina woman, but her father was an American soldier who fathered Lorelyn outside of wedlock before returning to the United States alone shortly after. U.S.

²³ *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 1 (2022).

²⁴ *Miller v. Albright*, 523 U.S. 420 (1998).

Citizenship law required that a child whose father was an American citizen had to apply to the State Department for citizenship by when the child reached the age of 18, whereas a child born to a mother with American citizenship will receive citizenship from birth. The father must also provide financial support for the child through the age of 18.²⁵ Both Millers sued against this policy by saying it was in violation of the Fifth Amendment's Due Process Clause, and the equal protections the clause provides.²⁶ This clause had been used in previous cases to argue against gender discrimination and strike down laws with sex-based classifications. Still, the Supreme Court ruled against the Millers and held that the policy could stand.²⁷ *Miller v. Albright* affirmed an institutional difference among genders. If a father was the only American citizen, their child was not inherently afforded a right to citizenship, which is damaging to the non-American mothers because it places the burden of proof on them. The mothers have to play a role in making sure the fathers of their children both formally recognize and financially support the children. If an American

²⁵ 8 U.S.C. § 1409.

²⁶ U.S. Constitution amendment V §1.

²⁷ *Miller v. Albright*, 523 U.S. 420 (1998).

father is not going to play either their legal or parental role, the child will be unlikely to receive citizenship. *Miller* created a legal distinction between children's relationships with their mothers and fathers. The originalist interpretations used in both *Muller v. Oregon* and *Miller v. Albright* proved to be a hindrance for the advancement of gender equality. These cases are examples of legalizing sexism in our country. Some may argue that the cases represent a failure of Supreme Court justices, but not a failure of originalism. Yet, it is not just the Supreme Court's power of judicial review that weaves sexism through the foundation of this country and its legal framework.

The Bill of Rights has adaptive capabilities because Congress can pass more amendments to further guarantee the rights of American citizens. However, not all of these new additions have been supportive of the rights of women. The Fourteenth Amendment was written to allow citizens to have the right to vote for representation in the American government. This amendment was influenced by the Framers of the Constitution who believed people with the right to vote should be specifically "male."²⁸ The Fourteenth Amendment is

²⁸ U.S. Constitution amendment XIV §2.

the first instance within the U.S. Constitution that made rights conditional to gender. This amendment's prioritization of male Americans, and exclusion of female citizens, necessitated the need for the Nineteenth Amendment, which gave women the constitutional right to vote.²⁹ The Nineteenth Amendment was Congress acknowledging a legal mistake within the Constitution and overturning the female exclusion.³⁰ This historical precedent takes the teeth out of the originalist argument. If the government can recognize that historical gender inequalities have perpetuated male superiority and work to achieve more equitable circumstances for women, the Supreme Court should then advocate more for the use of this evolved context rather than the original logic of the United States' foundation.

Since women's rights were not a fundamental consideration in the United States' founding documents, judicial activists have to carve out a significant legal space to accommodate gendered issues. Judicial activism is a concept where justices will consider any broader social implications

²⁹ U.S. Constitution amendment XIX §1.

³⁰ Ruth Bader Ginsburg, *The Need for the Equal Rights Amendment*, 59 American Bar Association Journal 1013, 1013 (1973) (discussing how the Nineteenth Amendment is a result of the Fourteenth Amendment).

when handing down their decisions. This can often be a direct juxtaposition of originalism.³¹ The originalist interpretation of the Constitution at its foundational principles does not allow much reflection on modern circumstances; activist justices must use a different approach for judicial interpretation. The more appropriate method is living constitutionalism. Living constitutionalism is the acknowledgment that the meaning and values of the U.S. Constitution can change over time, even without a formal amending process. The change occurs within evolving social norms, public opinion, and government standards. Living constitutionalism enables judicial decisions to have greater contemporary relevance because it helps with the application of modern logic to an old, and sometimes outdated, document.³² Implementation of a living constitutionalist interpretation creates room for the progression of rights afforded to women where they would not have had those rights beforehand, which ultimately advances gender equality. Judicial activism has been threaded into Supreme Court precedents that have advanced gender equality

³¹ Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 *Duke L.J.* 239, 247 (2009) (judicial activism and its relationship to originalism).

³² *Id.* at 263-264.

by reading rights into the Constitution. Therefore, returning to originalist interpretations undermines the previous progress toward gender equality. An analysis of court case examples can help understand far-reaching impacts of both originalism and living constitutionalism.

Dobbs v. Jackson Women's Health Organization sought to trace American history of women's legal rights and how these rights could have led to guaranteeing abortion access.³³ The Supreme Court was unsatisfied with what history presented to them but looking at previous Supreme Court cases throughout the 20th century, there is a line of precedent creating a more equitable society for women, which includes reproductive health care access. *Griswold v. Connecticut* (1965)³⁴ is a major example of improved health care access. Connecticut passed a law in 1879 that banned medical methods of birth control, including the use of birth control drugs. While this law was rarely enforced, Dr. C. Lee Buxton, of Yale School of Medicine, and Estelle Griswold, head of Connecticut's Planned Parenthood, were arrested for opening a birth control

³³ *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 1 (2022).

³⁴ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

clinic that included providing service to married women. Dr. Buxton and Griswold challenged the constitutionality of the Connecticut law and their case traveled to the Supreme Court. They challenged this law under the Fourteenth Amendment, and in 1965, Connecticut's law was stricken as unconstitutional under the right to privacy.

The right to privacy is one of the most important rights that has been interpreted in the Constitution through judicial activism. This right is not explicitly stated, but as the majority opinion in *Griswold v. Connecticut* argues, this right is granted to American citizens by multiple amendments building off one another. Justice Douglas, who wrote the majority opinion, said that the right was implied in areas such as the Fifth Amendment where the protection of self-incrimination could also be understood as a right to privacy.³⁵ Another argument was made in the concurrence opinion written by Justice Goldberg, who used the Ninth and the Fourteenth Amendments to outline this right to privacy. The Ninth Amendment says that not all rights are written in the Constitution and the government must protect rights other

³⁵ U.S. Constitution amendment V §1.

than those enumerated, a fact of great significance for judicial activism.³⁶ An important aspect of Justice Goldberg's argument originates in the Due Process Clause of the Fourteenth Amendment, which states that the government cannot restrict a person's basic rights without due process of the law.³⁷ Combined, the Ninth and Fourteenth Amendments protect the right to privacy. The right to privacy is not explicitly gendered, but this right has often become the crux in many women's issues. The following decade after *Griswold* saw multiple cases pass through the Supreme Court that developed the right to privacy. *Griswold* was especially important because, before this case, it was seen that the federal government had an inherent interest in the procreation of American citizens. However, the case reversed the government's superseding interest in the reproductive capabilities of American citizens, and instead held that it was more important for women to control their own reproductive decisions.³⁸ *Griswold* continues to be used as precedent in gendered cases. The overturning of *Roe* through *Dobbs* has blurred how much access to reproductive healthcare

³⁶ U.S. Constitution amendment IX §1.

³⁷ U.S. Constitution amendment XIV §1.

³⁸ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

is protected through the right to privacy and a reversal of *Griswold* would undo a woman's ability to make even basic reproductive decisions.

Due process is closely related to the Equal Protection Clause, another portion of the Fourteenth Amendment.³⁹ This Equal Protection Clause states that no person can be denied the protection of the law, which has been interpreted to include the equal protection of the law on the basis of identity. Precedents have already established that the Fourteenth Amendment can apply to gendered cases in favor of women. Now that judicial activism has carved out a legal space for women's issues, such as the rights to privacy and reproductive autonomy, it is equally important that women obtain the same legal protections that men receive without any codified male superiority.

The key case *Reed v. Reed* (1971)⁴⁰ reveals how institutionalized sexism persists. Cecil and Sally Reed were a separated couple living in Idaho when their adopted son tragically passed. Both Reeds wanted to be appointed as the administrator of their son's estate, but Idaho law favored men's

³⁹ U.S. Constitution amendment XIV §1.

⁴⁰ *Reed v. Reed*, 404 U.S. 71 (1971).

property ownership over women's.⁴¹ Idaho law did not allow Sally Reed to be considered for this position because of her gender identity as a woman. Sally Reed sued, asserting that this law was unconstitutional based on the Fourteenth Amendment's Equal Protection Clause. The Supreme Court ruled in favor of Sally Reed and the reasoning that Sally Reed should be allowed the opportunity to claim her son's estate instead of Cecil Reed having an automatic gender-based appointment.

The *Reed* case was the first time that the Equal Protection Clause was applied to gender, allowing this landmark decision to outlaw governmental discrimination of sex.⁴² In a purely originalist reading of the Constitution, the Equal Protection Clause only prohibits discrimination of persons.⁴³ By adding the extra distinction of gender, the Supreme Court took on a living constitutionalist approach. The Supreme Court recognized that as society evolved, and more emphasis was placed on acknowledging the impact of personal identities, there needed to be a reflective change within the

⁴¹ 93 Idaho 511, 465 P.2d 635.

⁴² *Reed v. Reed*, 404 U.S. 71 (1971).

⁴³ U.S. Constitution amendment XIV §1.

Constitution to better integrate women as equal members of society and reject legalized sexism. Reverting to the original language of the Constitution could have disastrous impacts on the issue of institutionalized discrimination. The history of legalized sexism is perpetuated if the judicial system does not adapt their interpretations of the Constitution to contemporary issues.

The importance of living constitutionalism is particularly critical when looking at how women's rights impact the way men and women operate within society. Treating women as inferior implies a superiority for men. The *Frontieros* dealt with this gendered expectation firsthand.⁴⁴ Sharron Frontiero held the respected position of an Air Force lieutenant in the early 1970s while her husband was a civilian. The law at the time allowed for civilian wives to automatically be considered dependents of their husbands; civilian husbands, on the other hand, had to apply for spousal support, and could only be granted these benefits if they were dependent on their wives for over half of necessary financial support. Lt. Frontiero's husband did not qualify for spousal benefits and

⁴⁴ *Frontiero v. Richardson*, 411 U.S.677 (1973).

was denied, leading them to sue in the subsequent court case *Frontiero v. Richardson* (1973).⁴⁵ The *Frontieros* argued that this law violated the Fifth Amendment's Due Process Clause's protection against gender discrimination.⁴⁶ The Due Process Clause found in both the Fifth Amendment and the Fourteenth Amendment use identical language. It demonstrates that this concept of due process is considered a vital right for people in the United States because it is the only text included twice in the Constitution. Since the Fourteenth Amendment protects against gender discrimination, it would make legal sense for the same protection to apply under the Due Process Clause of the Fifth Amendment.

The Supreme Court held that the law regarding military spousal benefits, outlined in *Frontiero v. Richardson*, did violate the Constitution. The opinion written by Justice Brennan argued that any classification based on sex cannot be constitutionally protected by due process of law.⁴⁷ This is a gendered case, similar to the other cases previously described, but it is different because its decision directly impacts both

⁴⁵ *Id.*

⁴⁶ U.S. Constitution amendment V §1.

⁴⁷ *Frontiero v. Richardson*, 411 U.S.677 (1973).

women and men. Women were discriminated against because their military positions were not being respected; by not legally qualifying as an automatic lead contributor to household finances, despite their male counterparts doing so, the law is once again weaponized to codify sexism. However, in this case, men were also being treated unfairly by the government. Men were not easily getting spousal support that was received by women for their marriage to a military member, regardless of the military status their wives held. This confrontation with gender discrimination gives a better example of how all members of American society are impacted by legalized sexism. The Framers of the Constitution wanted to protect men.⁴⁸ However, allowing gender discrimination in the law also hurts the rights of men. The Supreme Court needs to recognize that by protecting rights in gendered cases, they would be benefitting all Americans.

One of the most controversial legal judgements is whether people capable of getting pregnant have the right to an abortion procedure. On the same day that the famous

⁴⁸ Ruth Bader Ginsburg, *The Need for the Equal Rights Amendment*, 59 American Bar Association Journal 1013, 1013 (1973) (quoting Thomas Jefferson).

decision in *Roe v. Wade* (1973) was handed down, there was a companion case: *Doe v. Bolton* (1973).⁴⁹ This case addressed a Georgia law requiring any person seeking an abortion to have permission from their personal physicians, two other physicians, and a separate committee at the hospital where the abortion would take place. Furthermore, any person living in Georgia that wanted an abortion had to either have a life-threatening pregnancy, a fetus that would most likely be permanently disfigured, or prove that the pregnancy was a result of rape. Georgia hospitals themselves had restrictions: the hospitals had to be accredited by the Joint Commission on Accreditation of Hospitals to perform an abortion.⁵⁰ The state of Georgia made it very difficult for its citizens to receive an abortion, so "Mary Doe" sued Arthur Bolton, the Attorney General of Georgia, for not considering mental and social reasons for why someone may want an abortion. *Doe* specifically cites financial hardships as one such reason.⁵¹ The case argued that the right to procreation was under the right to privacy inferred by the Fourteenth Amendment. Justice

⁴⁹ *Doe v. Bolton*, 410 U.S. 179 (1973).

⁵⁰ Ga. Criminal Code §26-1202.

⁵¹ *Doe v. Bolton*, 410 U.S. 179 (1973).

Blackmun wrote the majority opinion. He acknowledged that abortion was now legalized under the *Roe* companion case but recognized the state's inherent interest in the health of people with the ability to become pregnant, which could allow for moderate legal restrictions.⁵² The restrictions put in place by Georgia were considered too severe. Ultimately, this case advocates for gender equality because it reaffirms reproductive rights while still acknowledging possible state interest. This decision shows how laws and rights can be in conversation with each other, regardless of whether some people agree with the decision about restrictions or not. *Doe v. Bolton* is yet another example of how the Constitution can be adapted to modern society and judicial precedent can be built from other cases through an activist lens. *Dobbs* strikes down this case and overturns the reasoning used from a living constitutionalist perspective.⁵³ Much of the progressive work achieved by the case examples of *Griswold v. Connecticut* (1965), *Reed v. Reed* (1971), *Frontiero v. Richardson* (1973), and *Doe v. Bolton* is in danger of being reversed because of the

⁵² *Id.*

⁵³ *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 1 (2022).

current Supreme Court's emphasis on returning to 18th century logic.

A living constitutionalism interpretation approach should be taken when drafting judicial decisions, but this approach on its own is not always enough for gendered cases. There needs to be a constant, contextual recognition that sexism has been legalized in the United States, alongside an effort to understand societal impacts of judicial decisions on gender rights. Also, judicial decisions should work to create a more equal society among all genders. Taking this approach into consideration would help justices fall in line with Feminist Legal Theory (FLT). FLT's various components follow the waves of feminist advocacy in American society. One aspect is equal treatment, which is the idea that women and men should be equally treated and respected through the law.⁵⁴ This aspect emphasizes individualism because it argues that generalizations about women as a group is not sufficient to understand full implications of legal policy. Another aspect is cultural feminism, and this aspect emphasizes the desire of

⁵⁴ Nancy Levit, Robert R. M. Verchick, & Martha Minow, *Feminist Legal Theories*, in *Feminist Legal Theory (Second Edition): A Primer* 11, 12-13 (2016).

society to reach equity.⁵⁵ Legal theorists recognized that equality was an integral first step to correcting the country's mistakes in gender rights. However, equality of opportunity does not always mean equal results. The handling of gendered court cases necessitates contextual acknowledgement of different experiences and perspectives women may have concerning the law. Part of the FLT is to call attention to the problem of how equal law may still perpetuate male superiority if there are not equitable outcomes. A third major FLT theory is anti-essentialism, and this theory acknowledges how intersecting identities need attention instead of focusing solely on gender for legal reform. Women of different races, sexual orientations, and classes cannot ignore how their other identities are implicated in the American legal system.⁵⁶ These three major aspects are just a few theories which represent the type of thinking that is being done to broaden the legal field. The goal of FLT is recognition leading to progress. Living constitutionalism is a significant step towards creating a more equal and equitable reality across genders. The court cases

⁵⁵ Nancy Levit, Robert R. M. Verchick, & Martha Minow, *Feminist Legal Theories*, in *Feminist Legal Theory (Second Edition): A Primer* 11, 15-16 (2016).

⁵⁶ Nancy Levit, Robert R. M. Verchick, & Martha Minow, *Feminist Legal Theories*, in *Feminist Legal Theory (Second Edition): A Primer* 11, 24-28 (2016).

discussed as examples of living constitutionalism reveal how necessary activist judicial approaches are.

However, living constitutionalism has faults because public opinion sways between traditional and progressive attitudes. FLT takes judicial activism a step further, advocating for justices to consider how women operate within society, and how this context will change as a result of their decisions. FLT would allow more adaptable constitutional interpretation with less influence of traditional social norms. Living constitutionalism should be the starting point and Feminist Legal Theory should be what the interpreters of law hope to achieve.

Looking at *Dobbs v. Jackson Women's Health Organization* (2022), there are many aspects of the decision that caused controversy within the American masses. The case overturned a line of precedent throughout the 20th century that progressed gender rights, especially in analysis of the Fifth, Ninth, and Fourteenth Amendments. The concepts of due process and equal protection have been heralded as the solution for integrating women into American society as people who deserve rights equal to men. *Dobbs* did more than

reversing the right to abortion; this landmark decision shed light on how different judicial interpretations impact modern realities. Originalism does not work. The Supreme Court decision reasoned that a right to an abortion is not included in “the Nation’s history and tradition.”⁵⁷ A dive into this history and tradition regarding gender only shows legalized sexism. American founding documents were created under the premise of male privilege and superiority, and subsequent laws have created a patriarchal system. It is not only *Dobbs*, but cases like *Muller v. Oregon* (1908) and *Miller v. Albright* (1998) that show how sexist reasoning persists over time. In order to ensure rights in favor of women, separate legal thinking has had to be created. This type of thinking employs the use of judicial activism and a living constitutionalism. These methods approach the U.S. Constitution from a modern perspective to try and understand how the principles would fit today’s world; this interpretative approach was especially significant for women’s rights in the late 20th century, as shown through cases like *Griswold v. Connecticut* (1965), *Reed v. Reed* (1971), *Frontiero v. Richardson* (1973), and *Doe v. Bolton* (1973). Such

⁵⁷ *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 2 (2022).

cases have improved the quality of life for female American citizens, as well as people with the ability to reproduce. Calling sex-based discrimination unconstitutional helped create a world where gender identity became less of a barrier. The status of women is still not completely equal with men, but they now have more legal recognition within the American social realm.

The quality of life of Americans should be one of the major focuses of judicial bodies like the Supreme Court. They hold enormous responsibility when handing down decisions, and it is inappropriate to use a method of judicial interpretation that will fundamentally classify one aspect of an identity as superior or inferior to another. A more ethical approach to law, in regard to gendered cases, can be done through utilizing Feminist Legal Theory. Implementing FTL would require justices to critically think about the influence they have in gender dynamics. They should work to diminish notions of male superiority because of the harmful realities this creates for people of other genders. A societally relevant Constitution would do good for all people in the United States.