

Feminist Judging and Judicial Decision Making: An Analysis of *Dobbs v. Jackson*

Lucy Wood

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This research paper focuses on the concept of feminist judging and its impact on judicial decision-making in the context of the U.S. Supreme Court case *Dobbs v. Jackson*, which overturned *Roe v. Wade*. In this paper, I explore the historical context of women and femininity in courts, the difference between women judges and feminist judges, and the challenges of putting feminist judging into practice. The paper identifies three main pillars of feminist judging—intersectionality, ethics of care, and understanding contextual shifts—and analyzes how the Supreme Court failed to apply them in *Dobbs v. Jackson*. The paper argues that the lack of feminist judging principles used in this case resulted in a flawed outcome and provides an analysis of the case based on the three pillars of feminist judging. In this paper, I highlight the importance of feminist judging in achieving true equality under the law and conclude that it is a deeper analysis of cases and circumstances that can benefit all judges in serving justice to all.

Introduction

The focus of this paper is to describe what feminist judging is and its influence in court through an analysis of the U.S. Supreme Court case *Dobbs v. Jackson*, the case that overturned *Roe v. Wade*. In the first half, I investigate how feminist judging influences judicial decision making. I discuss what feminist judging is by providing historical context of women and femininity in courts, and the difference between women judges and feminist judges. I then describe feminist judging as I have defined it, followed by the difficulties in putting feminist judging into practice. In the second half, I provide a background on *Roe v. Wade* and the subsequent cases, *Planned Parenthood v. Casey* and *Dobbs v. Jackson*. I then describe how the Supreme Court failed to use feminist judging practices when making the final decision in *Dobbs v. Jackson* in each of the three pillars. Finally, I provide an analysis of *Dobbs v. Jackson* based on the pillars of feminist judging.

Through the study of feminist papers and court cases from the U.S., I determined the three main pillars of feminist judging to be intersectionality, ethics of care, and understanding contextual shifts. The Supreme Court failed to put substantial enough emphasis on these three pillars in *Dobbs v. Jackson*, which resulted in the unequal and biased outcome. The purpose of this paper is to explore the topic of feminist judging and what influence it can have on justice under the law. It is important to note that feminist judging, while derived from feminist ideologies, is not an insertion of personal opinions of the judges. It is an approach to finding further justice under

the law than has been found previously. That is why I will be providing an analysis of *Dobbs v. Jackson*, because the lack of feminist judging principles used to reach the outcome resulted in “justice” that was flawed.

What is Feminist Judging?

I have defined feminist judging as a judicial practice derived from feminism and implemented by judges in courts of law. There are three main pillars of feminist judging: intersectionality, ethics of care, and understanding contextual shifts. Intersectionality is interpreting all aspects of a person’s identity and the specifics of a case to deepen the understanding of influencing factors. Ethics of care involves compassion for those involved in the case and relies on empathy in deciding the outcome. Understanding contextual shifts is the knowledge that society changes based on time period and geography, and that the law should reflect those changes and react accordingly. This is not an exhaustive list of all the elements of feminist judging; rather, it is my interpretation of the three most important and prevalent factors of this practice. Feminist judging can be applied to every scenario; it is a specific approach to judicial decision making and is all about the process.

Women judges have not been around for long at all. Along with the heightened women’s rights movement in the late nineteenth century, there came a push for access to voting rights and higher education for women. This eventually paved the way for women lawyers to emerge and be instated. Women judges were first recorded in the early twentieth century typically in European countries, with Asian countries following

suit up to fifty years later. Some Middle Eastern countries have followed only within the past two decades (and some countries have yet to allow women to be judges). This struggle for women's involvement in the law naturally followed the centuries-long oppression women faced in virtually all aspects of society. Restricted access to education prevented women from obtaining the qualifications needed to be accepted as lawyers, judges, and lawmakers. Even after women were able to cross the educational barrier, gender stereotypes and enforced gender norms prevented them from being successful in their chosen fields. Stigma existed based on women's perceived natural roles in society, which served to diminish their credibility as thinkers. Women were expected to be mothers and caretakers, so becoming at all involved in law was a monumental challenge. Women lawyers and judges were assumed to be more emotional and softer mannered, which was thought to cloud their judgment and influence them to be biased or fail to enforce proper consequences. Their ability to be objective in their rulings was doubted because of supposed "biological mood-swings." Yet another ridiculous argument was that women were too virtuous and pure to be involved in the hardened profession of law; popular notions suggested that women must be shielded from the harshness of criminality lest their motherly capabilities and innocence be despoiled¹.

One way women began to penetrate the law was by getting involved in lower courts. Less qualified women could still work in the field and slowly pave the way for other women. By having more women in the force, their presence was less stigmatized, and they were able to start assimilating. Women judges have become increasingly popular within countries with the civil law system; however, certain barriers remain. Courts and law firms, whether consciously or not, continue to view femininity as a threat to the prestige and uniformity of their institutions. While this can prevent women from being hired in the field at all, it can also hold women back from higher positions or promotions. Systematically, women judges are typically concentrated in lower courts, while male judges are found more often in higher positions.

An important distinction to be made is that feminist judges and women judges are not synonymous. A woman is not always a feminist, and likewise feminism is not limited to women. A woman judge may choose to not take a feminist approach to judging or may not even know that such an approach exists as an alternative. Also, a judge does not have to be a feminist to participate in feminist judging. Feminist judging is a practice and a process, not a defined set of values that the judge must already hold. It is a specialized approach that is based on feminist principles, but can be applied by anyone, regardless of gender, progressive ideologies (or lack thereof), or political party. The three pillars of feminist judging, although derived from feminist thinking, are just more in-depth ways of finding justice under the law. Such an approach comes from

the recognition that minorities' special concerns are often neglected in laws that were written primarily by majority culture men. Intersectionality serves the purpose of considering all factors; ethics of care is meant to provide more compassion in outcomes, and understanding contextual shifts helps laws become living and transformative to correct enduring errors from the past. The pillars of feminist judging are ways for judges to achieve more thorough and thoughtful justice under the law.

It must also be noted that feminist judging is not a form of judicial activism or a way for progressive policies to become more implemented through maneuvering the law; feminist judging does not involve the personal opinions of the judges. An example of this can be found in the Supreme Court case of *Brown v. Board of Education* (1954)². The court was tasked with deciding the constitutionality of racial segregation in schools, and the decision on this case would either uphold or overrule *Plessy v. Ferguson* (1896)³ which had previously deemed racial segregation in schools constitutional if the facilities were equal. One of the justices on this case personally supported this segregation, however the decision to disallow the segregation due to the Equal Protection Clause of the Fourteenth Amendment ended up being unanimous. In this example, the personal opinion of that judge did not interfere with their ability to come to a just conclusion according to the constitution.

First Pillar: Intersectionality

The first pillar of feminist judging is the concept of intersectionality, which is an analysis of how multiple aspects of a person's identity can result in either privilege or oppression, depending on specifics⁴. The term was first coined by Kimberle Crenshaw in 1989. She recognized that there was a disconnect between minority groups within feminism and racial activism. For example, white women and women of color have vastly different experiences, and race and gender were addressed by activists as two separate issues. She stressed the importance of intersectionality because multiple parts of one's identity can contribute to their oppression at the same time, and without consideration those issues can go overlooked and unresolved. For example, with a woman of color, Crenshaw explains how identities are usually seen as either/or when analyzed, meaning a woman of color could only be seen as a woman or as a person of color within progressive ideologies, but never as both. Without the analysis of a person's complete identity, a full understanding of the systematic adversities they face might be impossible. Intersectionality, as explained by Crenshaw, helps recognize experiences of those with overlapping identities and not force groups to be yet further marginalized within certain sectors.

Some of the most common factors considered in intersectionality include race, gender, ethnicity, sexuality, religion,

and class. Intersectionality is meant to allow a deeper understanding of the things that influence any one group's experiences. There are social disadvantages to being, for example, a woman, person of color, or queer. But combined, these factors create unique levels of intertwined prejudices. For example, trans women of color face a heightened level of hate crimes because of their specific identity. Every person has multiple facets of social identities, and when they have more minority aspects, they face more systemic oppression.

This separation of intersecting identities has been observed and established in euro-centric feminist ideologies, known for their mainstream focus on the white woman's experience and their avoidance of the oppression faced by women of color, as well as the proper solutions needed to rectify oppressive conditions⁵. Due to this avoidance, a universal sense of gender oppression was adopted, and other factors like economic or social classes were neglected. Therefore, working-class women and women of color were alienated. Euro-centric feminists lacked the intersectionality needed to really understand, empathize, and solve for women of color's unique oppression⁶. The point of intersectionality in judging is to analyze the uniqueness of a case. Often multiple different factors influence a result, and looking at how each of them affects the outcome of a situation, which intersectionality allows for, is very helpful for a judge determining the right decision to make.

An example of how intersectionality can be used in court is a hypothetical civil case involving a black woman who applies to a job but doesn't get hired and decides to sue the company for discrimination based on race and gender. The court looks at the company and sees black men working there, so it concludes there is no discrimination based on race. It then looks at the employees and sees white women, so it decides there is no evidence of discrimination based on gender. This outcome lacks intersectionality, as the court only considered each factor separately, and ignored the possibility of discrimination based on race and gender. To add intersectionality into the case, the court would need to see if the company has any black women employees. If it didn't, the court might come to a different conclusion.⁷

Second Pillar: Ethics of Care

The second pillar of feminist judging is feminist ethics of care. When analyzing the reasons a feminist judge makes a certain decision in a case, one thing that is commonly seen is an unprecedented level of empathy. These judges consider the emotions of the parties involved in the case: the hurt, betrayal, and grief of the victim, as well as the regret or lack thereof in the perpetrator. As defined by Carol Gilligan—an American feminist, ethicist, and psychologist—feminist ethics of care involve empathy and justice, practices that, when combined, utilize thinking and feeling to carry out different kinds

of action for others⁸. This method makes certain factors of a case more closely considered because of the compassionate analysis embedded in the process.

From birth, women are socially conditioned to be more empathetic, more caring than are men⁸. This is because of the tendency of people to enforce gender roles: women are the caretakers, nurturers, and emotional beings of the world, while men are ambitious and logical. However, Gilligan makes it clear that the caring mindset is not biologically assigned or exclusive to women. Having and expressing emotions has become feminized, and in patriarchal societies men are discouraged from acting in a feminine manner. Consequently, most women are more caring than men are because of the way they are raised, treated, and expected to behave: women and men grow up to fit the characteristics enforced on them. Gilligan shows this concept's legitimacy by conveying how factors like education and social class affect moral development, so experiences related to gender are relevant as well⁸.

This compassion seeps into the way feminist judges make their decisions. These judges understand emotions on a deeper level because they are aware of enforced gender norms, and they actively bring that compassion into practice in the courtroom. This caring approach encourages feminist judges to take better care of the victims in a case; there is less victim blaming and more consequences where they are due⁹. For example, in a case with sexual assault, these judges would not ask the victim what they were wearing, where they were, or what actions they took to stop the assault—which places the blame and responsibility onto the victim—the focus is more rightly directed to the offender: what they did, why they did it, every considerable factor to assign responsibility to the right person and levy appropriate consequences. Sexual assault is often downplayed, due to rape culture and enforced gender stereotypes, through jokes, inflated statistics, social pressure to accept circumstances, and the trivialization of the matter itself¹⁰. Judges can combat this by placing the blame appropriately on the perpetrator and by showing compassion for the victim.

A hypothetical case that requires ethics of care to have a just outcome is the sexual assault of a woman who was drinking alone at a bar late at night. If there was a lack of ethics of care, some of the questions asked of the victim would be directed at her actions that might have contributed to the assault. For example, “what were you wearing?”, “why were you there so late at night?”, “what were you wearing?”, “why didn't you come with friends?”, etc. All these questions point the blame and responsibility of the crime onto the victim by implying that she did something to instigate the attack and therefore she would be less entitled to protection by the state. However, ethics of care is focused on protecting the victim and getting them the justice they deserve, so the questions that a judge should ask to utilize ethics of care would be focused on how

the victim was affected by the attack. For example, “did you want this person to talk to you?”, “how did you feel when they wouldn’t leave you alone?”, or “why did you want to leave?” to show the clear state of mind of the victim and it can be understood how much they were affected by the attack.

Third Pillar: Understanding Contextual Shifts

The third pillar of feminist judging is understanding that context matters. Feminist judges are hyper aware of the fact that some things that might have been acceptable in the past are not anymore and vice versa. The point of this is mainly to consider the surrounding circumstances of a case to understand completely the factors that influenced it in anyway. This consideration is important because it is difficult for societies to move on from tradition or past norms; usually change is fought against in hopes of allowing older beliefs to persevere for the purposes of security and feeling grounded. Feminist judges understand that while the past does not dictate the future, it does influence it, and they actively confront this influence when deciding cases. Other factors that influence context are country, culture, and laws. For example, some beliefs or practices may be acceptable in only a few countries or may be a part of certain cultures.

An example of this is homosexuality and homophobia in American culture. In the past, homophobia was widespread and acceptable due to many cultural and religious influences. Homosexuality was viewed as an abomination, something that needed to be fixed. Before same-sex relationships and marriage were legalized, feminist judges would have used understanding contextual shifts to determine the legality of homosexuality. Feminist judges would recognize that, although homophobia is a big part of American culture and has persisted throughout hundreds of years of legislation in the country, it is still unconstitutional to prohibit homosexuality because same-sex couples would then be denied the same equality under the law as heterosexual couples. The primary reasons for homophobia are religious, but the constitution also calls for separation of church and state. Feminist judges would understand that homosexuality does not harm anyone, and so there are no good reasons to continue to suppress it. Since there are no reasonable objections to homosexuality, of course it should be legal for equality purposes. By not allowing same-sex couples to get married, they were denied the financial and social benefits of marriage that were allowed to heterosexual spouses, thus creating inequality under the law. A feminist judge would recognize this, whatever the current societal beliefs may be, and deem the ban on same-sex marriage unconstitutional.

An instance in which contextual shifting is used in court is when courts go back and overturn previous cases or replacing them with updated rulings. An example of this is the Supreme Court cases of *Plessy v. Ferguson* (1896)³ and

Brown v. Board of Education (1954)². In *Plessy*, the court ruled that racial segregation in schools was not unconstitutional if the facilities were equal in quality. In *Brown*, the court ruled that racial segregation in schools was unconstitutional no matter the quality of the facilities. This ruling partially overruled decisions made in *Plessy* and was made because this time they paid special attention to the Fourteenth Amendment’s Equal Protection Clause. This shows the understanding of contextual shifts: as society progressed more people recognized that racial segregation was wrong and promoted discrimination and inequality in communities. And instead of dismissing *Brown* because a decision had already been made decades earlier on the issue of racial segregation in schools, the Supreme Court reconsidered it and came to a different, more just, conclusion.

What Are the Challenges of Feminist Judging?

There are some inherent challenges with feminist judging. First, due to the name, many might assume that feminist judging is a biased practice which involves judges ruling based on their personal opinions instead of being neutral. However, it is called “feminist” judging because the three main pillars align with the core values of feminist movements; feminist judging is merely a different way to interpret the law and is implemented to ensure justice is achieved no matter the context.⁴

Another issue that arises is, when judging based on feminist ethics of care, many judges are criticized for being “too emotional.” By being more empathetic than judges typically have been, some assume that the resulting decision is less logical than if the emotions involved in a case were not considered. Being emotional is also considered to be a feminine thing and is routinely criticized, allowing people to attack the existence of feminist or women judges in the first place. Gilligan corroborates this challenge by explaining that people equate care with feeling and then contrast it to logic; they consider caring as something that is passive or diminishing⁸. However, care, just like logic, is an enhancing factor to justice. It ensures that the focus is directed towards the aggrieved parties, and that the law protects and upholds their rights and wellbeing. Care does not replace logic or take away from its potential in the judicial decision-making process, instead it adds to the scope of what that justice can bring by making it multi-faceted.

Judges are also consistently forced to deal with outdated laws that fail to accord with current day beliefs or values, making it extremely difficult to apply feminist judging. Some laws have biased language, and law enforcement officials and other judges can be biased as well. Feminist judges must navigate these obstacles to try and allow for more considerate approaches to cases. One judge reported using specified language to remove the rape culture embedded in the original interpretation of a high court case. In a case involving a man

becoming violent to influence women to have sex with him, the judge said the high court seemed like they were saying there was nothing “remarkable” about that when comparing it to the case at bar. However, the judge responded with, “the High Court obviously didn’t mean that because. . . that would be such a stupid thing to say that that was obviously not what they were saying.” The judge then added on how they mean it’s not “so exceptional so as to fall in the similar fact test”⁹. By switching the language in the analysis of the court case, the judge removed the misogynistic language and was still able to maintain the original meaning and use the case appropriately.

Feminist judges working with historically encumbered constitutions, such as America’s, generally have a harder time due to the context in which the rights originally were written. In 1776 for example, a time where women and people of color had very few rights, a constitution written by white men was not going to provide much liberty for these groups. More than 250 years later, but with the same document, feminist judges must find ways to serve justice for victims and penalties for criminals while still upholding the laws put in place ages ago. Even if they do not have the ability to overturn archaic laws, judges can participate in progressive legal reform. Judges can openly criticize biased practices under the law to encourage implementing reform, and specifically criticize practices embodying misogyny, racism, and rape culture⁸.

Feminist Judging in Practice

I will present an analysis of *Dobbs v. Jackson* through a feminist judging perspective. First, *Roe v. Wade* started with two attorneys looking to overturn the Texas abortion ban based on its unconstitutionality—a violation of the right to privacy guaranteed in the due process clause of the 14th Amendment¹¹. The Supreme Court ruled in favor of *Roe*, and decided upon a trimester system in which the right to abortion would be dependent on the trimester state of the pregnancy. In the first trimester, abortions were completely the woman’s choice because first-trimester abortions are safer for the mother than birth is. In the second trimester, due to abortions being more difficult, states were allowed to impose regulations that were strictly due to increased risks to the mother’s health. In the third trimester, due to the fetus being viable outside the womb with medical assistance, states were allowed to restrict abortions except in cases of risk to the mother’s life or health. The following case, *Planned Parenthood v. Casey* (1992)¹², changes the trimester schedule because the viability of a fetus had started weeks earlier due to medical advancements, and abortion rights were going to be considered under the undue burden standard instead of due process. The undue burden standard states that the government does not have the ability to impose overly burdensome or restrictive regulations on a person’s fundamental rights. In *Casey*, it was argued that state

restrictions on abortion enforced traditional gender roles and violated a person’s right to personal family decisions, both of which are protected in the undue burden standard. In 2022, *Roe v. Wade* was overturned with *Dobbs v. Jackson* on the grounds that the constitution does not include the right to abortion, nor do any constitutional provisions protect abortions. The case argues that the due process clause of the 14th Amendment, upon which *Roe* depends, does not apply due to the absence of abortion rights in our nation’s history. Since no such rights were so rooted, *Roe* was overturned.

The supreme court failed to apply principles of feminist judging. Although certain aspects of intersectionality, feminist ethics of care, and understanding contextual shifts were applied, they were not given the proper weight or appropriate level of careful consideration to affect the majority opinion and outcome of the case.

Intersectionality: Lacking in the Overturning of *Roe*

With access to abortion now unprotected by the Constitution, states have the right to ban or restrict abortion access as they please. The issue with this is that certain groups of people are disproportionately affected by these restrictions. The court did not consider how restricted access to legal abortions would affect these groups. Among the reasons people give for getting abortions, 40% do so because they cannot afford to raise a child¹³. Women who are financially able can travel to other states to receive an abortion. But traveling for an abortion is not a viable option for that forty percent because they cannot afford it. When there is no safe, legal, economically viable option for someone to obtain an abortion, they resort to unsafe, illegal options. People can take large amounts of medication to terminate their pregnancies, try to perform abortions themselves, or receive abortions by unlicensed individuals. Unsafe abortion options like these can cause severe, permanent damage to a person’s body and can even result in death¹⁴.

These so-called “back alley” abortions burden women of color and poor women disproportionately. The Supreme Court did not take into consideration how overturning *Roe* would affect people on different levels, and instead looked at the effects in a blanket manner. The Constitution is meant to uphold equality and justice for all people; however, by its very nature, restricted abortion access does not affect women equally.

Ethics of Care: Overlooked in the Overturning of *Roe*

One of the most significant issues with overturning *Roe* is where the focus of the judges was directed. Many argue that the trimester system and viability of the fetus conditions originally established in *Roe* placed the protections on the unborn fetuses rather than the women who were seeking the abortions. Other people completely ignore the fetus to separate

the mother and fetus biologically to better defend the woman's choice. The reality is, however, that the mother and fetus are connected physically and psychologically, and they must be considered in relation to each other when looking at abortion. The mother and fetus cannot be seen as two separate entities because they are connected and intertwined. Ethics of care, when applied here, should focus on relational values.

According to Jonathan Herring in 2019, where relationships are dependent upon care, the law should protect and promote healthy versions. But when relationships do not involve care, or care that is coerced or forced, the law should seek to offer other options in which a caring relationship might prevail¹⁵. This means that when someone has an unwanted pregnancy, the pregnancy can be reasonably sacrificed for the purpose of upholding other caring relationships in that woman's life. This mother might not be able to care for the child in such a way that a child should be cared for; whether a woman is not financially stable, still in school, lacking in support from others, etc., she is not prepared to properly raise a child. Further, if she did have the child after the unwanted pregnancy, she might have to sacrifice other caring relationships in her life for that child. The following example serves to illustrate this point: a woman and her partner want to have children in the future, but neither of them are financially nor mentally able to at the moment. They want to raise a child but cannot do so properly in the positions they are both in, so she gets an abortion and gives both her child and her partner chances for better, more caring relationships in the future. Alternatively, consider the case of a woman who has gotten pregnant but has a medical condition that makes pregnancy and birth possibly fatal for her. She already has children at home, and risking her life is not something she wants to do for the sake of the unborn fetus. Many of the reasons women give for seeking abortions pertain to the concern that they might need to sacrifice caring relationships for non-caring relationships. They want to be good parents to their children, and want to uphold existing responsibilities of care, which they cannot do if they have to raise a child.

This emphasis on uncoerced caring relationships also means that when a wanted pregnancy comes about, the pregnancy should be protected. The relationship between parent and child is inherently more caring than when a pregnancy is unwanted, whatever the motivations are for not wanting that child. A parent should be able to care for their child in the way they wish to do so, and they will have thought out finances, other relationships, and most other factors in their lives already. The care in wanted pregnancies is uncoerced and has greater moral value than care that is coerced¹⁵. The law should promote and support healthy, caring relationships. Factors like poverty and ill health can inhibit a parent's ability to care for a child; therefore, abortion can be a positive good for these people. Without abortions, unhealthy relationships can develop where they otherwise would never have arisen.

Further, the focus of the care must be on the woman, and on her pre-existing relationships and commitments. Where an unwanted child is carried to term, there are few resources to help the mother and child afterwards. Child support is often unpaid or inadequate, and taking leave from work might not be possible; a pregnant woman or new mother might also need to drop out of school. If a child is given up for adoption, that entails even more complications. The foster care system is often unsafe for children; foster homes can be unhealthy, and there is no guarantee that a child will be adopted. The prospect of unpleasant outcomes exact deep mental and physical tolls on all parties involved, and again do not promote caring relationships. The law should promote and protect caring relationships above all else from an ethics of care standpoint.

However, by far the most compelling ethics of care argument for abortion is this: no person is required under the law to give their body to someone else; consent must be given for someone to use another person's body. You are not required to donate blood, organs, or stem cells to anyone else, even your own child. Not even a deceased person's organs can be unless they produce consent through a donor card; even if you are the only person who has what another person medically requires, and they will die without your bodily assistance, you are still not required under the law to help them. You must give consent before anyone else uses your body. So why would we apply different reasoning to pregnant women? In an unwanted pregnancy, the woman did not give consent for the usage of her body for nine months, as well as birth and the postpartum stage. If the law is to remain consistent, then it cannot require women to give up their own bodily autonomy for the life of the fetus. Why should pregnant women be treated differently under the law than every other person? Herring emphasizes that this does not at all mean the life of the fetus is valueless; rather, it means that the value of that life cannot prevail over the rights possessed by another¹⁵.

Understanding Contextual Shifts: Not Understood in the Overturning of Roe

One of the most prominent arguments against nationwide abortion rights is, first, the absence of abortion in the Constitution. Second, it is that the Due Process clause under the 9th amendment, in consideration of which Roe was originally deemed constitutional, is no longer regarded as acceptable reasoning; there is no long-standing presence of abortion rights, or support for them, in our nation's history. These are the two main reasons why Roe v. Wade was overturned, according to the majority opinion of the Supreme Court in Dobbs v. Jackson¹⁶. The majority failed to take into account how context has shifted dramatically since the Constitution was written, and in recent decades abortion has become generally accepted.

The Constitution was written and adopted more than two

hundred years ago by a much different culture facing much different circumstances. The people who wrote it were white and male; they were slave-owners and denied women and people of color basic human rights. Women and minorities were extremely disadvantaged at the time the Constitution was written. Therefore, originalism, the practice of interpreting the Constitution according to the founders' perspective, is very dangerous for minority groups.

The founding fathers had no consideration for providing equal opportunity for all Americans, so it is reasonable to assume that abortion rights, which implies compassion and care for women, would not be noted or protected by a document written by and for rich white men. Nevertheless, abortion actually was legal at the founding of this country. Midwives regularly performed abortions for women through herbal medicines or minor surgeries before "quickening" (a stage where fetal movement became detectable by the mother). Abortion was widely accepted as a normal part of medicine and as a real option for pregnant women. But this changed, not for religious or political reasons as we see today, but instead for capitalistic reasons. The American Medical Association (AMA) was led by physicians who desperately wanted to control the pharmaceutical business in America. In 1857, they launched an attack at unregulated abortions through letter-writing campaigns to lawmakers by convincing them that there was medical proof that life began at conception, rather than at quickening. This was followed by abortion bans across the country within just twenty years. Illegal abortion rates rose especially during the Great Depression, when doctors were sympathetic and understanding to women who did not want to carry out their pregnancies in that economic calamity. After World War II, however, when gender roles were reinforced in full, women were expected to stay home and have their babies. Thus, abortion regulations were once again tightened. Starting with the early 1960's, due to outbreaks of birth-defect related diseases, abortion regulations were again loosened, and soon after *Roe v. Wade* was passed by the Supreme Court. Following *Roe* were many cases reinforcing and diminishing what was originally established, until we finally reached the complete overturn of *Roe* in 2022 with *Dobbs v. Jackson*¹⁷.

As we can see, there is a very long-standing presence of abortion in America, despite many legislative changes over the past two hundred years. But regardless of all this history, society's morals and attitudes change over time. The past demonstrates this much. Whether or not an issue has a history, and regardless of the popular attitude about it originally, judges must consider the present circumstances and present attitudes. We should not be determining an extremely important constitutional decision by the ideologies of people who 1. were not affected by the issue, 2. had no consideration for the people who the issue did affect, or 3. did not even care about the

issue. Instead, a transformative constitution would be much more helpful to be able to consider the contextual shifts surrounding an issue because it would be tailored towards helping the people of that time and can be edited later to better suit their needs as society evolves. Interpreting the constitution in the way that the founding fathers intended is harmful towards pregnant women concerning abortion rights, and the lack of legal and safe options will result in the injury of a lot of women.

Feminist Judging Analysis of *Dobbs v. Jackson*

If the Supreme Court employed feminist judges, the minority dissent for *Dobbs v. Jackson* would have been the majority. The duty of the Supreme Court is to check and balance the government's use of power and protect the rights of minorities, or those who are otherwise neglected by laws set in place. This is not to imply that the Supreme Court did not consider the rights of women in these cases, but there not enough emphasis put onto these three feminist judging pillars for a fair outcome to ensue.

Firstly, abortion rights would have been argued on an equality basis¹⁸. The court should protect women's rights to bodily integrity and personal/familial privacy. States cannot force any person to offer their body for the life and protection of another. It does not matter the suffering of the other person or how much or how little of a toll it would take on that person's body, under the law a state cannot force someone to do any such thing. There is no difference when looking at a pregnant woman and her child. The child requires the mother's body to survive, but yet this still does not erase the fact that the mother has the right to or to not consent to this use, and the state must respect her decision either way. In the same way a state cannot force a woman to have an abortion, it cannot force someone to give birth, because both cases would be ignoring her consent for the use of her body. From a different perspective, a state also cannot force a man to get a vasectomy or refuse him the means to do so. It is unlawful for states to require the consent of another (the mother's doctors, partner, state, fetus, etc.) for the mother to receive an abortion. Pregnant women must be treated equally under the law as any other person might be. Further, abortion restrictions do not even affect all pregnant women equally. Poor women, women of color, and other marginalized women face the effects of restricted abortion access or forced births more than otherwise privileged women. Women with lower incomes cannot afford to take time off work for pregnancy or travel to another state to get an abortion. They also likely cannot afford the medical care necessary to carry out pregnancy safely or give birth. Abortion restrictions in general reinforce gender stereotypes and stigma about the proper way of life for women. Once a woman becomes pregnant, aspects of her life such as rela-

tionships, job searches, promotions, travel, or any other aspect is immediately affected and oftentimes detrimentally if the woman has not been given the chance to plan properly. States cannot require women to give up the use of their bodies without consent just because they are women.

Secondly, the state's interest should be more focused in protecting life after birth for the mother and the child. States can be interested in fetal life, but it can never trump the woman's decision whether to carry the pregnancy to term. Up until after delivery, the fetus is a part of and is connected to the woman, and therefore her rights must still be considered. In not doing so, pregnant women are provided with specialized deprivation of rights, and whatever reason a state might have for protecting fetal life, it must yield to the woman's fundamental rights to bodily integrity. After a child is born, the woman's body is no longer needed for their survival, and the state has every right and duty to protect that life. While states cannot use their power to force birth, they can provide better services to encourage women to not choose abortions. They can offer low-cost prenatal care, low-cost (and high quality) childcare, professional support for women returning to the workforce after giving birth, or assistance for women still in school¹⁸. These would all combat common motivations for women seeking abortions. Women who cannot afford a child on their own might be more compelled to give birth if the cost was minimized. Women who cannot raise a child in their current state might give the child up for adoption instead of an abortion if she believed the foster care system or other childcare options would treat that child well and help them live a normal life. Women who prioritize their professional life, if ensured that she would be able to return to work in the same position with the same pay and opportunities, might consider giving birth. And women who want to finish school to be able to live the life they want might not choose an abortion if she did not have to fail her classes or drop out. All these scenarios are ways that the state can use its power to influence women in the direction they want to. However, the final decision must always be up to the woman.

Conclusion

Feminist judging is a specific judicial practice and approach to finding further justice under the law, despite the challenges. The three pillars are intersectionality, ethics of care, and understanding contextual shifting. Intersectionality is understanding the multiple facets that affect a case and situation and acknowledging that these different factors contribute to oppression and privilege faced by the parties involved. Ethics of care is the practice of incorporating compassion and empathy into decision-making for the purposes of protecting victims and enforcing proper consequences onto perpetrators. Adding care into decision-making ensures that justice is truly found in

the process. Understanding contextual shifts is knowing how society evolves, and based on the time period and geography in which laws were written and are applied, they may need to be transformed to fit the current society they are existing in. This is done to ensure that the law can be updated to fit the needs of a community at any given time properly and to the best of its ability. The challenges associated with putting these three pillars into practice are that ethics of care are generally associated with being "too emotional" and cited with clouding logical and objective thinking. Feminist judges are also forced to make decisions under outdated and biased laws. This makes it extremely hard to go the extra step of including the pillars because the judges must still obey the law.

Concerning abortion, courts have routinely lacked the implementation of the pillars of feminist judging, but most notably with *Dobbs v. Jackson* in the Supreme Court. Intersectionality was not considered highly enough. Certain demographics of women, such as women of color and lower-class women, are affected more heavily than others by restricted access to abortions, which allows states to uphold inequality within the law. Ethics of care were lacking because bodily autonomy is ensured under the law for everyone except pregnant women. Every other law requires consent from a person before another party uses their body, but the same standards were not applied to pregnant women in *Dobbs*. Contextual shifts were not considered, as the majority opinion emphasized time and time again that the constitution does not provide abortion protection and therefore it must not be added. It was not considered, however, how the beliefs of society have changed since, and the mindset in which the constitution was written has been drastically changed. If the Supreme Court took a feminist judging approach to this case, abortion would be protected under the constitution. States would recognize that upholding a law that does not affect all citizens equally is unconstitutional, they would recognize that pregnant women deserve the same rights to bodily autonomy as guaranteed to all other citizens, and they would recognize that laws written centuries ago should be adapted to reflect modern society, and laws therefore should be transformative.

These three pillars of feminist judging are all meant for providing true equality under the law. They are not specific to feminist judges; they can be applied by every single judge to serve justice to all. Feminist judging is a deeper analysis of cases and circumstances and can only stand to help integrate real and uniform equality in society.

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