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The Feminist-Neutrality Paradox

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Articles

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ABSTRACT

This Symposium asks us to contemplate women's role in the judiciary. Female judges are vital to a well-functioning third branch of government given the long-documented link between diversity and judicial legitimacy. Beyond appearances, however, the Article explores the reasons why so many empirical studies have shown that judges do not decide cases differently on account of their gender. This Article describes how women must act like men to gain acceptance into the male-dominated judicial sphere and then are expected to apply precedent that has been overwhelmingly decided by men. In other words, the decisions of female (and feminist) judges are largely the same as those of their male counterparts because of systemic pressures on female judges to conform to the unstated male norm under the guise of neutrality and the rule of law. These observations are not new. But in the wake of *Dobbs v. Jackson Women's Health Organization*—the case that erased the constitutional right to abortion with little concern for the appearance of judicial neutrality or stare decisis—this Article asks whether feminists should stop playing by the rules.

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INTRODUCTION

For the last several decades, many have wondered whether female judges[1] decide cases differently than their male counterparts. Although scholars initially hypothesized that women would bring a different voice to their judicial analyses, the consistent answer to the empirical question of whether it matters if a judge is a woman has been "no."[2] Women do not decide cases differently than men, either in substance or method.[3] The question remains, however, why not?

On the one hand, our system of applying precedent to decide cases seems to itself easily explain why the sex of the decision-maker does not matter to the outcome of a legal dispute.[4] Many argue that this is as it should be. Neutral judging legitimizes the

1. This Article refers to "men" and "women" to differentiate between persons who identify as male and female, respectively, but these monikers are not intended to suggest that gender is only binary. Gender is a fluid concept, but for purposes of this Article and consistent with the terminology of prior research about the differences between "men" and "women," the two terms are used in a binary way.

2. *See e.g.*, Jeanine E. Kraybill, *Women of SCOTUS: An Analysis of the Different Voice Debate*, *in* OPEN JUDICIAL POLITICS 92, 94–96 (Rorie Spill Solberg et al. eds., 2020); Ronen Perry, Oren Gazal-Ayal & Chen Toubul, *"He Said, She Said": With a Twist*, 69 SMU L. REV. 3, 11 (2016); Sue Davis, *Do Women Judges Speak "in a Different Voice?" – Carol Gilligan, Feminist Legal Theory, and the Ninth Circuit*, 8 WIS. WOMEN'S L.J. 143, 145 n.5 (1992–1993). *But see* Theresa M. Beiner, *How the Contentious Nature of Federal Judicial Appointments Affects "Diversity" on the Bench*, 39 U. RICH. L. REV. 849, 857 (2005).

3. *See* Davis, *supra* note 2, at 171; Perry, Gazal-Ayal & Toubul, *supra* note 2, at 6–7.

4. *See* Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1885–86 ("The imagery of Justice is emblematic of many of these hopes. The judicial icon is a goddess-like figure, frequently shown with scales, sword, and, after the sixteenth century, with a blindfold.").

court as an institution and ensures stability in the rule of law. As the theory goes, we do not want judges making decisions based on their personal preferences or ideological leanings.[5]

On the other hand, for women even to be elected or appointed as a judge, they must act like men.[6] Women judges are expected to project strength and sternness, and to dutifully apply precedent to prove that they belong on the bench alongside men.[7] But precedent is not viewpoint neutral; rather, because cases decided in the first two centuries of our nation's history were the exclusive purview of white men, precedent most often reflects the white male view.[8] The debate surrounding this tension—the paradox between our desire for neutrality, stability, and legitimacy, and our desire to rethink how we approach legal decisions with the views of those previously left out in mind—has been waging since at least the 1980s.[9]

Then, in June of 2022, the Court decided *Dobbs v. Jackson Women's Health Organization*.[10] The majority in *Dobbs* used originalism to justify its holding that "[t]he Constitution makes no reference to abortion," and that the right to an abortion should be a matter of state law alone because that is how abortion was treated for the first 185 years of the Republic.[11] But originalism is not neutral. "[P]rioritizing the original understanding of the Constitution, to the extent such a thing is discernible, is to elevate the white, male, propertied voices of the Framers to the exclusion of essentially all others."[12]

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5. *See* Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891, 914 (1995). *See also* Sandra Day O'Connor, *Justice Sandra Day O'Connor on Why Judges Wear Black Robes*, SMITHSONIAN MAG. (Nov. 2013), https://bit.ly/2ErFup8 [https://perma.cc/G69B-P4K9].

6. *See, e.g.*, Hannah Brenner & Renee Newman Knake, *Rethinking Gender Equality in the Legal Profession's Pipeline to Power: A Study on Media Coverage of Supreme Court Nominees (Phase I, the Introduction Week)*, 84 TEMP. L. REV. 325, 331–32 (2012); Theresa M. Beiner, *White Male Heterosexist Norms in the Confirmation Process*, 32 WOMEN'S RTS. L. REP. 105, 136–37 (2011) [hereinafter Beiner II]; Beiner, *supra* note 2, at 851–52.

7. *See* Beiner, *supra* note 2, at 851.

8. Cynthia Soohoo, *Reproductive Justice and Transformative Constitutionalism*, 42 CARDOZO L. REV. 819, 861–62 (2021); Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 95 (1987).

9. *See* Minow, *supra* note 8, at 75 ("It is a paradox. Only by admitting our partiality can we strive for impartiality.").

10. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

11. *Id.* at 2240, 2242.

12. G. Alex Sinha, *Original(ism) Sin*, 95 ST. JOHN'S L. REV. 739, 741 (2021); *see also* Lisa Schultz Bressman, *The Rise and Fall of the Self-Regulatory Court*, 101 TEX. L. REV. 1, 43 (2022) ("The stronger the originalist case, the weaker the stare decisis constraint.").

Stated another way, *Dobbs* chose viewpoint judging over the ideals of neutrality and stare decisis, knowing full well what the outcome would be. "Cast with an eye on protecting the rights most valued by white, cisgender, propertied males," it is not at all surprising that "the U.S. Constitution and Bill of Rights failed to explicitly protect and ensure the rights needed by people who are pregnant, have the capacity to become pregnant, or choose to become parents."[13]

Arguably, the emboldened act of overturning 50 years of rights specifically afforded to women could only have been accomplished by a majority-male court.[14] Given that men and women do not empirically judge differently from one another, one might reasonably respond that the outcome in *Dobbs* is explained by political leanings rather than gender.[15] After all, it is no secret that *Dobbs* was the culmination of decades of high-stakes political campaigns to appoint pro-life Supreme Court justices specifically willing to overturn *Roe*.[16] But originalism in particular cannot be separated from gendered patriarchal preferences.[17] The *Dobbs* opinion laid bare the myths of neutrality and stare decisis.[18]

As someone disheartened by the outcome in *Dobbs*, it is easy to want to suggest that we throw off the gloves and respond to *Dobbs* with a feminist campaign to commandeer the bench.[19] I caution against that for the reason that asking liberal judges to opine in accord with their political leanings would result in a never-ending

13. *See* Soohoo, *supra* note 8.

14. *See e.g.*, Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. (forthcoming 2023), https://bit.ly/3LeHlyP [https://perma.cc/Q3HN-LMHS] (positing that conservative political opposition to feminist aspirations became a substitute for overtly opposing feminism in public).

15. Beiner II, *supra* note 6, at 121–22 (finding political affiliation to be the best predictor of decision-making in sex discrimination cases and those involving women's issues, noting that for women's issues, male judges were actually more supportive of the woman's position than female judges); Beiner, *supra* note 2, at 856 (describing the "attitudinal model" of political science, which points to political ideology as best predictor of judicial decision-making).

16. *See, e.g.*, Jess Bravin, *The Conservative Legal Push to Overturn* Roe v. Wade *Was 50 Years in the Making*, WALL ST. J. (June 24, 2022, 6:54 PM), https://www.bit.ly/3lrWOBa [https://perma.cc/44AE-26MM].

17. CAROL GILLIGAN & DAVID A.J. RICHARDS, DARKNESS NOW VISIBLE: PATRIARCHY'S RESURGENCE AND FEMINIST RESISTANCE 47 (2018).

18. Siegel, supra note 14, at 13–14; Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1079–81 (2006).

19. *See* Brandon Hasbrouck, *Movement Judges*, 97 N.Y. L. REV. 631, 636 (2022) (calling for movement judges to help realize legal theories "in solidarity with collective struggle, such as Black Lives Matter or labor organizing").

cycle of the very destabilization that critics of *Dobbs* are currently up in arms about. However, it seems high time for women to stop acting like men when it comes to ascending to, or making decisions on, the bench. Instead of hiding feminist perspectives for fear of appearing weak or unpopular, it is time to embrace feminist legal theories and to do so transparently, even loudly. Harvard Law School Professor and former Dean, Martha Minow, called for a similar solution to the neutrality paradox in 1987, when Justice Sandra Day O'Connor was still the only woman justice on the Supreme Court:

> Through deliberate attention to our own partiality, we can begin to acknowledge the dangers of pretended impartiality. By taking difference into account, we can overcome our pretended indifference to difference, and people our worlds with those who can surprise and enrich one another. As we make audible, in official arenas, the struggles over which version of reality will secure power, we disrupt the silence of one perspective, imposed as if universal.[20]

Although there is reason to despair when a call for multi-perspectivity in 1987 is still not only relevant, but perhaps critical in 2023, the arc of the moral universe calls.[21]

Part I of this Article looks at whether women judge in a different voice. Given the empirical proof that they do not, Part II asks why that is, hypothesizing that women engage in social masking to both get and do their jobs. Part II also highlights the paradox presented by our system's desire for at least the appearance of neutrality, on the one hand, and the desire for diverse voices to ensure broader levels of real and perceived justice on the other. Using the *Dobbs* opinion as an example, Part III then points out that when the traditionally male viewpoint is used, such as in originalist judging, neutrality is more easily cast aside than when the viewpoint is a feminist one. Part IV concludes by calling for somewhat of a middle ground: judging using feminist legal methods out loud[22] in hopes of leading to a more examined jurisprudence, and one that owns up to its complicated relationship with neutrality.

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20. *See* Minow, *supra* note 8, at 95.

21. *See* Martin Luther King, Jr., Remaining Awake Through a Great Revolution (Mar. 31, 1968) ("We shall overcome because the arc of the moral universe is long, but it bends toward justice.").

22. *See generally* Alexa Z. Chew & Rachel Gurvich, *Saying the Quiet Parts Out Loud: Teaching Students How Law School Works*, 100 NEB. L. REV. 887 (2022) (explaining a law school course aimed at teaching the structural inequities of law school).

I. IN HOPES OF A "DIFFERENT VOICE"

When Carol Gilligan's *In a Different Voice: Psychological Theory and Women's Development* was published in 1982, a sales rep from the publishing house took her out to lunch to try to figure out why such a "boring" book was selling so fast.[23] Gilligan, then a psychology professor at Harvard, had set out to determine whether women's voices were being heard in psychology research:

> I was the only woman in my house . . . . The dog was male. The cat was male. Everybody at Harvard was male. It was sink or swim. You could say I was in a situation where the issue was heightened. What would it mean to bring a different voice into this household, this university, this conversation? Would it alter the conversation or stay outside and in the margins?[24]

To test her theory, Gilligan posed moral dilemmas to girls and boys, women and men.[25] Not coincidentally, Gilligan studied, in part, how men and women approached the decision of whether to have an abortion.[26] Gilligan found that girls and women were more likely to consider others in their decision-making process, while boys and men were more likely to look to abstract, universal principles to decide an issue.[27]

Gilligan described the differences between men's and women's decision-making as the male "logic of the ladder" and the female "web of connection."[28] "Men tend to see and to judge human interactions as the contractual arrangements of individuals seeking position in a hierarchy,"—*a ladder*—while women "tend to see the same interactions as part of ongoing, sharing connections in a network of relationships"—*a web*.[29]

Many critiqued Gilligan's contrasting ladder and web as too essentialist.[30] Gilligan's critics were concerned that dichotomizing

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23. *See* Penelope Green, *Carefully Smash the Patriarchy*, N.Y. TIMES (Mar. 18, 2019), https://nyti.ms/2FdL2kt [https://perma.cc/G5EQ-PY2G].

24. *Id.*

25. *See* Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, in LEGAL ETHICS AND LEGAL PRACTICE: CONTEMPORARY ISSUES 27–28 (Stephen Parker & Charles Sampford eds. 1995).

26. See Pamela S. Karlan & Daniel R. Ortiz, *In a Different Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda*, 87 NW. U. L. REV. 858, 886–87 (1993).

27. Davis, *supra* note 2, at 144–45.

28. *See* Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 462 (1984).

29. Hon. Patricia M. Wald, *The Role of Morality in Judging: A Woman Judge's Perspective*, 4 LAW & INEQ. 3, 7–8 (1985) (citing Karst, *supra* note 28).

30. Davis, *supra* note 2, at 145–46 n. 6–7.

women as consistently different from men would reinforce negative stereotypes about women and would also drown out diverse viewpoints among women themselves.[31] Nevertheless, Gilligan's different voice theory became a jumping-off point for legal scholarship about the effect of women in the legal profession and the judiciary.[32]

In 1984, UCLA law professor Kenneth Karst explained that, as applied to law, the male logic of the ladder "tends to produce a morality of rights, an abstract hierarchy of rules to govern the competition of highly individuated individuals."[33] Viewing law from the ladder, "judicial review is an aberration, finding its only legitimate justification in the original contract, the Constitution as written and intended by the framers."[34] When viewing law from the web, on the other hand, judges become "'sentient actors,' with their own responsibilities to real people . . . . They properly see themselves not as enforcing a bargain struck in 1787 or 1866 but as helping to make a nation."[35]

Given the idea that women might judge in the female voice associated with the web of connection, scholars began to predict that, with the entry of more women into the legal profession, the whole profession would become more cooperative and substantively benefit women and other minorities in court.[36] Empirical research soon began to show, however, that women's addition to the

31. *See* Erika Rackley, *From Arachne to Charlotte: An Imaginative Revisiting of Gilligan's "In A Different Voice"*, 13 WM. & MARY J. WOMEN & L. 751, 764 (2007) ("Thus, while it remains pertinent to somehow capture the essence of the feminine, in actuality this encapsulation excludes the polytonality of women's voices."); Solimine & Wheatley, *supra* note 5, at 892–93 (calling for a more diverse judiciary, not one based on differences in judging but rather to remedy past discrimination against women and enrich the judiciary as a whole); Menkel-Meadow, *supra* note 25, at 30–31 ("Many feminists fear that valorizing women's differences will legitimate discriminatory treatment of women's difference and assign women to conventional . . . roles.").

32. *See* Davis, *supra* note 2, at 152–54; Menkel-Meadow, *supra* note 25, at 31–34; Cynthia Grant Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 FORDHAM L. REV. 249, 257–60 (1998); Sarah Westergren, *Gender Effects in the Courts of Appeals Revisited: The Date Since 1994*, 92 GEO. L.J. 689, 691–93 (2004).

33. Karst, *supra* note 28, at 462.

34. *Id.* at 501.

35. *Id.* at 502.

36. Solimine & Wheatley, *supra* note 5, at 892 n.4; Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 54–55 (1985); Susan Maloney Smith, Comment, *Diversifying the Judiciary: The Influence of Gender and Race on Judging*, 28 UNIV. OF RICH. L. REV. 179, 183 (1994).

judiciary does not, at least because of gender alone, matter to case outcomes.[37] The obvious next question is: why not?

II. WHY NOT?

In one of the first empirical studies to test Gilligan's theory as applied to women judges, political scientist Sue Davis offered two primary reasons why there did not appear to be much of a difference made by the influx of women to the judiciary: (1) Gilligan was simply wrong, or (2) the law itself and the legal profession make it nearly impossible for women to express their different voice.[38] There is truth to both of Davis's explanations.

A. Maybe Gilligan Was Wrong

It is possible that Gilligan's different voice theory has not held up as a practical matter because men and women are not so easily differentiated. Gender is fluid, not binary, and as Davis noted, "sometimes, some men judges also speak in that different voice."[39] In this way, Gilligan might well just have been wrong.

But Gilligan's theory was not originally intended to describe judicial rulings by male and female judges. The idea of a different voice was meant to awaken the field of psychology to a blind spot, having up until then assumed that male subjects would adequately and automatically represent women in psychological experiments. Gilligan sought to expose "the non-patriarchal voice, the emotive voice, the voice that speaks out of the affective life."[40]

Gilligan's different voice theory in psychology helped to fuel new theories in the legal field that came to be described as feminist legal methods.[41] Feminist legal methods ask that the decisionmaker pause to consider voices previously unheard in the law, favoring a flexibility of rules.[42] Feminist judging favors the web over the ladder: "Traditional legal methods place a high premium on the pre-

37. Kraybill, *supra* note 2, at 125–26; Solimine & Wheatley, *supra* note 5, at 897–06; Davis, *supra* note 2, at 171 ("The results presented here do not provide empirical support for the theory that the presence of women judges will transform the very nature of the law."); *but see* Rosalind Dixon, *Female Justices, Feminism, and the Politics of Judicial Appointment: A Re-Examination*, 21 YALE J.L. & FEMINISM 297, 312 (2010) ("Since at least the 1990s, however, the vast majority of studies have found a clear and statistically significant link between a judge's gender and voting behavior in gender cases.").

38. Davis, *supra* note 2, at 171.

39. *Id.*

40. Green, *supra* note 23.

41. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837–67 (1990).

42. *Id.* at 836, 888.

dictability, certainty, and fixity of rules. In contrast, feminist legal methods, which have emerged from the critique that existing rules overrepresent existing power structures, value rule-flexibility and the ability to identify missing points of view."[43]

For the last 20 years, the Feminist Judgments Project has attempted to demonstrate what feminist judging might look like in practice.[44] "Feminist judgments are 'shadow' court decisions rewritten from a feminist perspective, using only the precedent in effect and the facts known at the time of the original decision."[45] By applying feminist legal methods, the scholars involved in the Project show how feminist perspectives might have changed the legal reasoning or outcome in important cases while still remaining true to the law in place at the time of the decision.[46] Reimagining these opinions from the perspective of a judge sensitive to historical power dynamics and biased assumptions demonstrates what is possible when "neutral" judging and strict adherence to precedent gives way to more inclusive approach.[47] Stated another way, it starts to resemble judgments made with the web of connection in mind—what many originally hoped would emerge from increasing the number of women in the judiciary.

While the Feminist Judgments Project creatively shows us what could be, it is hard to find feminist judgments in real cases. "Decisional law at present contains judgments hostile to feminism, many more judgments that pay no attention to feminism, and every now and then a piece of judicial writing that moves a feminist agenda forward."[48]

The dearth of feminist judicial opinions likely is the product of a multitude of factors. Gilligan could just be wrong. Or, it could be that the pressure placed on women to act like men, first to become judges and then to prove that they belong in judicial spaces, has left us with a jurisprudence that continues the view from the ladder.

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43. *Id.* at 832.

44. Linda L. Berger et al., *Learning from Feminist Judgments: Lessons in Language and Advocacy*, 98 TEX. L. REV. ONLINE 40, 44 (2019).

45. Bridget J. Crawford et al., *Teaching with Feminist Judgments: A Global Conversation*, 38 LAW & INEQ. 1, 2 (2020).

46. *Id.*

47. Linda L. Berger et al., *Rewriting Judicial Opinions and the Feminist Scholarly Project*, 94 NOTRE DAME L. REV. ONLINE 1, 10–11 (2018). *See e.g.*, KATHRYN M. STANCHI ET AL., FEMINIST JUDGMENTS, REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (2016).

48. Anita Bernstein, *There's Feminism in Those Judgments*, 61 B.C. L. REV. E. SUPP. I.-112, I.-115 (2020).

B. Maybe Pressure to Conform Drowns Out Different Voices

"American law is predominantly a system of the ladder, by the ladder, and for the ladder."[49]

The American legal profession was comprised of almost entirely white men for the first 200 years of its now nearly 250-year existence and is still very much dominated by them.[50] To assimilate into such a male-dominated profession, women lawyers have had to act like men.[51]

In June 2018, two-thirds of Americans told the Pew Research Center that it is easier for men than women to get elected to high political offices.[52] Indeed, women seeking a judicial appointment or election as a judge have to have stronger credentials than their male counterparts; specifically, prior judicial, and often prosecutorial, experience.[53] Sadly, but not surprisingly, the path is even steeper for women of color.[54]

Beginning with President Carter, who in 1977 announced a commitment to diversifying the federal judiciary, presidents began to more consciously appoint women to the federal bench.[55] This has waxed and waned with different presidential administrations. Only 24 percent of President Trump's judicial nominees were women (Trump's nominees were also 84 percent white).[56] Now, two years

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49. Karst, *supra* note 28, at 462.

50. *See Women in the Legal Profession*, AM. BAR ASS'N, https://bit.ly/3SYmhhO [https://perma.cc/S7LT-NFYV] (last visited Apr. 22, 2023).

51. *See* Alissa Rubin Gomez, *The Mismeasure of Success*, 94 ST. JOHN'S L. REV. 927, 927 (2020).

52. Kelly Dittmar, *Unfinished Business: Women Running in 2018 and Beyond*, RUTGERS UNIV.: CTR. FOR AM. WOMEN & POL., https://bit.ly/3YxTd1E [https://perma.cc/9FJJ-HQPY] (last visited Apr. 22, 2023). Interestingly, in recent years, women running for state appellate court seats to challenge male incumbents actually have enjoyed a slight advantage with the electorate. Rebecca D. Gill & Kate Eugenis, *Do Voters Prefer Women Judges? Deconstructing the Competitive Advantage in State Supreme Court Elections*, 19 STATE POL. & POL'Y Q. 399, 411 (2019). *See also* Brian Frederick & Matthew J. Streb, *Women Running for Judge: The Impact of Sex on Candidate Success in State Intermediate Appellate Court Elections*, 89 SOC. SCI. Q., 937, 950–51 (2008).

53. Beiner II, *supra* note 6, at 115. *See also* Dixon, *supra* note 37, at 337 ("In a world in which implicit gender bias persists, it will be more difficult, all else being equal, for the President to succeed in nominating and confirming strongly pro-feminist female rather than male judges.").

54. See John Gramlich, *Black Women Account for a Small Fraction of the Federal Judges Who Have Served to Date*, PEW RSCH. CTR. (Feb. 2, 2022), https://pewrsr.ch/3YA1ulM [https://perma.cc/94AF-7WJ4].

55. Stacy Hawkins, *Trump's Dangerous Judicial Legacy*, 67 UCLA L. REV.: DISCOURSE 20, 43 (2019).

56. *Id.* at 44; John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), https://pewrsr.ch/3L1uRdM [https://perma.cc/S2Q9-QMGW].

into President Biden's first term as president, three out of four federal judicial nominees have been women.[57] Even so, the number of female judges still lags well behind the percentage of women in the United States population, hovering at about one-third of the judiciary as compared to just over 50 percent of the population as a whole.[58]

Once nominated, women seeking a federal judicial appointment must face the Senate confirmation process. Data from Supreme Court confirmation hearings from 1967 to 2010 found that "male senators grill female nominees on their judicial philosophies . . . more so than they press male nominees."[59] When Justice Sonia Sotomayor famously described herself as a "wise Latina woman" during her confirmation hearings, she was accused of being biased and warned not to bring her viewpoint to her judging:

> I will not vote for—and no Senator should vote for—an individual nominated by any President who believes it is acceptable for a judge to allow their personal background, gender, prejudices, or sympathies to sway their decision in favor of, or against, parties before the court. In my view, such a philosophy is disqualifying.[60]

Meanwhile, Justice Samuel Alito said during his confirmation hearings that he would take his Italian heritage and his family's experience with discrimination into account when deciding discrimination cases, "[y]et, there were no repercussions—either in the media or during the confirmation hearings—as a result of Al-

57. Seung Kim & Colleen Long, *Biden Outpaces Predecessors with Diverse Judicial Nominees*, PBS NEWS HOUR (Dec. 29, 2022, 6:02 PM), https://to.pbs.org/3Ztlbx9 [https://perma.cc/LM9H-N3Y2].

58. Women currently make up approximately 38 percent of the federal judiciary. *Diversity of the Federal Bench*, AM. CONST. SOC'Y, https://bit.ly/3mEOj5J [https://perma.cc/AA5L-L2FN] (last visited Apr. 22, 2023). The number of women state court judges is similar: approximately 34 percent. *2022 U.S. State Court Women Judges*, NAT'L ASS'N WOMEN JUDGES, https://bit.ly/41WeqW3 [https://perma.cc/4Z9B-7336] (last visited Apr. 22, 2023). As of the latest census, women make up 50.5 percent of the U.S. population. *QuickFacts*, U.S. CENSUS BUREAU, https://bit.ly/3ZwV7Ba [https://perma.cc/3QTN-QLW2] (last visited Apr. 22, 2023). *See also* Jonathan K. Stubbs, *A Demographic History of Federal Judicial Appointments by Sex and Race: 1789–2016*, 26 BERKELEY LA RAZA L.J. 92, 113 (2016) (noting that Americans perceive the federal judiciary as more diverse than it really is, perhaps because of visibility bias resulting from "newsworthy" judicial appointments of women and minorities, contrasted with less public appointments of white men).

59. Christina L. Boyd et al., *The Role of Nominee Gender and Race at U.S. Supreme Court Confirmation Hearings*, 52 L. & SOC'Y REV. 871, 895 (2018).

60. Beiner II, *supra* note 6, at 131 (quoting then Senator Jeff Sessions of Alabama).

ito's discussion regarding how his ethnicity might impact his decision making."[61]

Most recently, during Justice Ketanji Brown Jackson's confirmation hearings, Fox News reported that Jackson was enduring an easy confirmation hearing compared with that of Justice Brett Kavanaugh, suggesting that Jackson's questioning about judicial philosophy was within bounds, whereas questions about Kavanaugh committing sexual assault in college were not.[62] Sotomayor and Jackson are both minority women. Their viewpoints threaten the white male norm, whereas white male candidates like Alito and Kavanaugh do not. "Members of the Senate Judiciary Committee and public commentators who attack such nontraditional candidates based on the diversity of perspective they bring . . . ignore the supposition of White male heterosexist norms that are presented as views of 'neutrality.'"[63]

Once on the bench, women must prove that they have the right to be there. One way to assure any naysayers is to show that, despite being female, they can judge like men. Women judges impose harsher criminal sentences than male judges.[64] Women also write longer opinions than their male counterparts and cite more precedent.[65] Women may be doing this to prove that they belong on the bench alongside men: "[R]esearch on the impostor phenomenon finds that, in fields dominated by a particular group, individuals who do not fit into the profession's stereotype may adopt perfectionistic tendencies and set exceptionally high standards for their work, in order to demonstrate they have legitimately earned their position."[66]

Of course, most women judges are just trying to do their jobs the way that they have been told they should. Judges are told early on—starting in law school if not before—that the quintessential es-

61. *Id.* at 136–37.

62. Marisa Shultz & Tyler Olson, *Ketanji Brown Jackson hearing decorum far cry from explosive Kavanaugh confirmation: "Behaving Themselves"*, FOX NEWS (Mar. 23, 2022), http://bit.ly/3Fd7yd9 [https://perma.cc/FE64-4EHP] ("Jackson has faced tough and substantive questions on the law and judicial philosophy. But there have been no outbursts, interruptions or character attacks.").

63. Beiner II, *supra* note 6, at 142.

64. Debra Cassens Weiss, *Does age and gender affect judges' sentences? New study suggests nuanced answer*, AM. BAR ASS'N J. (Sept. 17, 2020, 12:43 PM), http://bit.ly/3ypWN3y [https://perma.cc/T85B-WJZF]; *Building a More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS (Oct. 3, 2019), http://bit.ly/3kWGKa8 [https://perma.cc/Y2VL-FWHU].

65. Laura P. Moyer et al., *"All Eyes Are on You": Gender, Race, and Opinion Writing on the US Courts of Appeals*, 55 L. & SOC'Y REV. 452, 464 (2021).

66. *Id.* at 453.

sence of judging is neutrality, and, relatedly, that judges ensure the rule of law by adhering to precedent. The result, however, is that there is little room for the female voice to emerge.

C. The Added Pressure of "Neutrality" and Stare Decisis

In the classical model of judging, judges are supposed to be neutral and impartial.[67] "The idea that judges are supposed to be detached neutral and independent arbiters of the law is deeply ingrained in United States law and culture."[68] For judges who bring outsider perspectives to the bench, including women, they in particular are encouraged to "'strip down like a runner' in order to execute faithfully the judicial oath."[69]

Related to neutral judging is the idea of stare decisis—adherence to the law as it has previously been decided. Like impartiality, stare decisis is highly valued in the American legal system and by the American public.[70] Stare decisis promotes judicial efficiency, ensures stability in the rule of law, and enhances the legitimacy of the judicial branch.[71] "Without stare decisis—that is, adherence to institutional precedent—courts would rule according to whatever their current membership happens to believe about the law."[72]

But judging is not, and never has been, neutral.[73] The law is a human construct, and the vast majority of the humans who constructed it have been white men. To state the obvious, then, expecting judges to dispassionately apply previously decided cases over and over again further cements the viewpoint of the white men who

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67. *See supra* note 5.

68. Natalie Gomez-Velez, *Judicial Selection: Diversity, Discretion, Inclusion, and the Idea of Justice*, 48 CAP. U. L. REV. 285, 301–02 (2020).

69. Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 457 (2000) (decrying the "impartiality myth" as hampering "the potential for a racially diverse judiciary to bring diverse perspectives to judging"); *see also* Edward E. Sampson, *Justice and the Neutral State: A Postmodern, Feminist Critique of Lehning's Account of Justice*, 7 SOC. JUST. RSCH. 145, 148 (1994).

70. Bressman, *supra* note 12, at 4–5 ("Of the rules governing the Court's decision-making, stare decisis is the most foundational. . . . Stare decisis has been the single most defining feature of the Court, so deeply rooted in the country's history and collective consciousness that it is essential to properly describe, let alone justify, our legal system.").

71. *Id.* at 33 (citing Glen Staszewski, *Precedent and Disagreement*, 116 MICH. L. REV. 1019, 1019 (2018)).

72. Richard M. Re, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. 824, 825 (2023).

73. *See e.g.*, Jennet Kirkpatrick, *Fairness has a face: neutrality and descriptive representation on courts*, POL., GROUPS, & IDENTITIES 803, 803–11 (2020); Chemerinsky, *supra* note 18, at 1073.

decided those cases in the first place. "[S]tare decisis can mask what is really a masculine viewpoint."[74]

Even so, stare decisis "is not 'an inexorable command' requiring absolute adherence to prior precedent."[75] While scholars have tried to articulate when stare decisis should control and when precedent should instead be overturned, no one theory has emerged.[76] For women judges, this potential flexibility presents a paradox. Aiming to appear neutral and faithful to the common law as they find it is necessary for women judges to appear legitimate, yet knowing that neutrality is a myth, places women judges in the uncomfortable position of reinforcing dominant white male norms in the pursuit of legitimacy.[77] "[I]f I pretend to be impartial, I hide my partiality; however, if I embrace partiality, I risk ignoring you, your needs, and your alternate reality—or, conversely, embracing and appropriating your view into yet another rigid, partial view."[78]

This is the tension between the ladder and the web. And while various legal scholars have called on judges to consider flexible viewpoint judging in light of the partiality of existing law, "[o]utside the pages of the law reviews, constitutional law thus far knows only the vocabulary of the ladder."[79]

Dobbs v. Jackson Women's Health Organization has changed the conversation.

III. ONLY FEMINISTS PLAY BY THE RULES

Dobbs is the decision that was first leaked and then officially handed down in June 2022, reversing 50 years of precedent and erasing the constitutionally guaranteed right to an abortion established in *Roe v. Wade*.[80] *Dobbs* held that the Due Process Clause of

74. Leslie A. Gordon, *A Different View: New Project Rewrites SCOTUS Opinions from A Feminist Perspective*, AM. BAR ASS'N J. (Feb. 2015), https://bit.ly/3L0raDB [https://perma.cc/7BBR-RSML]; Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493, 510 (2013) (describing the question that remains after legal realism bursts the neutrality bubble as "how much partiality can be tolerated before rule of law objectives are thwarted to an unacceptable degree"). For an interesting discussion about how to handle partisan and political judging at the Supreme Court level, see David Orentlicher, *Judicial Consensus: Why the Supreme Court Should Decide Its Cases Unanimously*, 54 CONN. L. REV. 303, 318 (2022).

75. Bressman, *supra* note 12, at 33 (citing Payne v. Tennessee, 501 U.S. 808, 828 (1991)).

76. *Id.* at 33–34.

77. Hawkins, *supra* note 55, at 42; Minow, *supra* note 9, at 81.

78. Minow, *supra* note 8, at 76.

79. Karst, *supra* note 28, at 503.

80. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2246 (2022).

the Fourteenth Amendment does not guarantee a right to abortion because such a right is neither in the Constitution's text nor "deeply rooted in our history and tradition" or "essential to our Nation's scheme of ordered liberty."[81] *Dobbs* criticized *Roe* for relying "on an erroneous historical narrative" and for engaging in "the imposition of extraconstitutional value preferences."[82] The *Dobbs* majority then overruled *Roe* by engaging in its own review of the history of abortion and replacing 50 years of reaffirmed precedent with the majority's pro-life value preferences.[83] It tossed aside arguments of modern science, of equal protection, of women's stories and worries and fears, reinstating normative values from centuries past without concern for the views of those who were not at the table at the time—women.[84]

The majority in *Dobbs* reached its decision by relying on originalism as an interpretative method.[85] Originalism looks to the intent of the Framers to discern the original meaning of the Constitution and maintain original meaning in modern circumstances.[86] Although originalism purports to be value-neutral, originalism is a particular kind of viewpoint judging: It attempts to discern the intent of the white male voices of the Constitution's authors.[87] In other words, originalism is not neutral.[88] Originalism is a preference

81. *Id.* (internal citations omitted).

82. *Id.* at 2247–48, 2266, 2271.

83. *Id.* at 2248–65.

84. *Id.* at 2324–25 (Breyer, SOTOMAYOR, & KAGAN, JJ, dissenting) ("What rights did those 'people' have in their heads at the time? But, of course, 'people' did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation.").

85. Siegel, *supra* note 14, at 1; Michael Waldman, *Originalism Run Amok at the Supreme Court*, BRENNAN CTR. FOR JUST. (June 28, 2022), https://bit.ly/3kSk62K [https://perma.cc/MQB2-PECC].

86. Sinha, *supra* note 12, at 791.

87. *Id.* at 742. *See also Dobbs*, 142 S. Ct. at 2328 (Breyer, SOTOMAYOR, & KAGAN, JJ, dissenting) ("And eliminating that right, we need to say before further describing our precedents, is not taking a 'neutral' position . . ."); Mary Ann Case, *The Ladies? Forget About Them. A Feminist Perspective on the Limits of Originalism*, 29 CONST. COMMENT. 431, 448 (2014) ("I am much more worried about an originalist theory that will find coverture and the elimination of women from public life constitutional.").

88. Siegel, *supra* note 14, at 6 ("Originalism took shape as a value-laden, goal-oriented politics in the Justice Department of the Reagan Presidency before originalism was elaborated as a presumptively value-neutral method of interpretation in the legal academy."); Chemerinsky, *supra* note 18, at 1072 ("Even originalism, which presents itself as a theory of constitutional interpretation divorced from the values of individual judges, allows tremendous judicial discretion.").

for the logic of the ladder—strict adherence to abstract principles without regard to the persons affected by them.[89]

Not coincidentally, the *Dobbs* decision was joined by all but one of the male justices on the Court (Justice Breyer dissented), plus Justice Amy Coney Barrett.[90] Justice Barrett's "female" voice cannot be heard in the *Dobbs* opinion at all, as she joined in Alito's majority opinion but did not write separately.[91]

Public backlash in the wake of *Dobbs* has been swift, heated, and broad.[92] Many have asked whether, after *Dobbs*, feminism is dead.[93] To be sure, many point out that only a majority-male court could be so blatantly partial on a topic as controversial as abortion, which uniquely affects women.[94] Indeed, to see male privilege in action, one need only compare the methods of the Feminist Judgments Project—which restrains its authors to precedent and exists only in academic publications—to those of the *Dobbs* majority—which eschewed precedent in favor of abstract principles without

89. Karst, *supra* note 28, at 501.

90. *Dobbs*, 142 S. Ct. at 2239.

91. *See* Mark Walsh, *Justice Amy Coney Barrett Hasn't Disappointed Conservative Supporters—So Far*, AM. BAR ASS'N J. (Aug. 18, 2022, 9:58 AM), https://bit.ly/3YjPfd2 [https://perma.cc/T87N-BG4X].

92. *See e.g.*, Deborah Dinner, *Originalism and the Misogynist Distortion of History in Dobbs*, L. & HIST. REV.: THE DOCKET (2022), https://bit.ly/3SWCUub [https://perma.cc/9PVU-HAFB]; Jia Tolentino, *We're Not Going Back to the Time Before Roe. We're Going Somewhere Worse*, NEW YORKER (June 24, 2022), https://bit.ly/3ZMtLXc [https://perma.cc/5C8C-73HX]; *Clayman Institute's Statement on Supreme Court's Dobbs v. Jackson Decision*, STAN. UNIV. SCH. OF HUMAN. & SCI. (Aug. 10, 2022), https://stanford.io/3KWnc0h [https://perma.cc/9HAU-7CZA].

93. Michele Goodwin, *61. Fifteen Minutes of Feminism: Dobbs Explained—It's Not Over*, MS. MAG. (June 28, 2022), https://bit.ly/3yhJyBQ [https://perma.cc/HJ4G-YGFS]; Michelle Goldberg, *The Future Isn't Female Anymore*, N.Y. TIMES (June 17, 2022), https://nyti.ms/3ZpG8sJ [https://perma.cc/CS7D-SLZ2].

94. Sheila Jasanoff, *Seize Back the Political Discourse on Life*, HARV. KENNEDY SCH. (June 28, 2022), https://bit.ly/3KUMSJ0 [https://perma.cc/9H59-N6MF] ("A high court of six men and three women, representing a small slice of this nation's intellectual, moral, and gender diversity, has handed down a decision that rolls back 50 years of growing control by women over their bodies, selves, and life choices."); F. Laguardia, *Pain That Only She Must Bear: On the Invisibility of Women in Judicial Abortion Rhetoric*, 9 J.L. & BIOSCIENCES 1, 36 (2022). *See also* Leah Willingham, *Gender Divide Prominent as Male-Dominated Legislatures Debate Abortion*, PBS NEWS HOUR (Sept. 24, 2022), https://to.pbs.org/3KShJWE [https://perma.cc/8QNR-5YCU]; Nicole Gaudiano et al., *Behind the Wave of State Abortion Bans, There Are a Lot of Men*, BUS. INSIDER (Jun. 24, 2022, 12:37 PM), https://bit.ly/41Sjbzi [https://perma.cc/HMY8-6QT3] ("91% of US Senators who voted to confirm Supreme Court justices in the anti-Roe majority are men."). *But see* Cathy Young, *The Complicated Place of Men in the Abortion Debate*, CATO INST. (July 13, 2022), https://bit.ly/41xyai7 [https://perma.cc/WN4Q-VJRX] (arguing that positioning men and women as opposite in the abortion debate oversimplifies individual views).

much regard for the impact of its decision on real people.[95] As the dissenters pointed out in *Dobbs* itself:

> The most striking feature of the [majority] is the absence of any serious discussion of how its ruling will affect women. By characterizing *Casey*'s reliance arguments as "generalized assertions about the national psyche," it reveals how little it knows or cares about women's lives or about the suffering its decision will cause.[96]

The logic of the ladder prevailed over the web.

While *Dobbs* exposed in dramatic fashion the lack of neutrality and the selective use of stare decisis in judicial decision-making, the question for feminists becomes whether to follow suit and engage in outwardly unapologetic feminist judging, or whether instead to insist on neutrality and adherence to precedent to maintain some semblance of institutional legitimacy. The question is an open one, but again, it is not new.

IV. WHAT NOW?

Judging cannot ever be truly neutral, and in American courts, the traditional white male view often masquerades as a substitute for neutrality because it is what we are used to.[97] Feminist legal scholars have debated for some time what, if anything, should be done about it. At the risk of oversimplifying the debate itself, these scholars have, by and large, concluded that feminist thought should inform judging, not by making it partial, but instead by introducing emotion to the legal decision-making process as a tool rather than eschewing it as per se unacceptably biased.[98]

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95. Paula A. Monopoli, *Situating Dobbs*, 14 CONLAWNOW 45, 61 (2023) (criticizing *Dobbs* as using "precisely the opposite interpretive approach" as feminist constitutionalism, which asks what interpretation "does the least harm to women").

96. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2343 (2022) (Breyer, SOTOMAYOR, & KAGAN, JJ, dissenting).

97. Minow, *supra* note 8, at 32 ("The unstated point of comparison is not neutral, but particular, and not inevitable, but only seemingly so when left unstated. A notion of equality that demands disregarding a 'difference' calls for assimilation to an unstated norm. To strip away difference, then, often is to remove or ignore a feature distinguishing an individual from a presumed norm—like a white, able-bodied Christian man—but leaving that norm in place as the measure for equal treatment.").

98. Resnik, *supra* note 4, at 1944 ("Feminism rejects the choice between being a blank slate and imposing oneself on another, between having no interest and being corrupted by self-interest."); Minow, *supra* note 8, at 90 ("By struggling to respond humanly to the dilemma in each particular context, the judge can supply

> We are all familiar with the work of Carol Gilligan, who identified two different methods of moral reasoning: one based on an ethic of care, and one based on an ethic of justice. . . . Our judgments should integrate insights from the two different ethics, seeking to do justice yet respecting connections between people and recognizing that our own (sometimes shifting) perspectives construct this decision.[99]

After *Dobbs*, however, this "softer" approach may be reaching its limits.[100]

Since the *Dobbs* decision came down, there have been scholarly calls for new ways to get away from the rigid application of rules to legal disputes, such as by intentionally appointing "movement judges"[101] or asking that judges engage in "deliberative democracy."[102] Each of these ideas attempts to resolve the neutrality paradox by proposing that judges weave the ethics of care into their decision-making; the difference is one of degree.[103]

These newer theories echo what Martha Minow and Judith Resnik described in the late 1980s and early 1990s.[104] Their advice remains sage. We should cast aside idealistic notions of neutrality, not replacing that ideal with partiality but instead with an unapologetic refusal to accept a rule of law divorced from its people. The rule of law is important; in many ways, it is sacrosanct. But it is but one of many competing ideals. The competing ideal with which this Article grapples is that of the unheard voice.

The decision in *Dobbs* was a wake-up call. Regardless of one's stance on abortion, the methods used by the *Dobbs* majority put

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the possibility of connection otherwise missing in the categorical treatments of difference.")

99. Naomi R. Cahn, *The Case of the Speluncean Explorers: Contemporary Proceedings,* 61 GEO. WASH. L. REV. 1755, 1761 (1993).

100. Solimine & Wheatley, *supra* note 5, at 910 (referring to a "softer school of gender-sensitive judicial selection [that] does not call for partial judging. Rather, it holds that female judges can uniquely bring to bear the useful tools of compassion, preference for standards over rules, and a general understanding of gender issues.")

101. Hasbrouck, *supra* note 19, at 670 ("A movement judge, by contrast, views the law and facts in their full social context, applying consistently democracy-affirming interpretations with an eye to collateral consequences.")

102. Glen Staszewski, *A Deliberative Democratic Theory of Precedent*, 94 U. COLO. L. REV. 1, 63 (2023) ("A deliberative democratic theory of precedent, in contrast, questions these assumptions and maintains that the appropriate treatment of precedent requires interpretive pluralism and reasoned deliberation regarding the most justifiable decision on the merits in each case based on all the relevant considerations, rather than dogmatic adherence to any single foundational approach to constitutional interpretation.")

103. *See infra* notes 104–05.

104. *See supra* note 101.

principles over people, original intent over impact. In the long run, this method surely will backfire.[105]

It is time to get loud. Not biased, not agenda-driven, but loud in the use of the "female voice"—the ethics of care—to decide cases. Feminist legal methods ask that judges consider the voices of those not at the table. The Feminist Judgments Project exemplifies in theory what this could look like in practice. It is time to convert one to the other. Rather than excoriating judicial nominees for having viewpoints, the question should become whether the nominee can consider someone else's viewpoint, too.

The ethics of care and the law of the ladder both have their place. It is when the law of the ladder stands alone that care crumbles and those affected by its judgments suffer.

CONCLUSION

The female voice is not easily heard in our jurisprudence. It has morphed into, and become part of, a collective jurisprudence that we label as neutral but instead reflects the historically dominant voice of the men (mostly white) who created it.

Because the female voice has not been heard, it is hard to know what it would sound like. Feminist legal scholarship suggests that the feminist voice would reflect an ethics of care—aiming to decide cases with people and relationships in mind rather than rigidly applying abstract principals with logic in the driver's seat.

The Supreme Court's recent decision in *Dobbs* displays in stark relief what can happen when the male logic of the ladder is applied without consideration for the impact a court decision can have on real people. Of course, *Dobbs* can be explained by many other forces as well, including deeply partisan judicial nominations and increasingly political individual Supreme Court justices. But the male voice—particularly that of the originalist persuasion—provides cover to those other forces, making it appear neutral. That neutrality does not exist. Rather than continuing to pretend that it does, it is time for the female voice to unapologetically emerge as part of our jurisprudence.

105. "Then they came for me, and there was no one left to speak for me." *Martin Niemöller: "First They Came For . . .,"* U.S. HOLOCAUST MEM'L MUSEUM, https://bit.ly/2NHIKgy [https://perma.cc/2EXM-QRKJ].

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