PERSUASIVE OR PIPE DREAM? THE POTENTIAL INFLUENCE OF THE FEMINIST JUDGMENTS PROJECT ON FUTURE JUDICIAL DECISION MAKING

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ABSTRACT

The Feminist Judgments Project (“FJP” or the “Project”) rewrites existing judicial opinions from a feminist perspective. This article explores whether and how the FJP’s alternative jurisprudence can influence future legal decisions. The FJP seeks to change the law by revealing unconscious bias and opening judicial minds to previously unknown perspectives - a method that draws on psychological theories of decision making such as cultural cognition. This article takes a different approach and evaluates the FJP using theories from political science. In light of the increasingly conservative judiciary and the Republican administration, the attitudinal and strategic theories of decision making would give the FJP little prospect of actually influencing the law. Thus, this article focuses on historical institutionalism to present a theoretical explanation for why and how the FJP’s re-envisioned law could possibly persuade the judiciary. Specifically, the article examines the degree to which the FJP draws on social facts highlighted by the #MeToo and LGBTQ rights movements and whether the Project thereby creates the conditions for social construction and resultant legal change. It also uses theories on displacement to present a critique of the FJP’s more radical re-writes and points to the more moderate approach of ideational salience amplification as effective. Ultimately, it concludes that the FJP’s path of persuasion is somewhat narrow and limited, but possible.

KEYWORDS

Feminist Judgments Project, Feminism and Political Science, Historical Institutionalism, Judicial Decision Making

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The purpose of the Feminist Judgments Project is to rewrite existing opinions from a feminist perspective.¹ The project is an international effort that originated in Canada and the United Kingdom and has spread to the United States, Australia, New Zealand, and India.² The United States' Feminist Judgment Project ("FJP" or the "Project")³ has issued two collections of opinions to date, *Feminist Judgments: Rewritten Opinions of the Supreme Court*⁴ and *Feminist Judgments: Rewritten Tax Opinions*,⁵ with many more collections planned and in progress.⁶ The FJP correctly claims value in its own right regardless of its impact on the judiciary. For example, one goal of the Project is simply to explore what feminist judging is, substantively and rhetorically.⁷ The FJP tests which feminist theories have practical application and which feminist methods are most workable within the limitations of judging.⁸ Another goal of the FJP is to reveal how seemingly neutral decision making is not neutral.⁹ Ultimately, however, the FJP is more than theoretical; it also seeks to create change, to affect the future development of the law in order "to achieve gender justice in the outcomes of cases as well as in the process of judging."¹⁰

The FJP asserts that it can achieve this change by opening minds, revealing points or perspectives that the judiciary's implicit biases shield from view.¹¹ This approach reflects theories of cultural cognition which posit that judicial decision

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¹ E.g., Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford, *Introduction to the U.S. Feminist Judgments Project*, in FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT 5 (Kathryn M. Stanchi et al. eds., 2016) [hereinafter "Stanchi Introduction"].

² *Id.* at 6-7; Bridget J. Crawford & Anthony C. Infanti, *Introduction to the Feminist Judgments: Rewritten Tax Opinions Project*, in FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS 3 (Bridget J. Crawford & Anthony C. Infanti eds., 2017) [hereinafter "Crawford Introduction"]. See also Melinda Buckley, *Women's Court of Canada Act and Rules*, 8 Oñati Socio-Legal Series 1259, 1261 (2018); FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE (Rosemary Hunter et al. eds., 2010); AUSTRALIAN FEMINIST JUDGMENTS: RIGHTING AND REWRITING LAW 1 (Heather Douglas et al. eds., 2014); FEMINIST JUDGMENTS OF AOTEAROA NEW ZEALAND: TE RINO: A TWO-STRANDED ROPE (Elisabeth McDonald et al. eds., 2017); THE FEMINIST JUDGMENTS PROJECT: INDIA, <https://fjpi.wixsite.com/fjpi> (last visited July 25, 2019).

³ U.S. FEMINIST JUDGMENTS PROJECT, <https://sites.temple.edu/usfeministjudgments/> (last visited July 25, 2019).

⁴ FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn M. Stanchi et al. eds., 2016) [hereinafter "FEMINIST JUDGMENTS"].

⁵ FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS (Bridget J. Crawford & Anthony C. Infanti eds., 2017).

⁶ *Series Projects*, U.S. FEMINIST JUDGMENTS PROJECT, <https://sites.temple.edu/usfeministjudgments/projects/> (last visited July 25, 2019) [hereinafter "Series Projects"].

⁷ Stanchi Introduction, *supra* note 1, at 5.

⁸ *Id.* at 5-6.

⁹ *Id.* at 4 ("Although the project has a number of goals, one priority is to uncover that what passes for neutral law making and objective legal reasoning is often bound up in traditional assumptions and power hierarchies.").

¹⁰ Linda L. Berger et al., *Rewriting Judicial Opinions and the Feminist Scholarly Project*, 94 NOTRE DAME L. REV. ONLINE 1, 2 (2018). See also Stanchi Introduction, *supra* note 1, at 5 ("If we can broaden the perspectives of the decision makers, change in the law is possible.").

¹¹ Stanchi Introduction, *supra* note 1, at 4-5.

making is driven by psychological factors.¹² According to this perspective, a judge's viewpoint is shaped by background and can be changed when the blinders of experience are removed.¹³ This article, however, analyzes and critiques the FJP from a different perspective. Instead of psychological theories, this article uses political science models of judicial decision making to evaluate the potential persuasiveness of the FJP's alternative opinions and arguments. Political science scholarship is of particular relevance because certain prominent political theories would find the FJP to have no potential to influence the judiciary.¹⁴ These theorists present extensive empirical evidence that judges are ideological decision makers.¹⁵ They assert that the legal arguments, such as those offered by the FJP, do not persuade, but merely act as cover for jurists' pursuit of policy preference.¹⁶ In light of the challenge of these ideological theories, and an increasingly conservative judiciary, this article explores whether the field of political science universally condemns the FJP to a purely intellectual exercise. As the following sections explain, one alternative branch of political science, historical institutionalism, does offer a theoretical argument for why and how the types of arguments made within the FJP opinions could potentially persuade courts, regardless of ideology.¹⁷ This Article explores the potential of this theory, and any supporting empirical evidence, to justify the utility of the FJP for future persuasion. Ultimately, it concludes that the path of persuasion is somewhat narrow and limited, but possible.

Part I of this Article details the history and substance of the FJP, identifying the Project's goals and methods and providing examples of the types of arguments in the rewritten opinions. Part II explores the basics of the political science theories that view judicial decision making as ideological and the contrasting theories of historical institutionalism that find judges sometimes follow institutional norms even when contrary to policy preference. Part III more specifically discusses historical institutionalism theories on legal change and what type of arguments are persuasive. Part IV applies historical institutionalism to the FJP and explores which FJP arguments and cases most closely match historical institutionalism's theories of persuasion. Part V analyzes and critiques the application, exploring the degree to which historical institutionalism offers a convincing argument for the persuasiveness of the FJP. In this analysis, Part V identifies different categories of argument within the FJP and their varied likelihoods of success.

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¹² Kate Webber, *Families Are More Popular Than Feminism: Exploring the Greater Judicial Success of Family and Medical Leave Laws*, 32 COLUM. J. GENDER & L. 145, 167 (2016).

¹³ *Id.* at 167-68; see also Ann C. McGinley, *Cognitive Illiberalism, Summary Judgment, and Title VII: An Examination of Ricci v. DeStefano*, 57 N.Y.L. SCH. L. REV. 865, 874 (2013); See, e.g., Paul Secunda, *Cognitive Illiberalism and Institutional Debiasing Strategies*, 49 SAN DIEGO L. REV. 373, 387-394 (2012).

¹⁴ See *infra* Part II.

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ See *infra* Parts II & III.

I. THE FEMINIST JUDGMENTS PROJECT: CRITICAL OPINION WRITING AND THE HOPE TO PERSUADE

The FJP takes existing judicial opinions and re-writes them from a feminist perspective.¹⁸ The Project is spearheaded by editors Kathy Stanchi, Linda Berger and Bridget Crawford,¹⁹ and has issued two collections: one consisting of twenty-seven rewritten Supreme Court opinions²⁰ and a second consisting of eleven rewritten tax opinions from various courts and administrative bodies.²¹ In both collections, each rewritten decision is paired with a separately authored commentary.²² The FJP plans to issue at least six additional collections with rewritten opinions in the following subject areas: reproductive justice, torts, corporations, trusts and estates, employment discrimination, and family law.²³

The inspiration for the FJP came from similar efforts to rewrite legal decisions, first in Canada, and then the United Kingdom.²⁴ A number of other common law countries have either issued, begun, or are considering similar projects, including: Australia, Ireland, New Zealand, and India.²⁵ A feminist rewriting of international law is also planned.²⁶

A. METHODS AND OUTCOMES

Both the Supreme Court collection and tax decision collection of the FJP, as with all of their sister projects, were limited in their ability to rewrite the law.²⁷ Specifically, authors of the feminist opinions had to write as if bound by the law and facts as they

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¹⁸ Stanchi Introduction, *supra* note 1, at 3; Crawford Introduction, *supra* note 2, at 3; U.S. FEMINIST JUDGMENTS PROJECT, *supra* note 3 (“The United States Feminist Judgments Project is a collaborative effort of more than 100 feminist law professors to rewrite U.S. legal decisions from a feminist perspective.”).

¹⁹ U.S. FEMINIST JUDGMENTS PROJECT, *supra* note 3.

²⁰ FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE U.S. SUPREME COURT, *supra* note 4.

²¹ FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS, *supra* note 5.

²² See generally, FEMINIST JUDGMENTS, *supra* note 4; FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS, *supra* note 5.

²³ Series Projects, *supra* note 6.

²⁴ Crawford Introduction, *supra* note 2, at 3. See Buckley, *supra* note 2, at 1261; FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE, *supra* note 2.

²⁵ Crawford Introduction, *supra* note 2, at 3. See AUSTRALIAN FEMINIST JUDGMENTS: RIGHTING AND REWRITING LAW 1, *supra* note 2; NORTHERN/IRISH FEMINIST JUDGMENTS: JUDGES’ TROUBLES AND THE GENDERED POLITICS OF IDENTITY (Maired Enright et al. eds., 2016); FEMINIST JUDGMENTS OF AOTEAROA NEW ZEALAND: TE RINO: A TWO-STRANDED ROPE, *supra* note 2; THE FEMINIST JUDGMENTS PROJECT: INDIA, *supra* note 2.

²⁶ *Feminist International Judgments Project: Women’s Voices in International Law*, U. LEICESTER, <https://www2.le.ac.uk/departments/doctorscollege/researchimages/2016-competition/feminist-international-judgments-project-women2019s-voices-in-international-law> (last visited July 25, 2019).

²⁷ Crawford Introduction, *supra* note 2, at 10 (“Authors were free to draw on their own understandings and interpretations of feminist theories and methods, but they were limited to rewriting their opinions based on the law and facts in existence at the time of the original decision. This is a key feature of all the books in the Feminist Judgments Series.”).

existed at the time.²⁸ Authors could expand on the facts presented in the opinion, but only if those additional details were available in the record before the Court or subject to judicial notice.²⁹ The opinion authors were free to write reimagined majority, concurring, or dissenting opinions.³⁰ In the Supreme Court collection, the opinion authors created fifteen new majority decisions, of which eight changed the outcome and seven changed only the reasoning.³¹ This collection contained four feminist concurrences, one partial concurrence/dissent, and five dissenting opinions.³² The tax law collection contains seven rewritten majority opinions, two dissents, one dissent in part and concurrence in part, and one concurrence.³³

²⁸ Stanchi Introduction, *supra* note 1, at 10; Crawford Introduction, *supra* note 2, at 3.

²⁹ *E.g.*, Stanchi Introduction, *supra* note 1, at 11.

³⁰ *Id.* at 9; Crawford Introduction, *supra* note 2, at 10.

³¹ Stanchi Introduction, *supra* note 1, at 13. The following opinions change the outcome of the case. Laura Rosenbury, *Griswold v. Connecticut*, in FEMINIST JUDGMENTS, *supra* note 4, at 103-113; Lucinda M. Finely, *Geduldig v. Aiello*, in FEMINIST JUDGMENTS, *supra* note 4, at 190-207; Tracy A. Thomas, *City of Los Angeles Department of Water & Power v. Manhart*, in FEMINIST JUDGMENTS, *supra* note 4, at 223-41; Leslie C. Griffin, *Harris v. McRae*, in FEMINIST JUDGMENTS, *supra* note 4, at 247-56; David S. Cohen, *Rostker v. Goldberg*, in FEMINIST JUDGMENTS, *supra* note 4, at 277-96; Lisa R. Pruitt, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, in FEMINIST JUDGMENTS, *supra* note 4, at 365-83; Ilene Durst, *Nguyen v. INS*, in FEMINIST JUDGMENTS, *supra* note 4, at 473-84; Maria Isabel Medina, *Town of Castle Rock v. Gonzalez*, in FEMINIST JUDGMENTS, *supra* note 4, at 508-526. The following cases change the reasoning. Teri McMurtry-Chubb, *Loving v. Virginia*, in FEMINIST JUDGMENTS, *supra* note 4, at 119-136; Dara E. Purvis, *Frontiero v. Richardson*, in FEMINIST JUDGMENTS, *supra* note 4, at 173-84; Angela Onwuachi-Willig, *Meritor Savings Bank v. Vinson*, in FEMINIST JUDGMENTS, *supra* note 4, at 303-21; Deborah L. Rhode, *Johnson v. Transportation Agency*, in FEMINIST JUDGMENTS, *supra* note 4, at 327-40; Ann C. McGinley, *Oncale v. Sundowner Offshore Services Inc.*, in FEMINIST JUDGMENTS, *supra* note 4, at 414-25; Ruthann Robson, *Lawrence v. Texas*, in FEMINIST JUDGMENTS, *supra* note 4, at 488-503; Carlos A. Ball, *Obergefell v. Hodges*, in FEMINIST JUDGMENTS, *supra* note 4, at 532-546.

³² Stanchi Introduction, *supra* note 1, at 13. The following decisions are concurrences. Karen Syma Czapanskiy, *Stanley v. Illinois*, in FEMINIST JUDGMENTS, *supra* note 4, at 142-45; Kimberly M. Mutcherson, *Roe v. Wade*, in FEMINIST JUDGMENTS, *supra* note 4, at 151-67; Martha Chamallas, *Price Waterhouse v. Hopkins*, in FEMINIST JUDGMENTS, *supra* note 4, at 345-60; Valorie K. Vojdik, *United States v. Virginia*, in FEMINIST JUDGMENTS, *supra* note 4, at 389-407. The following opinions are dissents. Phyllis Goldfarb, *Bradwell v. Illinois*, in FEMINIST JUDGMENTS, *supra* note 4, at 60-77; Pamela Lauder-Ukeles, *Muller v. Oregon*, in FEMINIST JUDGMENTS, *supra* note 4, at 83-97; Cynthia Godsoe, *Michel M. v. Superior Court*, in FEMINIST JUDGMENTS, *supra* note 4, at 262-71; Ann Bartow, *Gebser v. Lago Vista Independent School District*, in FEMINIST JUDGMENTS, *supra* note 4, at 430-46; Aníbal Rosario Lebrón, *United States v. Morrison*, in FEMINIST JUDGMENTS, *supra* note 4, at 452-67. *See also* Maria L. Ontiveros, *Dothard v. Rawlinson*, in FEMINIST JUDGMENTS, *supra* note 4, at 213-27 (partial concurrence/dissent).

³³ The following are majority opinions. Grant Christensen, *United States v. Rickert*, in FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS, *supra* note 5, at 54-79; Mary Louise Fellows, *Welch v. Helvering*, in FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS, *supra* note 5, at 103-20; Mary L. Heen, *Manufacturers Hanover Trust Co. v. United States*, in FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS, *supra* note 5, at 172-85; Danshera Cords, *Cheshire v. Commissioner*, in FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS, *supra* note 5, at 225-42; Jennifer Bird-Pollan, *Magdalin v. Commissioner*, in FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS, *supra* note 5, at 253-65; David B. Cruz,

The FJP calls on authors to rewrite the opinions from a feminist perspective,³⁴ but allows each author to choose from the “multiplicity of theories, methods, and approaches” within feminist legal theory.³⁵ For example, in the FJP published to date, some opinions reflect theories of formal equality, while others take an anti-subordination or intersectionality approach.³⁶ Opinion authors also use recognized feminist methods, such as feminist practical reasoning and narrative feminist method.³⁷ As a result, the rewritten opinions have a wide variety of outcomes and reasoning.

In some cases, the majority decision was re-envisioned to such a degree that the new, imagined opinion had the opposite outcome to the original.³⁸ For example, in the rewritten majority opinion of *Town of Castle Rock v. Gonzales*, Professor Maria Isabel Medina found that “the Colorado statute restricting law enforcement’s discretion to refuse to enforce mandatory arrest restraining orders created a property interest that entitles its holder to meaningful process under the Due Process Clause.”³⁹ This is directly contrary to the Supreme Court’s majority opinion in the original decision.⁴⁰ Despite the difference, Professor Medina based her opinion on existing precedent and facts, relying on a broad interpretation of *Board of Regents v. Roth*⁴¹ as well as reasoned consideration of the plain language

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O'Donnabhain v. Commissioner, in FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS, *supra* note 5, at 274-96; Ruthann Robson, *United States v. Windsor*, in FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS, *supra* note 5, at 306-16. The concurring opinion rewrites the *Bob Jones* decision. David A. Brennan, *Bob Jones University v. United States*, in FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS, *supra* note 5, at 150-63. The dissents are as follows. Ann M. Murphy, *Lucas v. Earl*, in FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS, *supra* note 5, at 89-94; Wendy C. Gerzog, *Estate of Clack v. Commissioner* in FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS, *supra* note 5, at 195-214. See also Patricia A. Cain, *United States v. Davis*, in FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS, *supra* note 5, at 129-39 (dissenting in part concurring in part). “Of the eleven rewritten cases in the [Tax FJP] book, six are Supreme Court decisions, one is a federal circuit court opinion and four are Tax Court opinions.” Crawford Introduction, *supra* note 2, at 10.

³⁴ Stanchi Introduction, *supra* note 1, at 9-11; Crawford Introduction, *supra* note 2, at 10.

³⁵ Berger, *supra* note 10, at 2-3; see also Crawford Introduction, *supra* note 2, at 3 (“there are no unitary feminist methods or reasoning processes”).

³⁶ See Stanchi Introduction, *supra* note 1, at 18-22.

³⁷ See *id.* at 15-17.

³⁸ E.g., Finely, *supra* note 31, at 199-200 (in rewritten *Geduldig v. Aiello* holding that a pregnancy exclusion in the California Unemployment Insurance Code discriminates on the basis of sex violating the Equal Protection Clause); Thomas, *supra* note 31, at 233 (in rewritten *City of Los Angeles Department of Water & Power v. Manhart* awarding retroactive damages after finding the retirement contribution plan violates Title VII of the Civil Rights Act of 1964); Griffin, *supra* note 31, at 254 (in rewritten *Harris v. McRae*, finding the Hyde Amendment, allowing federal defunding of abortion services through Medicaid, violates equal protection under the Fifth Amendment); Cohen, *supra* note 31, at 277 (in rewritten *Rostker v. Goldberg* holding that a male-only registration violates equal protection under the Fifth Amendment); Durst, *supra* note 31, at 473 (in rewritten *Nguyen v. INS*, finding section 1409(a) of the Immigration and Nationality Act violates equal protection).

³⁹ Medina, *supra* note 31, at 509.

⁴⁰ *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005).

⁴¹ 408 U.S. 564 (1972).

and legislative history of the underlying Colorado statute.⁴² Professor Medina's traditional legal arguments were bolstered by a detailed factual immersion into the reality of domestic violence. Using the feminist jurisprudential method of narrative and contextualization,⁴³ Professor Medina detailed the long history of women's legal subordination, the stereotypes beneath it, and how this led to a lack of enforcement of protective orders against domestic abusers.⁴⁴ She explained the nationwide effort to combat these biases through mandated enforcement and provided explicit description of the violence these laws were intended to mitigate.⁴⁵

In other FJP cases, the identical outcome was bolstered by a reinvigorated legal theory reflecting the insight of time and a critical analysis of the original decision.⁴⁶ As just one example, in the rewritten *Roe v. Wade*, Professor Kimberly Mutcherson based the right to abortion not just on a right to privacy, the basis of the original opinion,⁴⁷ but also on due process and equal protection.⁴⁸ Professor

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⁴² Medina, *supra* note 31, at 518-523.

⁴³ Stanchi Introduction, *supra* note 1, at 15-16. This could also be considered a use of the method of feminist practical reasoning. *Id.* at 15.

⁴⁴ Patricia A. Broussard, *Commentary on Town of Castle Rock v. Gonzales*, in *FEMINIST JUDGMENTS: SUPREME COURT*, *supra* note 4, at 507-508; Medina, *supra* note 31, at 509-10.

⁴⁵ Medina, *supra* note 31, at 510-12. The rewritten opinion of *Manufacturers Hanover Trust Co. v. United States*, is an example of this type of opposite outcome in the Tax Law collection of the FJP. See Heen, *supra* note 33, at 181. In the feminist judgment, Professor Heen rejected the original opinion's conclusion that use of gender-based tables to value reversionary interests was related to the important governmental objective of promoting fairness and accurately valuing these interests. *Id.*

⁴⁶ See Purvis, *supra* note 31, at 175 (applying strict scrutiny, instead of intermediate scrutiny, to gender based classifications; Vojdik, *supra* note 32, at 390 (same); McMurty-Chubb, *supra* note 31, at 122-23 (in rewritten *United States v. Virginia*, analyzing Virginia's statute barring interracial marriage beyond racial discrimination by looking at Virginia's history of white patriarchal influence on marriage to maintain "racialized gender roles"); Onwuachi-Willig, *supra* note 31, at 315, 319 (in rewritten *Meritor Savings Bank v. Vinson*, extending the reasonable person standard to that of a reasonable person in the victim's shoes in analyzing hostile environment harassment and applying strict liability, no longer requiring notice of the alleged misconduct to the employer, when supervisory personnel engage in sexual harassment); McGinley, *supra* note 31, at 418, 420-21 (in rewritten *Oncale v. Sundowner Offshore Services Inc.*, redefining the "because of sex" standard of harassment to include situations where victims do not conform gender roles or stereotypes and by shifting the burden on the defendant to prove if the behavior occurred because of sex); Czapskiy, *supra* note 32, at 142-43 (in rewritten *Stanley v. Illinois* restricting the level of due process owed to a parent to reflect the relationship between the parent and child thereby not extending due process rights to parents only because they are mothers or married). An example of this approach in the Tax FJP is the rewritten *O'Donnabhain v. Commissioner*. Cruz, *supra* note 33. In the feminist judgment of this case, the result is nearly identical but the reasoning moves away from characterizing the transgender taxpayer as having a 'disorder,' offering a less "pathologized" interpretation of the Treasury Regulations to allow a medical deduction for the taxpayer's gender conforming surgery. Nancy J. Knauer, *Commentary on O'Donnabhain v. Commissioner*, *FEMINIST JUDGMENTS: TAX OPINIONS*, *supra* note 5, at 272-73; Cruz, *supra* note 33, at 286-88.

⁴⁷ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

⁴⁸ Rachel Rebouché, *Commentary on Roe v. Wade*, in *FEMINIST JUDGMENTS: SUPREME COURT*, *supra* note 4, at 147; Mutcherson, *supra* note 32, at 153-54.

Mutcherson further rejected the trimester framework and established a strict scrutiny test for any state effort to restrict access to abortion.⁴⁹ Mutcherson adopted the argument of a number of scholars that limitations on abortion depend on gender stereotypes about women's "inherent" nature as mothers.⁵⁰ Thus, Mutcherson used the classic feminist legal method of "asking the woman question,"⁵¹ delving into the effect of abortion restriction laws that reinforce gender inequality.⁵² By doing so, Mutcherson explored the equal protection implications of abortion rights.⁵³

Finally, in a number of important decisions, the feminist perspective led to a ringing dissent, looking to future legal change for the adoption of the author's viewpoint.⁵⁴ For example, in the feminist judgment of *United States v. Morrison*, Professor Aníbal Rosario Lebrón wrote a dissenting opinion challenging the original opinion's holding that the Violence Against Women Act (VAWA) exceeded congressional authority under the Commerce Clause.⁵⁵ Applying narrative feminist method—and in sharp contrast to the brief and euphemistic references in the original case—Professor Rosario Lebrón's dissent provided explicit detail of the underlying case, including the rapist's "debasing remarks about what he liked to do with women."⁵⁶ Rosario Lebrón drew on earlier Commerce Clause precedents to focus on the burden and effect upon interstate commerce, rather than recent trends that analyze the source of the commerce, and used congressional findings to detail the ways gender violence acted as "a form of economic domination."⁵⁷ Rosario Lebrón also made the novel argument that the VAWA was a means to comply with the United States' obligations under international law, specifically the International

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⁴⁹ Rebouché, *supra* note 48, at 147; Mutcherson, *supra* note 32, at 157.

⁵⁰ Rebouché, *supra* note 48, at 148; Mutcherson, *supra* note 32, at 163.

⁵¹ Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1990).

⁵² Rebouché, *supra* note 48, at 148; Mutcherson, *supra* note 32, at 162-66.

⁵³ Mutcherson, *supra* note 32, at 162-63.

⁵⁴ Goldfarb, *supra* note 32, at 60 (rewritten *Bradwell v. Illinois*); Lauder-Okeles, *supra* note 32, at 83 (rewritten *Muller v. Oregon*); Godsoe, *supra* note 32, at 262 (rewritten *Michael M. v. Superior Court*); Bartow, *supra* note 32, at 430 (rewritten *Gebser v. Lago Vista Independent Scholl District*); and Lebrón, *supra* note 32, at 452 (rewritten *United States v. Morrison*). The feminist judgment in the *Estate of Clack v. Commissioner*, is an example of a dissenting opinion in the Tax FJP. Gerzog, *supra* note 33. In the feminist dissent, Professor Wendy Gerzog challenges the original opinion's holding that an executor has the discretion "to elect QTIP treatment, and possibly divest the surviving spouse of a property interest, qualified for the marital deduction pursuant to [Internal Revenue] Code § 2056(b)(7)." Goldburn P. Maynard Jr., *Commentary on Estate of Clack v. Commissioner*, in FEMINIST JUDGMENTS: TAX OPINIONS, *supra* note 5, at 188; Gerzog, *supra* note 33, at 207-14. Professor Gerzog uncovers the stereotypes underlying to original opinion and focuses on the disparate harmful effect of the decision on widows. Maynard, *supra* at 188; Gerzog, *supra* note 33, at 209-10. Professor Gerzog further critiques the original opinion for an unduly narrow interpretation of the underlying law and disregard for established understandings of the Internal Revenue Code. Maynard, *supra* at 188; Gerzog, *supra* note 33, at 201-203.

⁵⁵ Shaakirrah R. Sanders, *Commentary on United States v. Morrison*, in FEMINIST JUDGMENTS: SUPREME COURT, *supra* note 4, at 447; Lebrón, *supra* note 32, at 452-53 (rewritten *United States v. Morrison*).

⁵⁶ Sanders, *supra* note 55 at 447; Lebrón, *supra* note 32, at 453-56 (rewritten *United States v. Morrison*).

⁵⁷ Sanders, *supra* note 55, at 448-49; Lebrón, *supra* note 32, at 458-62 (rewritten *United States v. Morrison*).

Covenant on Civil and Political Rights (ICCPR) which calls on signatories to combat gender-motivated violence.⁵⁸

B. GOALS AND ASSUMPTIONS

One goal of the FJP is “[t]o make the point that law may be driven by perspective as much as *stare decisis*.”⁵⁹ The FJP seeks to demonstrate that a “more complex and contextualized vantage” would lead to a different decision making process.⁶⁰ The FJP is based on the premise that decision makers are profoundly influenced by “subjective (and often unconscious) beliefs and assumptions,” that “reinforce traditional or familiar approaches,” and that these underlying influences generate the systemic inequalities within the law.⁶¹ Indeed, according to the FJP, “all decision making involves a situated perspective ... affected by assumptions and expectations of norms relating to gender, race, class, sexuality, and other characteristics.”⁶² The FJP’s goal then, is to shed light on these underlying biases, and challenge the myth that judges are neutral actors who merely apply the law.⁶³ The FJP asserts that by highlighting these subjective, situated influences, the Project creates the conditions for avoiding that influence, and thus, for changing the law.⁶⁴

This stated premise of the FJP draws on the concepts of cultural cognition, a psychology- based theory of judicial decision making which asserts that unconscious cultural and cognitive forces subconsciously affect judges.⁶⁵ Cultural cognition recognizes that people process information in a manner that supports their existing

⁵⁸ Sanders, *supra* note 55, at 451; Lebrón, *supra* note 32, at 465-66 (rewritten *United States v. Morrison*).

⁵⁹ Stanchi Introduction, *supra* note 1, at 10.

⁶⁰ *Id.* at 9. See also Linda L. Berger et al., *Method, Impact, and Reach of the Global Feminist Judgments Projects*, 8 OÑATI SOCIO-LEGAL SERIES 1215, 1218 (2018) (“The signature achievement of the FJPs has been to demonstrate that judicial decision making is rarely detached from personal background and experience and that judicial interpretation is never purely neutral and objective.”).

⁶¹ Stanchi Introduction, *supra* note 1, at 5.

⁶² *Id.* at 4-5.

⁶³ *Id.* at 4-5.

⁶⁴ *Id.* at 5; Berger, *supra* note 10, at 2. The FJP looks to have an influence beyond judicial decision makers. It also speaks to lawyers, to show feminist advocates how to ‘use law to persuade and produce social change.’ *Id.* See also Gillian Thomas, *Feminist Judgments and Women’s Rights at Work*, 94 NOTRE DAME L. REV. ONLINE 12 (2018) (the FJP “overarching thought experiment also offers invaluable lessons to today’s practitioners... whom must tell clients’ stories”). Students are also beneficiaries of the various feminist judgment projects. Stanchi Introduction, *supra* note 1, at 4-6 (noting the important “educational function” of the Supreme Court FJP); see also Berger et al., *supra* note 60, at 1218 (noting how the projects have proved their value as teaching tools and have inspired students).

⁶⁵ Webber, *supra* note 12, at 167 (citing Paul Secunda, *Cognitive Illiberalism and Institutional Debiasing Strategies*, 49 SAN DIEGO L. REV. 373, 374 (2012); Sidney A. Shapiro & Richard Murphy, *Politicized Judicial Review in Administrative Law: Three Improbable Responses*, 19 GEO. MASON L. REV. 319, 337 (2012); Paul Secunda, *Cultural Cognition at Work*, 38 FLA. ST. U. L. REV. 107, 108-109 (2010)). See also Ann C. McGinley, *Cognitive Illiberalism, Summary Judgment, and Title VII: An Examination of Ricci v. Destefano*, 57 N.Y.L. SCH. L. REV. 865, 874 (2013).

viewpoint; overlooking information that is inconsistent with their values and overvaluing facts that support it.⁶⁶ When judges bring their own cultural perspective to a case, this type of processing results in biased decision making, a result termed “cognitive illiberalism.”⁶⁷ According to cultural cognition theory, this is unconscious, and judges sincerely believe they are applying the law neutrally, without deliberate reference to their ideological beliefs.⁶⁸ Consequently, those who adopt cultural cognition theory, and its related concepts of implicit bias, look to solutions via exposure, education, and conscious de-biasing techniques such as deliberately considering other points of view.⁶⁹ According to theories of cultural cognition, by training decision makers on the influence of these biases and teaching them to use their conscious mind to counteract them, biases in decisions can be reduced or eliminated.⁷⁰

As noted above, the FJP appears to adopt this approach to understanding the origin of biased decision making and what are the potential solutions. In particular, many⁷¹ of the rewritten opinions in the FJP seek to create legal change by offering new factual details omitted from or incompletely considered in the original opinions.⁷² This is consistent with the premise of cultural cognition that biases causes decision makers to unconsciously disregard facts that are inconsistent with their viewpoint, and the proposed solution of consciously examining the previously unconsidered perspective.⁷³ For example, in her rewritten opinion of *Meritor Savings Bank v. Vinson*, Professor Onwauchi-Willig revised the legal standard for sexual harassment to analyze the work environment, not from a reasonable person standard, but from the perspective of a “reasonable victim in the complainant’s shoes.”⁷⁴ In crafting this standard, Onwauchi-Willig emphasized the

⁶⁶ Webber, *supra* note 12, at 167 (citing Secunda, *Cognitive*, *supra* note 65, at 380-81; Shapiro & Murphy, *supra* note 65, at 337).

⁶⁷ *Id.* at 168.

⁶⁸ *Id.* at 167-68; See also McGinley, *supra* note 65, at 874.

⁶⁹ See, e.g., Secunda, *supra* note 65, at 387-94.

⁷⁰ *Id.* at 387-88.

⁷¹ See Goldfarb, *supra* note 32 (written *Bradwell v. Illinois*); Doneff & Lauder-Ukeles, *supra* note 32 (rewritten *Muller v. Oregon*); McMurty-Chubb, *supra* note 31 (rewritten *Loving v. Virginia*); Finely, *supra* note 31 (rewritten *Geduldig v. Aiello*); Cohen, *supra* note 31 (rewritten *Rostker v. Goldberg*); Onwuachi-Willig, *supra* note 31 (rewritten *Meritor Savings Bank v. Vinson*); Rhode, *supra* note 31 (rewritten *Johnson v. Transportation Agency*); Pruitt, *supra* note 31 (rewritten *Planned Parenthood of Southeastern Pennsylvania v. Casey*); Vojdik, *supra* note 32 (rewritten *United States v. Virginia*); McGinley, *supra* note 31 (rewritten *Oncale v. Sundowner Offshore Services, Inc.*); Bartow, *supra* note 32 (rewritten *Gebser v. Lago Vista Independent School District*); Lebrón, *supra* note 32 (rewritten *United States v. Morrison*); Durst, *supra* note 31 (rewritten *Nguyen v. INS*); Medina, *supra* note 31 (rewritten *Town of Castle Rock v. Gonzales*). See also Murphy, *supra* note 33, at 89-94 (rewritten *Lucas v. Earl*); Cain, *supra* note 33, at 129-29 (rewritten *United States v. Davis*); Brennen, *supra* note 33, at 150-63 (rewritten *Bob Jones University*); Heen, *supra* note 33, at 172-85 (rewritten *Manufacturers Hanover Trust Co.*); Cruz, *supra* note 33, at 274-96 (rewritten *O'Donnabhaim v. Commissioner*); Robson, *supra* note 33, at 306-16 (rewritten *United States v. Windsor*).

⁷² See Stanchi Introduction, *supra* note 1, at 15-16 (describing narrative feminist method).

⁷³ See *supra* notes 66-70 and accompanying text.

⁷⁴ Kristen Konrad Tiscione, *Commentary on Meritor Savings Bank v. Vinson*, in *FEMINIST JUDGMENTS: SUPREME COURT*, *supra* note 4, at 301; Onwuachi-Willig, *supra* note 31, at 309-12.

factual circumstances of the plaintiff, a single woman with limited education who is dependent on her job to support her family, noting women are more likely than men to view conduct as harassment and some are less likely to resist or complain given vulnerable economic circumstances.⁷⁵ Onwuachi-Willig went on to change the legal standard and hold employers strictly liable for sexual harassment by supervisors; again emphasizing the facts of worker vulnerability and the need to earn a living in contrast to the employer's superior ability to control a supervisor harasser.⁷⁶

II. POLITICAL SCIENCE AND THE FJP: CAN THE PROJECT PERSUADE?

Although the FJP's approach is consistent with theories of cultural cognition, other theories of judicial decision making pose a direct challenge to the Project's goal of influencing future decisions.⁷⁷ Specifically, political science has a long standing, empirically supported, body of research and theory asserting that judges, particularly the justices of the Supreme Court, make decisions based on ideological preferences.⁷⁸ Under these theories of decision making, the FJP's offer of new persuasive arguments is for naught unless feminist-minded judges are deciding the matter. The sections below explore this challenge and ask whether political science theories universally condemn the FJP to existence as an intellectual exercise in light of the number of conservative jurists currently on the bench.⁷⁹ Ultimately, although certain theories undermine the utility of the FJP, one line of thought, the theory of historical institutionalism, does find a role for legal persuasion and offers support for the Project's goal of inspiring change through novel reconstructions of the law.

A. THE PROBLEM OF THE IDEOLOGICAL MODELS

It is a common belief that judges, particularly the justices of the Supreme Court, are political, meaning they decide cases based on ideological preferences, not based on neutral application of the law.⁸⁰ A number of political science scholars

⁷⁵ Tiscione, *supra* note 74, at 301, Onwuachi-Willig, *supra* note 31, at 312.

⁷⁶ Tiscione, *supra* note 74, at 302; Onwuachi-Willig, *supra* note 31, at 319-21.

⁷⁷ Stanchi Introduction, *supra* note 1, at 5 ("[i]f we can broaden the perspectives of the decision makers, change in the law is possible"); Berger, *supra* note 10, at 2 ("In the form of rewritten opinions based on the facts and precedent in effect at the time of the original decisions, these projects demonstrate that judges who apply feminist perspectives would make a profound difference, not only in the outcomes and processes in individual cases, but also in the development of the law").

⁷⁸ Webber, *supra* note 12, at 158; See also Julie Novkov, *Understanding Law As A Democratic Institution Through Us Constitutional Development*, 40 LAW & SOC. INQUIRY 811, 814 (2015).

⁷⁹ See, e.g., Thomas Kaplan, *Trump is Putting Indelible Conservative Stamp on Judiciary*, N.Y. TIMES, Aug. 1, 2018, at A15.

⁸⁰ E.g., Adam Liptak, *Supreme Court Bars Challenges to Partisan Gerrymandering*, N.Y. TIMES (June 27, 2019) <https://www.nytimes.com/2019/06/27/us/politics/supreme-court-gerrymandering.html> (describing the addition of conservative Brett Kavanaugh to the court as contributing to the outcome); Lucia Manzi & Matthew E.K. Hall, *Friends You Can Trust: A Signaling Theory of Interest Group Litigation Before the U.S. Supreme*

have empirically tested this general view and find that ideology does determine judicial outcomes.⁸¹ The notion that ideology drives decisions is usually termed the attitudinal model of judicial decision making.⁸² The attitudinal model can be paired with the strategic model, which also asserts that judges engage in ideological decision making, but adds a constraint.⁸³ Specifically, the strategic model claims that judges want to make ideology based decisions but are confined in their ability to do so by other political forces, such as the potential for reversal, or in the case of the Supreme Court, legislative override or even impeachment.⁸⁴ Consequently, the strategic model states that judges will only vote as ideologically as possible, modifying their preferred position to stay below the partisan level of voting that could result in that type of backlash.⁸⁵

These political science theories pose a challenge to the FJP. If judges are ideological decision makers, no amount of creative or persuasive arguments will alter the legal outcomes. The only real recourse would be political action, the election of a president who would appoint feminist minded judges and justices and the election of feminist minded legislators who might provide strategic incentive for the courts to be less hostile to feminist legal goals. If these theories are the correct understanding of how the courts work, the FJP is merely academic, and the time invested in the Project is perhaps better spent in the political arena.

The field of political science, however, does not monolithically limit the FJP to a thought exercise. A number of political science scholars counter the ideological theories and offer alternative theories on how and why the law does matter to, and constrain, judges.⁸⁶ These alternative theories create the possibility that legal arguments, such as those offered by the FJP, can influence judges. In particular, the principles of “historical institutionalism” explain how judges, including Supreme Court justices, are limited by the institutional norms of the judiciary, including, for example, an obligation to apply precedents and consider certain legal values.⁸⁷

Court, 51 LAW & SOC’Y REV. 704, 729-30 (2017) (describing how amicus briefs influence justices of similar ideology); Neal Devins, Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 302 (2016) (describing ideological divide in the Supreme Court tied to party affiliation of appointing president).

⁸¹ Webber, *supra* note 12 at 158; *See also* Novkov, *supra* note 78, at 814.

⁸² Webber, *supra* note 12, at 158. *See also* LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES 69 (2013); RICHARD L. PACELLE, JR. ET AL., DECISION MAKING BY THE MODERN SUPREME COURT 34-36 (2011); JEFFREY A. SEGAL & HAROLD SPAETH, THE ATTITUDINAL MODEL REVISITED 86 (2002).

⁸³ E.g., Mario Bergara et al., *Modeling Supreme Court Strategic Decision Making: The Congressional Constraint*, 28 LEGIS. STUD. Q. 247, 267 (2003).

⁸⁴ Webber, *supra* note 12, at 158; MICHAEL A. BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT 97-101 (2011). PACELLE, JR. ET AL, *supra* note 82, at 39-45. Novkov, *supra* note 78, at 814-15.

⁸⁵ Webber, *supra* note 12, at 158; BAILEY & MALTZMAN, *supra* note 84, at 97-101; PACELLE, JR. ET AL, *supra* note 82, at 39-45.

⁸⁶ Webber, *supra* note 12, at 158-59 (describing the integrated model of judicial decision making that asserts judges “are ideological in part, but also modify their decisions based on ... a respect for legal principles such as precedent”) (citing BAILEY & MALTZMAN, *supra* note 84, at 73,78; PACELLE, JR. ET AL, *supra* note 82, at 51-52).

⁸⁷ E.g., Ronald Kahn, *Institutional Norms and Supreme Court Decision-Making: The Rehnquist Court on Privacy and Religion*, in SUPREME COURT DECISION-MAKING: NEW

As described in Section B below, according to this theory, institutional constraints prevent courts from acting as solely partisan decision makers.⁸⁸

B. HISTORICAL INSTITUTIONALISM: THEORY

Historical institutionalism is a model for the behavior of political actors, including the judiciary.⁸⁹ The basic premise of this model is that institutions, their norms, expectations and historical practices, confine and restrain decision makers.⁹⁰ In the judicial context, historical institutionalism contends that judges act within a set of internalized constraints such as “a sense of duty or obligation about their responsibilities to the law and the Constitution and by a commitment to act as judges rather than as legislators or executives.”⁹¹ Thus, courts, and the Supreme Court in particular, are unique among the three political branches, in that they are bound by certain legal practices and are not free to solely pursue their preferred ideological outcomes.⁹² To maintain their legitimacy, the courts must at least appear to be bound by the law; this limits the ability of judges to act in a wholly partisan

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INSTITUTIONALIST APPROACHES 175, 175-76 (Cornell W. Clayton & Howard Gillman eds., 1999).

⁸⁸ E.g., Kahn, INSTITUTIONAL NORMS, *supra* note 87, at 175-76.

⁸⁹ E.g. *id.* at 3; MARCELLA MARLOWE, JURISPRUDENTIAL REGIMES: THE SUPREME COURT, CIVIL RIGHTS, AND THE LIFE CYCLE OF JUDICIAL DOCTRINE 11 (2011). Historical institutionalism is sometimes termed new institutionalism. See e.g. MARLOWE, *supra* at 11; Rogers M. Smith, *Historical Institutionalism and the Study of Law*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 48 (Gregory A. Caldeira et al. eds. 2008) (describing how public law scholars critical of behavioralism identified themselves first as new institutionalist and then as historical institutionalists). Regardless of terminology, this institutionalist theory falls within the broader umbrella of American Political Development. MARLOWE, *supra* at 27-31; Ronald Kahn & Ken I. Kersch, *Introduction*, in THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 13-16 (2006). Historical institutionalism can be distinguished from “rational choice institutionalism.” Kahn & Kersch, *supra* at 5; Smith, *supra* at 47-48. Rational choice institutionalism maintains the premise that judges seek to implement their policy views into the law but sometimes cannot do so due to institutional forces such as Congress overturning a court’s statutory interpretation. Kahn & Kersch, *supra* at 5. Thus, the strategic model does accept some institutional premises. *Id.* Historical institutionalism, in contrast, views institutional forces not just as obstacles to ideological decision making, but rather, shaping decision making itself. Smith, *supra* at 47-48.

⁹⁰ E.g., Kahn, INSTITUTIONAL NORMS, *supra* note 89, at 4-5. Novkov, *supra* note 78, at 820 (noting the “fundamental historical institutional insight that legal decision making, even when it is responsive to political concerns, takes place within the available legal discursive frameworks of the jurisprudential moment in which it occurs”) (citing PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION (2011); KENNETH KERSCH, CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW (2004)).

⁹¹ Howard Gillman & Cornell W. Clayton, *Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 1, 5 (Cornell W. Clayton & Howard Gillman eds., 1999). See also MARLOWE, *supra* note 89, at 11-12; Kahn & Kersch, *supra* note 89, at 17-18.

⁹² MARLOWE, *supra* note 89, at 12.

manner.⁹³ Historical institutionalism does not completely reject the attitudinal premise that political preferences affect judicial decisions, acknowledging that such preferences play a role.⁹⁴ Rather, this model provides an explanation of the circumstances under which judges must subordinate their ideological preferences in order to serve institutional norms, including respect for the law.⁹⁵

For example, historical institutionalist scholar Professor Ronald Kahn examined landmark religion cases during the Rehnquist Court and concluded that its justices did not “follow election returns, the policies of the presidents who appointed them, or even personal policy wants ... institutional norms, including the following of precedent, or *stare decisis*; respect for the difference between law and politics; and concerns for institutional legitimacy inform[ed] Court decision-making in important ways.”⁹⁶ As Kahn explained, if the Supreme Court of that era had followed personal policy preferences, it would have rejected precedents regarding state establishment and free exercise of religion.⁹⁷ At the time, conservative scholars and politicians sought to replace the Establishment Clause test established in *Lemon v. Kurtzman* with what is called a coercion test, and which would allow greater state support of religion.⁹⁸ The Rehnquist Court, however, rejected the coercion test and kept “the central premise of the *Lemon* test.”⁹⁹ As Kahn explains, these decisions, which were contrary to conservative ideology, reflected the constraining effect of institutional principles, specifically, the duty to follow established precedents and the normative value of a Court’s “autonomy from politics.”¹⁰⁰

The evidence in support of historical institutionalism is often qualitative, consisting of deep analysis of the context and content of Supreme Court decisions and locating institutional influences at work.¹⁰¹ Yet the proponents of this approach offer it as an alternative to the ideological models of analysis,¹⁰² which are based on empirical studies.¹⁰³ Given the challenge that these theories pose to the utility of the FJP, explained above, it is important to examine what empirical evidence exists in support of the historical institutionalist claim that law matters. Fortunately, statistical analysis supporting the institutionalist position is available, including recent studies confirming the role of law in decisions.

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⁹³ *Id.* at 11-13; Kahn & Kersch, *supra* note 89, at 17-18.

⁹⁴ Howard Gillman, *The Court as an Idea, Not a Building (or a Game)*, in NEW INSTITUTIONALIST APPROACHES 65, 86 (Cornell W. Clayton & Howard Gillman eds., 1999), 180; Kahn & Kersch, *supra* note 89, at 14; Novkov, *supra* note 78, at 815-16.

⁹⁵ Kahn, *supra* note 87, at 180; Kahn & Kersch, *supra* note 89, at 14.

⁹⁶ Kahn, *supra* note 87, at 177.

⁹⁷ *Id.* at 185.

⁹⁸ *Id.* at 186.

⁹⁹ *Id.* (citing *Lee v. Weisman*, 505 U.S. 577, 587 (1992)).

¹⁰⁰ *Id.*

¹⁰¹ MARLOWE, *supra* note 89, at 23; Ronald Kahn, *The Commerce Clause and Executive Power: Exploring Nascent Individual Rights in National Federation of Independent Business v. Sebelius*, 73 MD. L. REV. 133, 143 (2013).

¹⁰² Kahn, *supra* note 87, at 175-77.

¹⁰³ E.g., Kate Webber, *It Is Political: Using the Models of Judicial Decision Making to Explain the Ideological History of Title VII*, 89 ST. JOHN’S L. REV. 841, 860-61 (2015). Kahn critiques this reliance as being based on the assumption that the Court’s decision making is based on external factors such as ideology and ignores internal institutional and precedential factors. Kahn, *supra* note 101, at 143.

C. EMPIRICAL SUPPORT FOR THE RELEVANCE OF THE LAW

Mark Richards and Herbert Kritzer provided one of the seminal statistical studies establishing the law's influence on the Supreme Court.¹⁰⁴ Their study examined the influence of "jurisprudential regimes" which "structure Supreme Court decision making by establishing which case factors are relevant for decision making and/or by setting the level of scrutiny or balancing the justices are to employ ...".¹⁰⁵ Richards and Kritzer applied statistical tests using logistic regression to examine "all cases from 1953 to 1998 that presented a free press, free expression, or free speech issue."¹⁰⁶ Although acknowledging that policy goals influence Supreme Court decision making, their study concludes that the Court "is not simply a small legislature - [l]aw matters in Supreme Court decision making" as well.¹⁰⁷ Specifically, they found that jurisprudential regimes did structure the justices' decisions, regardless of ideology.¹⁰⁸

This study is consistent with Kahn's historical institutional analysis of the survival of the *Lemon* test in the Rehnquist Court described above. In fact, in a subsequent study, Richards and Kritzer performed a statistical analysis of the impact of *Lemon v. Kurtzman* on a series of subsequent Establishment Clause decisions.¹⁰⁹ Their analysis concluded that although *Lemon* did not directly dictate specific outcomes, and justices did not always follow the decision, the *Lemon* test "acted as a framework for the decisions in Establishment Clause cases decided over the last 30 years."¹¹⁰ Thus, Richards and Kritzer explain, "law does matter" to the Supreme Court by setting the parameters for deciding cases.¹¹¹

In another example, to test the hypotheses "that justices' voting behavior is influenced by their desire to reach legally sound decisions," Stefanie Lindquist and David Klein studied 338 cases in which the Supreme Court granted certiorari to resolve a circuit split.¹¹² Their statistical analysis revealed "strong evidence that jurisprudential influences matter for justices' decisions in [circuit] conflicts cases."¹¹³ Specifically, they found that the greater the number of circuits in favor of a position, the more likely justices were to adopt that position.¹¹⁴ As Lindquist and Klein explained, this indicated a number of possible jurisprudential influences: for example, that with more circuit court opinions there were more chances that at least one court hit upon

¹⁰⁴ Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305 (2002).

¹⁰⁵ *Id.* at 305.

¹⁰⁶ *Id.* at 312.

¹⁰⁷ *Id.* at 315.

¹⁰⁸ *Id.* *Contra* MARLOWE, *supra* note 89, at 22 (describing evidence that "undercuts the efficacy" of the Kritzer and Richards results).

¹⁰⁹ Herbert M. Kritzer & Mark J. Richards, *Jurisprudential Regimes and Supreme Court Decisionmaking: The Lemon Regime and Establishment Clause Cases*, 37 LAW & SOC'Y REV. 827, 828-31 (2003).

¹¹⁰ *Id.* at 831, 839.

¹¹¹ *Id.* at 839.

¹¹² Stefanie A. Lindquist & David E. Klein, *The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases*, 40 LAW & SOC'Y REV. 135, 144 (2006).

¹¹³ *Id.* at 151.

¹¹⁴ *Id.* at 142, 151-52.

a persuasive legal argument or the winning position gained more supporting circuit court positions because it had “greater legal plausibility and justices tend to choose the more plausible position.”¹¹⁵ The study also found that justices were less likely to side with an argument that generated more dissenting and concurring opinions in the circuit court decisions.¹¹⁶ Again this indicated jurisprudential influences on the Supreme Court: “[d]issenting opinions typically identify faults in the majority’s legal analysis, thus undermining its persuasiveness.”¹¹⁷

This study also established that the more prestigious the circuit court, the more likely the Supreme Court would adopt its position, likely due to the fact that circuit courts are prestigious for their superior legal reasoning.¹¹⁸ Finally, Lindquist and Klein found that the position taken by the Solicitor General was, under certain circumstances, more likely to be adopted by the Supreme Court, and that this could indeed be due to the expertise in that office of crafting persuasive legal arguments.¹¹⁹ Thus, overall, based on their empirical study and statistical analysis, Lindquist and Klein conclude that although justices’ personal values affect their decisions, the “results strongly support the view that judges and justices [also] engage in sincere efforts to find solutions that are persuasive according to a commonly held set of criteria.”¹²⁰

More recent empirical studies bolster the evidence of legal influences on decisions making. For example, Michael Bailey and Forrest Maltzman tested the effects of three legal factors: precedent, deference to Congress, and “the sanctity of the First Amendment’s free speech clause,”¹²¹ in Supreme Court cases from 1951 through 2008.¹²² They found “strong evidence that legal principles are influential for the decisions made by most justices.”¹²³ In a different study, Richard Pacelle, Jr., Brett Curry, and Bryan Marshall performed a statistical analysis of the Supreme Court’s economic and civil liberties cases from the 1953-2000 terms to examine the influences of ideology and existing precedents.¹²⁴ Although the study found that justices’ policy preferences play a significant role, it also found that the “Court pays attention to precedent and seeks to establish consistency in the law....”¹²⁵ They specifically note the consistency of their findings with Richards and Kritzer’s 2002 study on the influence of jurisprudential regimes.¹²⁶ Thus, empirical studies support the assertion by historical institutionalists that the law acts as a constraining force on judicial decision making.

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¹¹⁵ *Id.* at 151-52.

¹¹⁶ *Id.* at 143, 153-54.

¹¹⁷ Lindquist & Klein, *supra* note 112, at 153.

¹¹⁸ *Id.* at 154-55. According to Lindquist and Klein, this explanation is the most likely given prior studies that show prestige of circuit courts is unrelated to ideology. *Id.* at 154.

¹¹⁹ *Id.* at 144, 155-56. Lindquist and Klein note that on this factor, their tests were not conclusive, but still concluded, “we think it highly likely that jurisprudential and/or institutional considerations account for some of the SG’s success in conflict cases.” *Id.* at 156.

¹²⁰ *Id.* at 156.

¹²¹ BAILEY & MALTZMAN, *supra* note 84, at 70.

¹²² *Id.* at 70.

¹²³ *Id.* at 78.

¹²⁴ PACELLE, JR. ET AL, *supra* note 82, at 61.

¹²⁵ *Id.* at 203.

¹²⁶ *Id.* at 203.

D. IMPLICATIONS FOR THE FJP

The first impact of historical institutionalism on the FJP is to offer some validation to the Project's goals. By rejecting the premise that judges only engage in ideological decision making, and giving law at least some role, historical institutionalism justifies the effort to craft legal arguments to persuade the courts, as the FJP does. Indeed, in many ways, the FJP works within the bounds of institutional theory. Specifically, the FJP only works with existing law.¹²⁷ The Project does not assume a constitution with an Equal Rights Amendment; it does not rely on imaginary statutes; and it does not create new facts that did not exist at the time of the various decisions.¹²⁸ Instead, all rewritten opinions in the FJP must use the law as it existed at the time and the facts available either in the record or through judicial notice.¹²⁹ In this manner, the FJP implicitly accepts and works with the historical institutionalist premise that the judiciary as an institution is bound by certain norms such as precedent.

The FJP, however, also has a seemingly contradictory premise. Although each opinion is bound by the law at the time, each opinion is new, changing the precedent it is based on and offering a different type of argument in that case. By rewriting existing precedents, the FJP attempts to show that even within confines of existing law and fact, a different outcome or legal reasoning was, and is, possible.¹³⁰ These changes in prior cases, create a model for deciding future cases in a similarly reinvented manner. Thus, the FJP ultimately seeks to *change* the law.¹³¹ Historical institutionalism's basic premise, that institutional norms such as precedent confine judges,¹³² seems to suggest more continuity rather than change. Indeed, the Richards and Kritzer results suggest the stability of the law via jurisprudential regimes.¹³³ Historical institutionalist works have addressed this issue, however. As described below, historical institutionalism theory offers detailed explanations on how change is possible even within institutional confines.¹³⁴

¹²⁷ E.g., Stanchi Introduction, *supra* note 1, at 10.

¹²⁸ *Id.* at 10-11; Crawford Introduction, *supra* note 2, at 3. Nor does the FJP assume a different bench of justices; many opinions were written as dissents in acknowledgment of that their arguments would not have been adopted by a majority at the time of the decision. Stanchi Introduction, *supra* note 1, at 9-11; Crawford Introduction, *supra* note 2, at 10.

¹²⁹ E.g., Stanchi Introduction, *supra* note 1, at 10.

¹³⁰ *Id.* at 13.

¹³¹ *Id.* at 5. "Through this project, we hope to show that systemic inequalities are not intrinsic to law, but rather may be rooted in the subjective (and often unconscious) beliefs and assumptions of the decision makers. These inequalities may derive from processes and influences that tend to reinforce traditional or familiar approaches, decisions, or values. In other words, if we can broaden the perspectives of the decision makers, change in the law is possible." *Id.*

¹³² E.g., Kahn, *supra* note 87, at 177.

¹³³ E.g., Kritzer, *supra* note 109, at 831, 839 (noting that "the *Lemon* regime acted as a framework for the decisions in Establishment Clause cases decided over the last 30 years.").

¹³⁴ See Novkov, *supra* note 78, at 820-22 (explaining how institutionalism enables scholars to theorize above change in law over time).

III. CHANGING THE LAW: HISTORICAL INSTITUTIONALIST THEORIES

As explained above, the institutional theory of decision making asserts that to achieve legitimacy, courts cannot decide cases based solely on politics or personal policy preferences, but must comply with precedent and other institutional norms.¹³⁵ The meaning or application of those institutional principles, however, can change in light of social, economic, and political changes in the outside world.¹³⁶ Thus, according to some institutionalists, a necessary additional premise of institutionalism is that to *sustain* the legitimacy of the judiciary, the law cannot remain stagnant; courts, particularly the Supreme Court, must “interpret principles and precedents in light of what they mean as applied in a changing society.”¹³⁷ As a result, as Kahn explains, the Supreme Court’s decision making process is both internal, governed by institutional concerns such as that law itself or judicial norms and procedures, and external, influenced by a changing social reality.¹³⁸ Professor

¹³⁵ Kahn, *supra* note 87, at 178. See also Ronald Kahn, *Why Does a Moderate/Conservative Supreme Court in a Conservative Age Expand Gay Rights?*, in CONSTITUTIONAL POLITICS IN A CONSERVATIVE ERA 173, 189-90 (Austin Sarat ed., 2008) (“The presence of constituting institutional norms and practices means that Supreme Court rulings have objectivity and are independent of individual subjective policy opinions held by each participant in a majority opinion.”); MARLOWE, *supra* note 89, at 12 (“Most new institutionalists believe that legal constraints are a legitimate part of the constitutive effect on judges, making an analysis of legal factors essential to a nuanced understanding of judicial behavior.”); Novkov, *supra* note 78, at 814-18 (describing the new institutionalist’s view of the law’s influence on the courts and critique of the attitudinal model).

¹³⁶ Kahn, *supra* note 135, at 195-96. See also MARLOWE, *supra* note 89, at 39-40 (explaining how a jurisprudential regime will begin to end when the doctrine at issue becomes outdated); Novkov, *supra* note 78, at 817-18 (describing new institutionalist scholar Howard Gillman’s analysis of the *Lochner* era and how his work illustrated “the courts’ construction of a new constitutional order around old principles but also how and why that order was ultimately unsustainable as struggles between capital and labor intensified in the political sphere.”).

¹³⁷ Kahn, *supra* note 101, at 188; see also Kahn & Kersch, *supra* note 89, at 72-73 (The Court emphasizes that its legitimacy is based on the quality of its decision making, which includes its ability to recognize when the social constructions prior rights were based on are no longer valid.”). As institutionalist scholar Howard Gillman explains, “as with any institution, those who are affiliated with the Court should be expected to deliberate about protecting their institution’s legitimacy and (relatedly) adapting their institution’s mission to changing contexts and the actions of other institutions; in other words, in addition to performing a mission, institutional actors must consider issues of institutional maintenance in the context of a dynamic social setting.” Gillman, *supra* note 94, at 81. See also Novkov, *supra* note 78, at 824-25 (describing institutionalists positions on legal change, noting that legal doctrine is “critically important ... and its meaning changes in response to the legal and political forces that act upon it”); MARLOWE, *supra* note 89, at 39-42 (describing the post-governance phase of a jurisprudential regime, where legal doctrine loses its relevance and force due to societal changes). Kahn notes, however, that for originalists, the Court’s legitimacy is undermined by this evolving rights approach. See *infra* Part V(A).

¹³⁸ Kahn, *supra* note 135, at 185-86. See also Kahn, *supra* note 101, at 143 (describing the bi-directionality approach and its view that there is a “mutual construction process involving internal institutional and precedential factors, as well as external factors”).

Kahn terms this mutually constructive process, “principled bi-directional decision making,” and it can lead to dramatic change in the law, including overturning precedent.¹³⁹

A. PRINCIPLED BI-DIRECTIONAL DECISION MAKING

According to Kahn, principled bi-directional decision making (PBD) “is the means through which the Court applies polity (political institutional) and rights principles, in light of the lives of citizens as they have lived them ... as the complexity and the diversity of the nation’s society, economy, and politics increase.”¹⁴⁰ PBD is principled because it is based on legal doctrines and underlying institutional values; but it is also bi-directional because the Court’s internal decision making norms interact with the external social and political world.¹⁴¹ To put it another way, the legal and institutional principles which the Court is constrained to follow, can only gain meaning through their application to the outside world.¹⁴²

PBD is a theoretical model that can explain Supreme Court decisions in certain areas such as individual rights; specifically, Kahn asserts that PBD can explain why “implied fundamental rights have been sustained and expanded in a conservative political era.”¹⁴³ He points to a number of key examples, including *Planned Parenthood v. Casey*,¹⁴⁴ *Lawrence v. Texas*,¹⁴⁵ *National Federation of Independent Business v. Sebelius*,¹⁴⁶ *United States v. Windsor*,¹⁴⁷ and *Obergefell v.*

¹³⁹ Kahn, *supra* note 135, at 175. PBD is the most recent term Kahn uses for this model; his previous work details similar concepts with different nomenclature. *E.g.* Kahn & Kersch, *supra* note 89, at 85.

¹⁴⁰ Kahn, *supra* note 5, at 177.

¹⁴¹ *Id.* at 175, 184-85.

¹⁴² Kahn & Kersch, *supra* note 89, at 68.

¹⁴³ See Kahn, *supra* note 135, at 184-85. Ronald Kahn, *The Right to Same-Sex Marriage: Formalism, Realism, and Social Change in Lawrence (2003), Windsor (2013), & Obergefell (2015)*, 75 MD. L. REV. 271, 273 (2015) (“[T]he Supreme Court has reaffirmed and expanded implied fundamental rights and equal protection under the law for gay men and lesbians during a period of political dominance by social conservatives and evangelical Christians, and other groups who view the protection of their definition of family values as a central mission of government.”).

¹⁴⁴ 505 U.S. 833 (1992). In the *Casey* decision, the Supreme Court upheld the central holding of *Roe v. Wade*, that the constitutional protected the right to abortion choice, but also upheld a series of restrictions to accessing abortion, including express consent, a 24-hour waiting period, parental consent, and reporting requirements. 505 U.S. at 860, 876-901.

¹⁴⁵ 539 U.S. 558 (2003). In the 2003 *Lawrence* decision, the Court overturned *Bowers v. Hardwick*, 478 U.S. 186 (1986) which had permitted anti-sodomy laws as applied solely to gays and lesbians. 539 U.S. at 564-67. *Lawrence* recognized that the protection of liberty within the Fourteenth Amendment, including the implied right to privacy, rendered such laws unconstitutional. *Id.*

¹⁴⁶ 567 U.S. 519 (2012). In the *Sebelius* decision, the Court upheld the constitutionality of the individual mandate under the Affordable Care Act. *Sebelius*, 567 U.S. at 563.

¹⁴⁷ 570 U.S. 744 (2013). In *United States v. Windsor*, the Court found that the Defense of Marriage Act (“DOMA”) which had denied recognition of same sex marriage, was unconstitutional. *Windsor*, 570 U.S. at 775.

Hodges.^{148 149} These decisions disappointed conservative activists who had hoped for different outcomes in light of the number of Republican appointments to the Supreme Court.¹⁵⁰

A number of commentators and scholars explain these liberal outcomes by pointing to the ideology of the justices joining the majority opinions, which in all but *Sebelius*, consisted of liberal justices plus, in some cases, the long-acknowledged “swing” votes of Justices O’Connor and/or Kennedy.¹⁵¹ Kahn, however, offers a different, non-ideologically based explanation, a “contextual analysis” that explores the relationship between the Court’s decision making process and society.¹⁵² Kahn claims the theory of PBD offers superior explanatory utility, asserting that “most social scientists and other legal scholars and experts in constitutional law have failed to explain or predict the expansion of privacy rights and other individual liberties,” in these important decisions.¹⁵³

For example, according to Kahn, in *Casey*, PBD forced the Court to look at the external society and acknowledge that the factual underpinnings of *Roe*, and the general understanding of those facts, had not changed.¹⁵⁴ In fact, since the *Roe* decision, women’s place in society continued to expand significantly, and “women and their families had grown to rely on the existence of rights of abortion choice.”¹⁵⁵ In the process of engaging in PBD, the Court considered these external realities in light of internal norms such as the importance of precedent and an apolitical judiciary.¹⁵⁶ Specifically, had the Court ignored the fact that societal facts still supported the central holding of *Roe* and overturned that case in whole, the Court would be seen as deciding the issue on “raw policy grounds, or in response to

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¹⁴⁸ 135 S. Ct. 2584 (2015). In *Obergefell v. Hodges*, the court held that the fundamental right to marry applies to same sex couples. 135 S. Ct. at 2604-2605.

¹⁴⁹ Kahn, *supra* note 143, at 273. (discussing *Lawrence*, *Windsor*, and *Obergefell*; Kahn, *supra* note 101 (discussing *Sebelius*); Kahn, *supra* note 136, at 178-184 (discussing the *Lawrence* and *Casey* decisions); Kahn & Kersch, *supra* note 89, at 68 (same).

¹⁵⁰ Kahn, *supra* note 101, at 139. Conservatives were particularly critical of Justice Roberts’ decision to uphold the individual mandate under the ACA. “Since 1969, when President Nixon named Warren Burger as Chief Justice, through 2005, when President George W. Bush appointed Chief Justice John Roberts to and nominated Samuel Alito for the Supreme Court, Republican presidents had made twelve of fourteen appointments to the Supreme Court, thus constituting a clear majority of appointees in any given year.” *Id.* at 135-36.

¹⁵¹ E.g., Robert H. Smith, *Uncoupling the “Centrist Bloc”—an Empirical Analysis of the Thesis of A Dominant, Moderate Bloc on the United States Supreme Court*, 62 TENN. L. REV. 1, 38, 70-71 (1994) (*Casey*); Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1537-39 (2007) (*Lawrence*); Tonja Jacobi, *Obamacare As A Window on Judicial Strategy*, 80 TENN. L. REV. 763, 777 (2013) (*Sebelius*); Bertrall L. Ross II, *The State As Witness: Windsor, Shelby County, and Judicial Distrust of the Legislative Record*, 89 N.Y.U. L. REV. 2027, 2029 (2014) (*Windsor*); Jane S. Schacter, *Putting the Politics of “Judicial Activism” in Historical Perspective*, 2017 SUP. CT. REV. 209, 265-68 (2017) (*Obergefell*).

¹⁵² Kahn, *supra* note 101, at 140; Kahn, *supra* note 143, at 273-74.

¹⁵³ Kahn, *supra* note 101, at 140; Kahn, *supra* note 143, at 273-74.

¹⁵⁴ Kahn & Kersch, *supra* note 89, at 70-71 (quoting 505 U.S. at 833, 864).

¹⁵⁵ *Id.* at 72.

¹⁵⁶ *Id.* Kahn, *supra* note 135, at 178.

politics.”¹⁵⁷ This would have undermined the Court’s legitimacy as an institution.¹⁵⁸ In fact, as a result of these institutional forces, the Court not only upheld the central holding of *Roe v. Wade*, it expanded beyond privacy rights as basis for doing so, recognizing abortion choice as important to women’s rights of personhood as well.¹⁵⁹ Thus, according to Kahn, in the *Casey* example, PBD acted as a force of both stability and change.¹⁶⁰ The process of PBD led to continuity in the central holding of *Roe* with new, reinvigorated legal principles for doing so, namely, a new emphasis on relevance of abortion choice to women’s right of personhood, not just privacy.¹⁶¹

According to Kahn, in *Lawrence v. Texas*, PBD led to significant legal change expanding gay rights.¹⁶² Kahn asserts that, as in *Casey*, in *Lawrence*, the Court considered the social factual background, but in this case found the facts, or understanding of those facts, had changed.¹⁶³ These new social constructions now recognized gay citizens as possessing rights of privacy and personhood that were often threatened by animus.¹⁶⁴ In the mutual construction process of PBD, these social constructions implicated key internal judicial norms that affected the Court’s legitimacy.¹⁶⁵ For example, Supreme Court decisions since *Bowers v. Hardwick* offered expanded understanding of the connection between intimate choices and the personal dignity and autonomy central to the liberty protected by the Fourteenth Amendment.¹⁶⁶ Had the Court refused to apply this legal precedent on liberty to a disfavored minority, it would be contrary to the Court’s norms of being apolitical and its institutional role of protector of rights, even in the face of majority animosity.¹⁶⁷

Kahn summarizes PBD in these two example cases as follows:

The Supreme Court sustains and expands individual rights, even gay rights, because ... majority and concurring Justices in *Casey* and *Lawrence* strongly reject political contestation and majoritarian opinion as reasons on which to decide implied fundamental rights cases. When the *Casey* and *Lawrence* Courts engaged in PBD, they considered whether the rights at issue in these cases, privacy and personhood, are still important and expanding and whether citizens have accepted these rights in their lives.¹⁶⁸

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¹⁵⁷ Kahn & Kersch, *supra* note 89, at 72.

¹⁵⁸ Kahn, *supra* note 135, at 178; Kahn & Kersch, *supra* note 89, at 71-72. Indeed, as Kahn notes, the *Casey* decision explicitly acknowledges this concern for legitimacy. *Id.* at 71 (quoting 505 U.S. at 833, 864).

¹⁵⁹ Kahn, *supra* note 135, at 178; Kahn & Kersch, *supra* note 89, at 71-72.

¹⁶⁰ Kahn, *supra* note 135, at 178; Kahn & Kersch, *supra* note 89, at 71-72.

¹⁶¹ Kahn, *supra* note 135, at 178; Kahn & Kersch, *supra* note 89, at 71-72.

¹⁶² Kahn, *supra* note 135, at 178-81.

¹⁶³ *Id.* at 178-79.

¹⁶⁴ *Id.* See also Kahn, *supra* note 143, at 289 (noting Kennedy’s reasoning in *Lawrence* that “state prohibitions on sodomy caused prejudice against gays, even if states were prohibiting all citizens from engaging in sodomy”) (citing *Lawrence*, 539 U.S. at 575).

¹⁶⁵ Kahn, *supra* note 135, at 180.

¹⁶⁶ Kahn & Kersch, *supra* note 89, (quoting *Lawrence* at 574).

¹⁶⁷ Kahn, *supra* note 135, at 180.

¹⁶⁸ *Id.* at 183.

B. SOCIAL CONSTRUCTION

As the above examples show, PBD leads to changes in the law because PBD considers changes in society and how the law must evolve to address them.¹⁶⁹ Kahn makes clear, however, that new social facts alone do not cause legal change; rather, advocates must use “legal grammar” to tie new social facts to existing institutional norms such as precedent or legal values of equal protection or liberty.¹⁷⁰ Kahn defines this conversion of raw fact into legally significant fact, “social construction,”¹⁷¹ and it is a central aspect of PBD described above. Kahn’s definition of social construction is “both empirical and normative”—empirical because it draws on the real lives of citizens and normative because it entails application of principles of justice, liberty, and equality to these social facts.¹⁷² As described above, the process of social construction played a role in the evolution of the law of abortion rights in *Casey* and the law of gay rights in *Lawrence*.

Social constructions are woven within lines of Supreme Court cases and can influence future decisions as much as legal principles.¹⁷³ For example, after *Reed v. Reed* and progressing through such cases as *Frontiero v. Richardson*, new social facts on women’s expanding role in society became a social construction relevant to the principle of equal protection.¹⁷⁴ As Kahn described it, “[w]ith each new case, social constructions would further illuminate what gender discrimination means, and thus what constituted an equal protection violation.”¹⁷⁵ Kahn identifies other examples of social construction, such as the effect of psychological coercion on children in *Lee v. Weisman* or the reality of domestic abuse and power disparity between women and their spouses recognized in *Casey*.¹⁷⁶ Kahn’s recent work, however, cautions that the social construction must be robust in order to have precedential effect.¹⁷⁷ Social construction will not create effective legal principles where social facts are not well connected to precedent, or the construction creates an unworkable rule.¹⁷⁸

C. MODERN DECISIONS

Kahn continues to rely on PBD to explain the monumental decisions in *Sebelius*, *Windsor*, and *Obergefell*, again rejecting a purely ideological explanation for the

¹⁶⁹ Kahn & Kersch, *supra* note 89, at 72 (“When changes in society are symbiotic with the Court’s evaluation of the application of rights principles, landmark cases will not be overruled; when social constructions in past landmark cases are no longer tenable, landmark cases are ripe for serious modification, if not outright overturning.”).

¹⁷⁰ Kahn, *supra* note 135, at 185, 193; Kahn & Kersch, *supra* note 89, at 86-87.

¹⁷¹ E.g., Kahn, *supra* note 135, at 193; Kahn & Kersch, *supra* note 89, at 86.

¹⁷² Kahn & Kersch, *supra* note 89, at 86.

¹⁷³ *Id.* at 87.

¹⁷⁴ Kahn, *supra* note 135, at 193; Kahn & Kersch, *supra* note 89, at 87-88.

¹⁷⁵ Kahn & Kersch, *supra* note 89, at 88.

¹⁷⁶ Kahn, *supra* note 135, at 193.

¹⁷⁷ Kahn, *supra* note 101, at 175-76.

¹⁷⁸ *Id.* (discussing Roberts’ interpretation of the Commerce Clause in *National Federation of Independent Business v. Sebelius*, finding it unlikely to be applied and sustained in the long term because it is impossible to clarify his interpretations key distinction between action/inaction and this construction’s conflict with prior precedent).

Justices' individual decisions on the case.¹⁷⁹ For example, Kahn describes Chief Justice Roberts' decision in *Sebelius* as bringing external economic realities into an analysis of principles of federalism and separation of powers and of prior cases on the Commerce and Taxing Clauses.¹⁸⁰ According to Kahn, Justice Roberts' refusal to find authority for the ACA under the Commerce Clause stems from "his comparison of the failure of citizens to purchase health insurance with the failure of farmers to purchase wheat in *Wickard* and the failure of persons to grow and use marijuana in *Raich*."¹⁸¹ This connection between external facts and internal norms (precedent) matches Kahn's definition of PBD, *principled* based decision making, not ideology based. Kahn similarly describes Justice Ginsberg's dissent, not as a justification for her preferred ideological outcome, but rather as bi-directional decision making, specifically, a critique of the Roberts' opinion's economic construction.¹⁸² According to Kahn, this dispute among the justices over how to incorporate economic realities into law reflects the centrality of the construction process to decision making, a key premise of his PBD theory in contrast to ideological explanations.¹⁸³

Kahn also offers this alternative explanation for the outcome in subsequent gay rights cases. In *Windsor*, instead of turning solely on the political viewpoints of the justices with Kennedy as the key swing vote, Kahn sees principled (precedent and rights based) bi-directional (external world affecting those precedents) decision making.¹⁸⁴ Kahn describes how the majority opinion brought in the outside world, the lived lives of same sex families,¹⁸⁵ to existing precedent on marriage and gay rights.¹⁸⁶ According to Khan, Kennedy looked outside of the bounds of the Constitution to consider the burdens DOMA placed on the family life of same sex couples and families, and that this reality demonstrated why DOMA was a denial of equal protection and liberty.¹⁸⁷ With respect to *Obergefell*, again, Kahn finds that ideology-based theories of judicial decision making do not fully explain this case's dramatic outcome.¹⁸⁸ Kahn notes that *Obergefell* is the logical next step in the social construction process started by *Lawrence* and continuing through other cases such as *Windsor*.¹⁸⁹ In all of these cases, the lived lives of gay families are connected

¹⁷⁹ E.g., Kahn, *supra* note 101, at 162 (asserting that in *Sebelius*, "[c]onservative and liberal Justices ... engage in a bidirectional Supreme Court decision-making process that incorporates the outside economic, social, and political world.").

¹⁸⁰ *Id.* at 159 (Roberts engaged in "an economic construction process ... drawing analogies between the construction processes of the individual mandate as compared to the economic constructions of prior Commerce and Taxing Clause jurisprudence.").

¹⁸¹ *Id.* at 187.

¹⁸² *Id.* at 176.

¹⁸³ *Id.* at 176-77.

¹⁸⁴ Kahn, *supra* note 143, at 299.

¹⁸⁵ *Id.* at 301.

¹⁸⁶ *Id.* at 299 ("The majority opinion in *Windsor* is a classic example of ... bidirectional decision-making. The principles and social constructions that produced a liberty of sexual relations in *Lawrence* led to the principles and social constructions behind the *Windsor* decision.").

¹⁸⁷ *Id.* at 292.

¹⁸⁸ *Id.* at 302. (*Obergefell* "cannot be explained by external factors that are emphasized by political scientists employing the attitudinal and regime approach to explain Court decision-making...").

¹⁸⁹ Kahn, *supra* note 143, at 301-303. "In *Obergefell*, as in *Windsor* and *Lawrence*, the Court emphasizes the importance of marriage in fostering deep, enduring personal relations

to legal principles of liberty and equal protection; a process of social construction which leads to the liberal outcome.¹⁹⁰

Thus, the historical institutionalist theory of PBD offers a method for persuading justices. Through social construction, advocates can tie changes in the lives of citizens to existing legal principles to show how the law must evolve and change as well. This theory offers an explanation for a number of cases with progressive outcomes. The FJP would like to do the same thing: convince judges to change the law towards a more feminist legal reasoning and case decisions.¹⁹¹ If the FJP uses the institutional change mechanism of PBD, perhaps the Project can succeed in its goals and influence even the current, conservative judiciary. The following section explores this question.

IV. THE FJP'S USE OF HISTORICAL INSTITUTIONALIST CHANGE TECHNIQUES

A number of decisions in the FJP use social construction, which, according to Kahn's theories of historical institutionalism, is a method of persuasion that can lead to legal change. Although the FJP limited the opinion writers to the facts available in the record or that were suitable to judicial notice,¹⁹² in many cases the FJP authors pointed to previously unconsidered, or improperly discounted facts.¹⁹³ As described below, in the FJP opinions, these social understandings are tied directly to legal principles to inform their interpretation. This process mirrors Professor Kahn's description of principled based decision making where the law can change when social realities are specifically tied to existing legal values.¹⁹⁴ The following sections describe two major social themes that appear in a number of FJP decisions: a broader understanding of sexual violence and harassment and expanded recognition of the experiences of gay, and transgender, people.

A. SOCIAL CONSTRUCTION IN THE FJP: #MeToo AND THE LAW

Although the FJP precedes the popularization of #MeToo, many FJP authors draw on the broader understanding of sexual violence and harassment that has since been more widely recognized as a result of the #MeToo movement¹⁹⁵ and the related

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deserving of protection; the hurt and loss of dignity to children and parents in same-sex families caused by the prejudice of the wider society towards them; and the rejection of simple, moral disapproval against gays as a basis for legislation." *Id.* at 303.

¹⁹⁰ *Id.* at 303.

¹⁹¹ Stanchi Introduction, *supra* note 1, at 5.

¹⁹² *Id.* at 10; Crawford, *supra* note 2, at 3.

¹⁹³ See *infra* Parts IV(A) & (B). See also Stanchi Introduction, *supra* note 1, at 15-16 (describing feminist method of using facts the law "often shies away from").

¹⁹⁴ See *supra* Part III.

¹⁹⁵ Although originally founded by Tarana Burke over ten years ago, the #MeToo became a national phenomenon in 2017 after a number of famous actresses came forward with their stories of abuse and harassment. Melissa Murray, *Consequential Sex: #Metoo, Masterpiece Cakeshop, and Private Sexual Regulation*, 113 NW. U. L. REV. 825, 831 at n. 24, 866-867 (2019). "Initially intended as a means of cultivating empathy among young women for other victims of sexual harassment and sexual assault, the movement

organization TimesUp.¹⁹⁶ The #MeToo movement has received significant media coverage and started a new national conversation about the sexual abuse of women by men with power over their careers.¹⁹⁷ Women under the #MeToo umbrella have come forward to report real life instances of mistreatment and crime, with many high profile perpetrators being held to account.¹⁹⁸ A number of the opinions in the FJP are fortuitously drawing on themes that the #MeToo movement has been broadcasting widely.¹⁹⁹ Moreover, the authors not only identify these new social facts, they specifically tie them to legal precedents and values using the “legal grammar” a judicial opinion requires.²⁰⁰ This full, social construction, provides the dual force of new fact and legal argument that Kahn describes as persuasive.²⁰¹

The rewritten opinion of *Dothard v. Rawlinson*,²⁰² is an example of this social construction. The original Supreme Court opinion held that the height and weight requirements imposed by Alabama’s correctional department violated the prohibition of sex discrimination in employment because it disparately excluded women and the state failed to show the requirements were necessary for the position.²⁰³ At the same time, the Court also held that sex was a bona fide occupational qualification (“BFOQ”) for guarding a men’s prison due to the risk of sexual assault, and, as a result, women could be completely excluded from that job.²⁰⁴ In the rewritten

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and its representative hashtag have come to represent the ubiquity of the offenses--and a society and legal culture that seem to condone the conduct.” *Id.* at 866. *See also* Jamie R. Abrams, *The #Metoo Movement: An Invitation for Feminist Critique of Rape Crisis Framing*, 52 U. RICH. L. REV. 749, 750 (2018) (“After decades of a relatively stagnant and opaque framing of rape and sexual assault through the lens of crisis, the #MeToo Movement “unleashed one of the highest-velocity shifts in our culture since the 1960s” with social media as its “powerful accelerant.” With the click of a “MeToo” hashtag, virtually overnight, a modern anti-sexual assault and -sexual harassment movement was born.”).

¹⁹⁶ “#MeToo has spawned similar social justice-oriented organizations, including Time’s Up, a ‘solution-based, action-oriented next step in the [# MeToo] movement’ that focuses on passing legislation and changing policies to address the systemic sources of inequality--lack of representation, gendered pay disparities, and the unequal distribution of power--that cultivate the conditions in which sexual harassment and violence may occur.

Murray, *supra* note 195, at 866-67.

¹⁹⁷ *E.g.*, Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 156, 193-196 (2019); L. Camille Herbert, *Is ‘MeToo’ Only a Social Movement or a Legal Movement Too?*, 22 EMPL. RTS. & EMPLOY. POL’Y J. 321, 322-23 (2018).

¹⁹⁸ “Using social media and the press, the # MeToo movement has identified recidivist harassers and workplaces where sexual harassment and sexual assault are rife, advocated for increased workplace harassment training, and, ultimately, called for the expulsion from the workplace of several high-profile men who, for years, engaged in objectionable conduct with impunity.” Murray, *supra* note 195, at 833. *See also*, Elizabeth C. Tippet, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 230, 230-32 (2018) (describing the MeToo movement and listing the prominent men accused and later fired).

¹⁹⁹ *See* Herbert, *supra* note 197, at 322-23.

²⁰⁰ *See infra*.

²⁰¹ *See supra* Part III.

²⁰² Ontiveros, *supra* note 32, at 213.

²⁰³ *Dothard v. Rawlinson*, 433 U.S. 321, 328-32 (1977).

²⁰⁴ *Id.* at 334-37.

feminist judgment, concurring and dissenting in part, Professor Maria Ontiveros critiques this BFOQ argument for its stereotyping of women as the cause of sexual assault,²⁰⁵ echoing a theme of #MeToo.²⁰⁶ As Ontiveros explains in her dissenting part, the majority accepted the assertion by the state that sexual assaults against female guards are inevitable; ignoring evidence that the prison system made a series of choices in the structure of the prison that created this hazard and failed to take available steps, used in other systems, to eliminate it.²⁰⁷ As Ontiveros explains, “the majority’s line of reasoning reinforces the stereotypes that women are, first and foremost, sexual objects whose very presence cause sexual assault [relying] on the unstated premise that the stereotype is fixed, normal and natural, and nothing can be done to change it.”²⁰⁸ Ontiveros then takes the next step in social construction by tying this social understanding of assault to the law. Specifically, she notes how all of these assumptions are stereotypes about the nature and roles of women, and that precedent explicitly prohibits basing a BFOQ defense on stereotypes.²⁰⁹ She also draws the logical corollary that BFOQ is not available when the employer itself creates the conditions that make a position inhospitable to a particular gender.²¹⁰

The rewritten opinion in *Meritor Saving Bank* also emphasizes a #MeToo principle, that there are many reasons why victims of harassment cannot immediately report the misconduct or find help,²¹¹ and adds another feature of new social facts, the intersectional impact of race and gender.²¹² The original *Meritor* opinion established the first definitive definition of sexual harassment as a form of sex discrimination under Title VII, requiring plaintiffs to show severe or pervasive misconduct based on sex that was both objectively and subjectively offensive.²¹³ In rewriting *Meritor*, Onwuachi-Willig took the opportunity to offer a new foundational definition that removed the problematic aspects of subjective offense (unwelcomeness), objective offense assessed by a “neutral” standard, and the severe and pervasive language which has proven to be a significant roadblock to plaintiffs’ recovery.²¹⁴ This rejection of the current legal standard for sexual harassment resonates with the #MeToo and TimesUp efforts to address harassment, including the unduly demanding legal standards as well as other barriers.²¹⁵ In the

²⁰⁵ Brenda V. Smith, *Commentary on Dothard v. Rawlins*, in FEMINIST JUDGMENTS: SUPREME COURT, *supra* note 4, at 209; Ontiveros, *supra* note 32, at 223-25.

²⁰⁶ Catharine A. MacKinnon, *Where #MeToo Came From, and Where It’s Going*, THE ATLANTIC, Mar. 24, 2019, <https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313/>.

²⁰⁷ Ontiveros, *supra* note 32, at 217, 225-26.

²⁰⁸ *Id.* at 223-24.

²⁰⁹ *Id.* at 218, 223-27.

²¹⁰ *Id.* at 223-27.

²¹¹ Abrams, *supra* note 195, at 771 (“The #MeToo Movement powerfully revealed the harsh reality that many women are not able to reveal their victimization for decades or years for myriad of reasons.”). *See also* Herbert, *supra* note 199, at 331-32 (noting the #MeToo movements potential to inform courts about “the complexity of reasons women fail to promptly report harassing conduct”).

²¹² Onwuachi-Willig, *supra* note 31, at 303; Abrams, *supra* note 195, at 779-81.

²¹³ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63-67 (1986).

²¹⁴ Tiscione, *supra* note 74, at 300, Onwuachi-Willig, *supra* note 31, at 315-17.

²¹⁵ *See, e.g.*, Jessica Clarke, *The Rules of #MeToo*, *forthcoming* 2019 at 7-10; Herbert, *supra* note 197, at 325-26, 329-31; Tippet, *supra* note 198, at 241-49.

rewritten opinion, “the gravamen” of a sexual harassment claim is now “whether the challenged conduct unreasonably interfered with the plaintiff’s work environment or performance, create a hostile or intimidating environment, or worked to preserve patterns of sex segregation in employment.”²¹⁶ Professor Onwuachi-Willig, removes the unwelcome requirement altogether, because focusing on whether the harassment was welcome ignores the power differentials that make it less likely that some women, given their economic or career vulnerabilities, are able to resist or complain, the accepted evidence of unwelcomeness.²¹⁷

In her discussion, Onwuachi-Willig also emphasized the particular vulnerability of black women, citing studies that showed their claims of sexual harm were less likely to be believed and the stereotypes of black women as sexually immoral that contribute to this.²¹⁸ To legally capture this social reality, she created a different standard for assessing whether there is a hostile work environment, asking how the reasonable person with the complainant’s identity characteristics, here a reasonable black woman, would perceive events instead of the original reasonable person standard.²¹⁹ Onwuachi-Willig moves beyond the hashtag MeToo movement in this intersectional analysis, echoing perhaps more of the original #MeToo creator’s message.²²⁰ Overall, she ties a broader understanding of the real life experiences of women, and black women in particular, into the legal definitions of harassment.

Other rewritten opinions reflect the increased social recognition of the nature, extent, and implications of sexual violence and harassment. In the rewritten *Gebser v. Lago Vista*,²²¹ for example, Professor Ann Bartow crafted a dissent rejecting the original opinion’s characterization of sex between a thirteen (to fifteen) year old and her teacher as a “relationship,” correctly identifying this as rape due to the student’s age and lack of capacity to consent.²²² Bartow further explores the social facts of how difficult it is for a minor to report sexual misconduct by a teacher with authority over their grades and courses.²²³ Bartow’s contextualization for a minor victim resonates with Tarana Burke’s original MeToo and its empathetic focus on younger victims of sexual violence; although Bartow’s case lacks the intersectional perspective Burke also emphasizes.²²⁴ Bartow then ties this reality to the legal

²¹⁶ Onwuachi-Willig, *supra* note 31, at 317.

²¹⁷ Tiscione, *supra* note 74, at 301; Onwuachi-Willig, *supra* note 31, at 316-17.

²¹⁸ Onwuachi-Willig, *supra* note 31, at 315.

²¹⁹ *Id.*

²²⁰ The Founder of #MeToo Doesn’t Want Us to Forget Victims of Color, PBS NewsHour (Nov. 15, 2017, 6:35 PM), <https://www.pbs.org/newshour/show/the-founder-of-metoo-doesnt-want-us-to-forget-victims-of-color> (MeToo creator Tarana Burke discussing how black women and girls are viewed as inherently sexual and therefore less likely to be believed when asserting claims of assault or harassment) Although Ms. Burke expressed this intersectional reality, others have critiqued MeToo for failing to address the specific experience of black women. Angela Onwuachi-Willig, *What About #ustoo?: The Invisibility of Race in the #Metoo Movement*, 128 YALE L.J. FORUM 105, 107-108 (2018).

²²¹ Bartow, *supra* note 32, at 430.

²²² Michelle S. Simon, *Commentary on Gebser v. Lago Vista Independent School District*, in FEMINIST JUDGMENTS: SUPREME COURT, *supra* note 4, at 428; Bartow, *supra* note 32, at 431, 436.

²²³ Bartow, *supra* note 32, at 437-38, 443.

²²⁴ *History & Vision*, METOO, <https://metoomvmt.org/about/#history> (last visited July 26, 2019) (“Tarana Burke began ‘me too’ with young Black women and girls from low

standard, again rejecting the original majority opinion and its requirement that a school have actual notice and fail to act before it is liable for a teacher's harassment of a student.²²⁵ Instead, Bartow offers a standard of liability based on agency law, that "a school district is liable under Title IX if a teacher's sexual harassment was 'facilitated either expressly or implicitly, by the teacher's actual or apparent authority as an employee of the school.'"²²⁶ This rewritten opinion also echoes some of the messages of the #MeToo and TimesUp movements more generally—namely the role of power disparity in facilitating sexual abuse,²²⁷ and the need for more effective, systemic solutions.²²⁸

Other examples include the rewritten opinions of *Town of Castle Rock v. Gonzales*²²⁹ and *Oncale v. Sundowner Offshore Services, Inc.*²³⁰ In *Town of Castle Rock*, the Supreme Court originally held that a victim of domestic violence had no federal constitutional right to the enforcement of a civil restraining order against her husband, despite a Colorado statute mandating such enforcement.²³¹ In the rewritten majority opinion, Professor Maria Isabel Medina comes to the opposite conclusion, finding a property interest in such enforcement that is protected by the Due Process Clause.²³² Medina's opinion provided detailed social facts highlighting the pervasiveness of domestic violence and the history of police under-enforcement of protective orders based on long standing stereotypes about "primacy of male spouses as heads of households" and "views of women as naturally submissive, indecisive, and prone to complaint, but likely to retract allegations of domestic violence."²³³ Medina reasoned that the Colorado legislature sought specifically to counteract those problems by requiring enforcement of domestic violence protective orders.²³⁴ She engaged in social construction by tying these concepts to existing precedent on property rights.²³⁵ She reasoned that the Colorado statute

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wealth communities. She developed culturally-informed curriculum to discuss sexual violence within the Black community and in society at large. Similarly, the 'me too' movement seeks to support folks working within their communities to attend to the specific needs of their community/communities, i.e. supporting disabled trans survivors of color working to lead and craft events/toolkits/etc. with other disabled trans survivors. Together, we can uplift and support each other to strengthen a global movement to interrupt sexual violence.").

²²⁵ Bartow, *supra* note 32, at 443-44.

²²⁶ *Id.* at 444.

²²⁷ See, e.g., Open Letter from Time's Up, *News Documents*, N.Y. TIMES, https://www.nytimes.com/interactive/2018/01/01/arts/02women-letter.html?_r=0 (last visited July 26, 2019).

²²⁸ Jennifer Smola, *Founder of 'Me Too' Movement Fears Narrative Being Hijacked from Helping Survivors Heal*, COLUMBUS DISPATCH (Apr. 23, 2018), <https://www.dispatch.com/news/20180423/founder-of-me-too-movement-fears-narrative-being-hijacked-from-helping-survivors-heal> ("This is about systems. There were systems in place that allowed [perpetrators of sexual violence] to behave the way they behaved . . . . It has to be a movement about how we dismantle the systems, not the individuals.").

²²⁹ Medina, *supra*, note 31, at 508-26.

²³⁰ McGinley, *supra* note 31, at 414-25.

²³¹ *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 766-67 (2005).

²³² Medina, *supra*, note 31, at 518-26.

²³³ *Id.* at 512.

²³⁴ *Id.* at 511.

²³⁵ *Id.* at 518-19.

created a bundle of rights, and that the Court had found other analogous state benefits to be protected by Due Process.²³⁶ Although not the main focus of the #MeToo movement, which in its current iteration most often concerns workplace abuse, some of the movement's themes have been extended to domestic violence.²³⁷ Indeed, as Professor Jane Stoever explains, "[t]he recent #MeToo movement is relevant to societal and legal responses to gender-based violence ... [and] reveals the persistent societal reluctance to believe abuse survivors and offer real remedies."²³⁸ Thus, Medina's rewritten opinion is also engaged in social construction on issues of increasing social salience.

In the rewritten *Oncale* decision, Professor Ann McGinley continues the process of social construction identified by Kahn, and extends Title VII to prohibit discrimination on the basis of sexual orientation.²³⁹ The original *Oncale* decision found that harassment between members of the same sex would also violate Title VII's prohibition of discrimination on the basis of sex; but did not address sexual orientation discrimination.²⁴⁰ McGinley's rewritten *per curiam* opinion has the same outcome, but extends the legal reasoning to specifically find that harassment and discrimination based on sexual orientation violates the statute as well.²⁴¹ McGinley reasons that the existing legal basis for finding that discrimination based on sex includes discrimination for failure to meet the social expectations for gender, women who are insufficiently feminine or men who are insufficiently masculine.²⁴² She then engages in social construction by extending this concept to animosity toward sexual orientation, explaining how this too is inextricably connected to stereotypes about the "proper" behavior of men and women.²⁴³ Specifically, drawing on masculinities theory she cites research that it is virtually impossible to distinguish between animosity towards a man's failure to meet expectations of masculinity and animosity toward homosexuality.²⁴⁴ She therefore concludes that

²³⁶ *Id.* at 519.

²³⁷ Melissa L. Breger, *Reforming by Re-Norming: How the Legal System Has the Potential to Change A Toxic Culture of Domestic Violence*, 44 J. LEGIS. 170, 171 (2017) ("[S]ome might argue that the #metoo movement is bringing to light "rape culture" and workplace sexual harassment through re-norming and changing social perceptions and norms in a way never seen before. We can apply some of these same re-norming lessons to try to curb intimate partner violence."); See, e.g., Rachel Leah, *Is #MeToo Moving Into Domestic Violence?* SALON (Dec. 8, 2017), <https://www.salon.com/2017/12/08/lucy-mcintosh-mark-houston-metoo-domestic-violence/>.

²³⁸ Jane K. Stoever, *Access to Safety and Justice: Service of Process in Domestic Violence Cases*, 94 WASH. L. REV. 333, 335 (2019). She also notes #MeToo is hindered by some of the same negative forces, such as infighting that appeared in the early battered women's movement. *Id.*

²³⁹ McGinley, *supra* note 31, at 424.

²⁴⁰ *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79-80 (1998).

²⁴¹ McGinley, *supra* note 31, at 423-24. The Supreme Court will soon decide this issue. See Linda Greenhouse, *On LGBTQ Rights the Supreme Court Asks the Question*, N.Y. TIMES, Apr. 25, 2019, <https://www.nytimes.com/2019/04/25/opinion/lgbt-rights-supreme-court.html?searchResultPosition=4>.

²⁴² McGinley, *supra* note 31, at 423.

²⁴³ *Id.* at 423-24.

²⁴⁴ *Id.* at 423 (citing Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame and Silence in the Construction of Gender Identity*, in THEORIZING MASCULINITIES 119-41 (Harry Brod & Michael Kaufman eds. 1994)).

a victim of same sex harassment may show the mistreatment was because of sex and thus actionable under Title VII by showing the harasser was motivated by the victim's failure to "adhere to masculine (or feminine) stereotypes including the real or perceived sexual orientation of the victim."²⁴⁵ Although not as explicitly tied to the #MeToo movement, McGinley's analysis does tie into an increasing social understanding of the harm of toxic masculinity, which has been part of the #MeToo discussion, and is now so prevalent as to appear in razor commercials and medical recommendations.²⁴⁶ Thus, in a number of the FJP's rewritten Supreme Court decisions, we see opinion authors tying increasingly salient social facts to legal principles, which is the type of argument Kahn identifies as potentially persuasive.

B. TAX OPINIONS AND CONTINUED SOCIAL RECOGNITION OF LGBTQ RIGHTS

Kahn's description of social construction, the way evolving social norms can be incorporated into legal rules and thus change the law, is echoed in a number of rewritten tax opinions of the FJP as well. A number of authors offer alternative legal standards based on modern feminist theory and more complete and compassionate factual backgrounds. For example, as described below, three of these opinions offer a roadmap for courts to consider new understandings of LGBTQ rights, life, and dignity, again echoing a method of social construction Kahn found to be effective in creating progressive legal change, even in a conservative court.

In the rewritten opinion in *Magdalin v. Commissioner*, Professor Jennifer Bird-Pollan challenges the U.S. Tax Court's refusal to grant a medical deduction to a fertile gay man who used reproductive technology in order to have biologically related children.²⁴⁷ The original opinion refused the deduction on the basis that the taxpayer did not suffer from a disease or defect requiring the fertility treatments.²⁴⁸ At issue was the definition of medical care, which is deductible, under §213 of the Tax Code.²⁴⁹ Unlike the original opinion which focused on §213's language defining medical care as treatment of disease,²⁵⁰ Bird-Pollan emphasized the second part of §213's definition, whether the amounts paid "for the purpose of affecting any structure or function of the body."²⁵¹ The rewritten opinion found that reproduction is a type of human functioning and thus reproductive treatments are covered by §213's second part, regardless of the presence or lack of a medical disease or

²⁴⁵ McGinley, *supra* note 31, at 424. She also changed the burden of proof. Margaret E. Johnson, *Commentary to Oncale v. Sundower Offshore Services, Inc.*, in FEMINIST JUDGMENTS: SUPREME COURT, *supra* note 4, at 414.

²⁴⁶ Maya Salam, *What is Toxic Masculinity?* (N.Y. TIMES, Jan. 22, 2019). <https://www.nytimes.com/2019/01/22/us/toxic-masculinity.html>. See also A.P.A. Guidelines for Psychological Practice with Boys and Men, Aug. 2018 AM. PSYCHOL. ASS'N, <https://www.apa.org/about/policy/boys-men-practice-guidelines.pdf> (last visited Apr. 3, 2020).

²⁴⁷ Bird-Pollan, *supra* note 33, at 253-65.

²⁴⁸ *Magdalin v. Comm'r*, 96 T.C.M. (CCH) 491, 493 (2008), *aff'd*, 2010-1 U.S. Tax. Cas. (CCH) ¶ 50, 150 (1st Cir. 2009).

²⁴⁹ I.R.C. § 213(a).

²⁵⁰ *Magdalin*, 96 T.C.M. at 492.

²⁵¹ Bird-Pollan, *supra* note 33, at 257-59.

defect.²⁵² This legal argument is presented in the context of important social facts about the reality of gay life and families, echoing the process Kahn identified in the *Lawrence*, *Windsor*, and *Obergefell* decisions.²⁵³ As Bird-Pollan explains, although some heterosexual couples require assisted reproductive technology due to medical conditions, “a large category of people ... by the very nature of their identity, will also require IVF in order to facilitate reproduction.”²⁵⁴ The original opinion’s conclusion that a fertile gay man could not deduct IVF expenses comes with the “unstated implication” that heterosexual intercourse was the proper way to have a child.²⁵⁵ As Bird-Pollan’s opinion explains, allowing a deduction ART for heterosexual couples but not fertile gay prospective parents “raise specters of discrimination on the part of the government” and injects non-determinative facts, namely, sexual orientation, into a tax deduction issue.²⁵⁶

The rewritten opinion in *O’Donnabhain v. Commissioner* similarly uses a broader understanding of the dignity of transgender people to construct the law on tax deductibility of gender confirmation surgery.²⁵⁷ In the original opinion, the Tax Court found that the taxpayer could deduct a significant portion, but not all, of the surgery and related treatment as a medical expense.²⁵⁸ The court’s conclusion, however, was based on a finding that the taxpayer suffered from a disease.²⁵⁹ Professor David Cruz’s rewritten opinion avoids the stigmatizing disease focus and incorporates a new social acceptance of the transgendered, by finding medical deductibility elsewhere.²⁶⁰ Indeed, his opinion specifically explains the harms of treating transgenderism as a kind of illness.²⁶¹ The new opinion therefore establishes that gender difference affects the structure and function of the body and is therefore deductible under the second part of §213.²⁶² In this manner Cruz analogizes gender confirmation surgery to vasectomies or abortions that do not treat a disease but that are nonetheless deductible as medical expenses.²⁶³ With the acknowledged cautions against stigmatizing the transgendered by undue emphasis on “disease”, Cruz’s opinion also presents the reasoning on why gender reassignment surgery and related expenses also meet the standard for treatment under the first portion of §213.²⁶⁴ He does so as a Tax Court opinion author, recognizing that the IRS might appeal the decision and that in later analysis, disease may be the taxpayer’s only winning argument.²⁶⁵ He does so in light of the “benefits that the (Gender Identity Disorder) diagnosis has brought, especially to trans people of limited economic means” and “[i]n the interest of doing justice to the real human person before us.”²⁶⁶

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²⁵² *Id.*

²⁵³ *See supra* Part III.

²⁵⁴ Bird-Pollan, *supra* note 33, at 261.

²⁵⁵ *Id.* at 260.

²⁵⁶ *Id.* at 261.

²⁵⁷ Cruz, *supra* note 33, at 274-96.

²⁵⁸ *O’Donnabhain v. Comm’r*, 134 T.C. 34, 77 (2010).

²⁵⁹ *Id.* at 46.

²⁶⁰ Cruz, *supra* note 33, at 277.

²⁶¹ Cruz, *supra* note 33, at 282-83.

²⁶² *Id.* at 277.

²⁶³ *Id.* at 280.

²⁶⁴ *Id.* at 281-92.

²⁶⁵ *Id.* at 284.

²⁶⁶ Cruz, *supra* note 33, at 284.

This theme of dignity is similar to the dignity concerns raised in the *Lawrence*, *Windsor*, and *Obergefell* decisions, and Kahn identifies these themes as part of the PBD process which led to the progressive decisions.²⁶⁷

Finally, in the rewritten opinion in *United States v. Windsor*, Professor Ruthann Robson invigorates even this progressive decision with newer and different understandings of society.²⁶⁸ Her rewritten opinion has the same outcome as the original, but offers a legal basis that more robustly prohibits discrimination on the basis of sexual orientation and recognizes the wide variety of family structures in current society.²⁶⁹ The original opinion reasoned that in the Defense of Marriage Act (DOMA), the federal government was treating some state sanctioned marriages, same sex, differently from others, in a manner that violated due process rights and equal protection under the constitution.²⁷⁰ The original opinion did not specifically call sexual orientation a suspect class nor designate a level scrutiny for it.²⁷¹ The rewritten opinion, in contrast, does not find any due process violation, and instead treats sexual orientation as a suspect classification subject to intermediate scrutiny under the equal protection clause.²⁷² Now six years after the original *Windsor*, it is possible that Robson's rewritten opinion taps a current social construction that supports protected class status for sexual orientation.²⁷³

The rewritten opinion also reflects a critique of the original *Windsor* opinion, that by basing the marriage rights on due process, it unduly glorified the status of marriage in a society of increasing variety of family structure.²⁷⁴ Instead, the focus on equal protection turns the focus toward harm of sexual orientation discrimination.²⁷⁵ Thus, the rewritten opinion avoids discussion of the harm to children which the original opinion mentioned frequently, despite the fact that the lesbian family which brought the suit had no children.²⁷⁶ Recognizing the new social reality of increasing variety in family structure, Robson removes the emphasis on traditional marriage and procreative purpose, to avoid "elevating a biological component to parenting that denigrates every adoptive or nonbiological parent, whether male or female."²⁷⁷ Although taking social construction beyond the issue of sexual orientation in the original *Windsor*, to include non-marital families in her rewrite, Robson is still using the PBD method to emphasize the legal importance of a broad social reality.

Overall, in each of these opinions, social facts infuse the analysis, guiding the rewritten opinion authors to new legal standards and alternative reasoning. Significantly, the reasoning in these opinions is not fictional; rather, it also draws

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²⁶⁷ E.g., Kahn, *supra* note 143, at 290.

²⁶⁸ Robson, *supra* note 33, at 306-16.

²⁶⁹ *Id.*

²⁷⁰ 570 U.S. 744, 775 (2013)

²⁷¹ See 570 U.S. 744 (2013).

²⁷² Robson, *supra* note 33, at 311-316

²⁷³ See, e.g., Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018), cert. granted sub nom. Altitude Exp., Inc. v. Zarda, 139 S. Ct. 1599 (2019) (finding sexual orientation to be a protected category under Title VII).

articles and cases on recognizing Title VII protection for sexual orientation.

²⁷⁴ Allison Anna Tait, *Commentary on United States v. Windsor*, in FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS, *supra* note 5, at 297, 302-305.

²⁷⁵ *Id.* at 304.

²⁷⁶ *Id.* at 303.

²⁷⁷ *Id.* at 304 (quoting Robson, *supra* note 33, at 314).

on precedents, statutes, and regulations, the proper legal grammar for a court.²⁷⁸ In this manner, the FJP opinions are engaging in social construction, the key aspect of PBD, a process that allows changes in social understandings to potentially change the law.²⁷⁹ By explicitly tying broader social acceptance and understanding of citizens' lived lives to existing legal norms, the FJP follows the blueprint for legal change described by Professor Kahn.²⁸⁰

V. CRITIQUE AND ANALYSIS

The historical institutionalist theory of PBD can help explain certain court decisions that unexpectedly expanded or preserved individual rights. As explained in Part IV, a number of the FJP opinions use the tool of PBD, social construction, to offer persuasive arguments to change the law. Thus, a political science-based argument for the efficacy and utility of the FJP is available. This argument is not without critique or limitation, however. First, PBD theory comes with an acknowledged barrier - originalist²⁸¹ judges do not engage in PBD and, thus, are not moved to change the law by the presentation of new social facts.²⁸² Section A below explores the degree to which originalism blocks the PBD method of legal change pursued by the FJP. Second, a number of FJP opinions go further than PBD to engage in displacement, the wholesale substitution of existing rules.²⁸³ Section B explores the challenges for these opinions which seek more fundamental change to existing precedent. Finally, in response to these critiques and to present a fuller picture, Section C explores alternative ways that the FJP can be effective, other than social construction and displacement.

A. THE PROBLEM OF ORIGINALISTS

A court will engage in PBD when it believes that adapting to social change is necessary to sustain legitimacy.²⁸⁴ Originalists, however, believe the opposite, that judicial expansion of rights beyond those historically recognized is unprincipled and undermines respect for the courts.²⁸⁵ As Kahn explains, originalists such as Scalia, “refus[e] to accept PBD and all rights based on that process, if that process moves beyond intentions derived from founding periods. Thus, *Roe*, *Casey*, *Romer*, and

²⁷⁸ See Kahn & Kersch, *supra* note 89, at 86-87 (discussing the importance of tying new social facts to existing law using legal grammar).

²⁷⁹ Kahn, *supra* note 135, at 194; Kahn & Kersch, *supra* note 89, at 86-87.

²⁸⁰ See *supra* Part III.

²⁸¹ Generally, originalism posits that legal texts mean what they meant at the time of their enactment.” Hillel Y. Levin, *Justice Gorsuch’s Views on Precedent in the Context of Statutory Interpretation*, 70 ALA. L. REV. 687, 689 at n. 1 (2019) (citing, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 78-82 (2012)).

²⁸² Kahn, *supra* note 135, at 200.

²⁸³ James Mahoney & Kathleen Thelen, *A Theory of Gradual Institutional Change, in EXPLAINING INSTITUTIONAL CHANGE: AMBIGUITY, AGENCY, AND POWER* 1, 15-16 (James Mahoney & Kathleen Thelen eds. 2009).

²⁸⁴ Kahn, *supra* note 135, at 180, 199.

²⁸⁵ *Id.* at 200.

Lawrence are all illegitimate claims of “Constitutional” law.”²⁸⁶ According to Kahn, the real fissure on the Supreme Court, and to some degree politics more broadly, is not conservative versus liberal, but rather, originalist versus non-originalist.²⁸⁷ This debate is not limited to the controversial decisions on gay rights or abortion, but extends to the nature of judicial decision-making and the role of the judiciary in government.²⁸⁸

A number of Supreme Court decisions reflect the limitations of PBD to create progressive outcomes when a significant portion of the Court is originalist.²⁸⁹ As just one example, the Supreme Court’s decision to allow President Trump’s ban on transgendered people serving in the military²⁹⁰ stands in direct contrast to the rewritten opinion in *O’Donnabhaim v. Commissioner*²⁹¹. Moreover, the recent appointment of Justices Kavanaugh and Gorsuch seems to have solidified an originalist bloc on the Court.²⁹² Thus, the originalists’ objection to PBD, combined with their status on the Supreme Court, does threaten to undermine the efficacy of social construction-based persuasion.

That said, perhaps Chief Justice Roberts’ apparent new role as the swing vote leaves the door open to PDB and some version of social fact-based argument.²⁹³ Indeed, his apparent concern for the Court’s legitimacy²⁹⁴ is, according to historical institutionalists, one of the foundational motivations that can drive judicial decision making away from ideology.²⁹⁵ In addition to Roberts’ potentially moderating path, as noted above, there are a number of empirical studies showing that law can still play at least some role in Supreme Court decision making even with ideological and strategic voting.²⁹⁶ Indeed, historical examples provide some basis for optimism. In an in-depth, comparative case-study of death penalty and abortion cases before the Supreme Court from 1972 through 1989, which included the Reagan/Bush Court, political science scholars Lynn Epstein and Joseph Kobylka examined the cause of legal change.²⁹⁷ Their study identified a myriad of factors influencing the Court’s

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²⁸⁶ *Id.* at 200.

²⁸⁷ *Id.* at 200-201.

²⁸⁸ *Id.* at 201.

²⁸⁹ *E.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010); *Trump v. Karnoski*, 139 S. Ct. 950 (Mem) (2019) (granting stay of lower court injunction, consequently allowing President Trump’s ban on transgender service in the military to take effect pending appeal).

²⁹⁰ *Trump v. Karnoski*, 139 S. Ct. 950 (Mem) (2019).

²⁹¹ *Cruz*, *supra* note 33, at 274-96; Part IV(B), *supra*.

²⁹² Levin, *supra* note 281, at 696 (“Broadly speaking, Justice Gorsuch does, like Justice Scalia, approach the law as a textualist-originalist. His early opinions on the Supreme Court suggest as much, he has said so himself, and observers seem to agree with the characterization.”); Jeremy Kidd, *New Metrics and the Politics of Judicial Selection*, 70 ALA. L. REV. 785, 804 (2019) (“As an originalist, Kavanaugh scored well on the percentage of opinions that used the language of originalism.”).

²⁹³ *E.g.*, Julie Hirschfeld Davis, *With Kennedy Gone, Roberts Will Be the Supreme Court’s Swing Vote*, N.Y. TIMES, June 28, 2018 at A19; Benjamin Pomerance, *Center of Order: Chief Justice John Roberts and the Coming Struggle for A Respected Supreme Court*, 82 ALB. L. REV. 449, 524-32 (2019).

²⁹⁴ Pomerance, *supra* note 293, at 517-24.

²⁹⁵ *E.g.*, Kahn & Kersch, *supra* note 89, at 17-18.

²⁹⁶ *See supra* Part II(D).

²⁹⁷ LEE EPSTEIN & JOSEPH F. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY* 5-7 (1992).

decisions, including changes in Court personnel, interest group mobilization and political context.²⁹⁸ Their study, however, also concluded that the legal arguments by the attorneys and within the *amicus* briefs had an influence as well, and that ultimately, “legal arguments grounded in law matter, and they matter dearly ... arguments seem to influence most clearly the content and direction of the legal change that results.”²⁹⁹

Thus, overall, the prospects for the FJP to be persuasive are mixed, particularly with respect to the FJP’s rewritten Supreme Court opinions. The historical institutionalists present PBD, a compelling theory for the efficacy of persuasive arguments such as those offered by the FJP, and some empirical and case studies support this premise. Given the resistance of originalists, however, this branch of political science cannot offer a complete defense of the Project’s utility.

B. DISPLACEMENT

A number of opinions within the FJP are subject to an even stronger critique because they engage in displacement, a more radical method of legal change than PBD. In PBD, existing legal principles are considered and applied in light of new social facts, a mutually constructive process that gives current legal rules an important role.³⁰⁰ In contrast, sometimes groups seek to completely substitute one set of rules for another, a process historical institutionalists term displacement.³⁰¹ Displacement is a more difficult type of change for out of power groups to achieve.³⁰² As described below, some of the rewritten FJP opinions concerning disparate impact are attempting this displacement, and in so doing, fail to offer strongly persuasive arguments for future use.

Disparate impact is a theory of discrimination that does not involve intentional conduct, but rather finds unintentional, or covert, acts create unequal results for protected groups.³⁰³ As described below, in a number of FJP rewritten opinions, the authors pursue equality on disparate impact theories, challenging neutral laws that disproportionately harm women. At first glance, the FJP opinions discussing disparate impact could seem to be effective under the concept of PBD. Specifically, many disparate impact arguments offered by the FJP reference the phenomenon of implicit bias—a term for subconscious bias that results in unequal outcomes.³⁰⁴ Implicit bias is gaining increased social recognition as a non-intentional, but nonetheless real,

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²⁹⁸ *Id.* at 302-10.

²⁹⁹ *Id.* at 302.

³⁰⁰ See *supra* Part III.

³⁰¹ Mahoney & Thelen, *supra* note 283, at 15-16.

³⁰² See Erik Bleich, *Historical Institutionalism and Judicial Decision-Making*, 70 WORLD POL. 53, 66 (2018) (“Ideational scholars have long demonstrated that when new actors enter the field they frequently struggle to enforce the supremacy of their distinct ideas through power or persuasion.”) See also MAHONEY, *supra* note 301, at 19 (“Where would-be agents of change face political contexts with myriad veto possibilities, it will be difficult for them to ... displace the existing institutional rules. Hence, displacement is unlikely in the context of strong veto possibilities. Likewise, efforts at active conversion will be difficult in such a context, since veto powers also apply to the realm of rule enactment.”).

³⁰³ E.g., Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653, 656-59 (2015).

³⁰⁴ *Id.* at 657 (text and accompanying footnotes).

source of discrimination.³⁰⁵ As Kahn makes clear, however, the mere presence of new social facts does not lead to change, but rather it is the ability to tie those facts to specific existing legal concepts that influences judges.³⁰⁶ Thus, although there are advances in understanding implicit bias, there is strong legal precedent requiring intentional discrimination that makes the adoption of these disparate impact theories much more difficult.³⁰⁷ Thus, according to historical institutionalists, the adoption of the FJP's disparate impact theories would not be the evolutionary social construction found in PDB, but rather, would require wholesale substitution of existing legal rules, a form of displacement which is not easily achieved.³⁰⁸

For example, in the rewritten *Griswold v. Connecticut* decision, Professor Laura Rosenbury came to the same outcome as the original opinion, finding Connecticut statutes criminalizing birth control to be unconstitutional, but offered a different legal basis.³⁰⁹ Instead of a right to privacy, Rosenbury invalidates the statutes based on Due Process and Equal Protection.³¹⁰ Specifically, Rosenbury takes advantage of the historically situated posture of each rewrite. According to the premise of the FJP, opinion authors are bound by existing law at the time, but not future decisions.³¹¹ Thus, Rosenbury's rewrite is before the *Washington v. Davis* case which held that only intentional discrimination creates a constitutional violation.³¹² Rosenbury, therefore ignores *Washington v. Davis* and finds disparate

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³⁰⁵ Tryon P. Woods, *The Implicit Bias of Implicit Bias Theory*, 10 DREXEL L. REV. 631, 636 (2018) (The scientific research on implicit bias has proliferated in recent years, with empirical findings documenting the pervasive reality of unconscious racism.). See also e.g. Office of Public Affairs, *Department of Justice Announces New Department-Wide Implicit Bias Training for Personnel*, DEPARTMENT OF JUSTICE (June 27, 2016), <https://www.justice.gov/opa/pr/departments-justice-announces-new-department-wide-implicit-bias-training-personnel>; Khiara M. Bridges, *Implicit Bias and Racial Disparities in Health Care*, 43 HUM. RTS. 19 (2018); Thomas C. Grella, *Implicit Bias: A Hidden Obstacle to Exemplary Firm Culture*, 45 LAW PRAC. 62 (May/June 2019).

³⁰⁶ See *supra* Part III(B).

³⁰⁷ See *Washington v. Davis*, 426 U.S. 229 (1976); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979); Dale Margolin Cecka, *Commentary to Price Waterhouse v. Hopkins*, in FEMINIST JUDGMENTS: SUPREME COURT, *supra* note 4, at 343 ("The U.S. Supreme Court has never recognized implicit bias against women"); Jonathan P. Feingold, *Equal Protection Design Defects*, 91 TEMP. L. REV. 513, 519 (2019) (A trio of cases in the 1970s solidified intent doctrine as the standard governing challenges to facially neutral state action) (citing *Feeney*, 442 U.S. at 278-79; *Arlington Heights*, 429 U.S. at 265; *Davis*, 426 U.S. at 240.); Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J. FORUM 1098, 1112 (2019) (noting the Supreme Court disfavors discrimination claims based on disparate impact without "ironclad proof of intentional animus") (citing *Washington v. Davis*); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 764 (2011) ("In the vast run of cases after *Feeney*, only facial discrimination has drawn heightened scrutiny under the equal protection guarantees.").

³⁰⁸ See Bleich, *supra* note 302, at 66. See also Mahoney & Thelen, *supra* note 283, at 19.

³⁰⁹ Rosenbury, *supra* note 31, at 103-113.

³¹⁰ Cynthia Hawkins Debose, *Commentary to Griswold v. Connecticut*, in FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE SUPREME COURT, *supra* note 4, at 98, 101; Rosenbury, *supra* note 31, at 106-111.

³¹¹ Stanchi Introduction, *supra* note 1, at 10; Crawford, *supra* note 2, at 3.

³¹² Debose, *supra* note 310, at 102 ("In recognizing this disparate impact, Rosenbury seeks to stave off the Court's subsequent holding in *Washington v. Davis*, which limited constitutional challenges to claims of intentional discrimination.").

impact violates the Equal Protection clause, as if to start an alternative timeline of the law.³¹³ This outcome might be historically possible at the time of the decision; however, arguments imagining the absence of a case that does, in fact, exist are less useful for the FJP's goal to affect future decisions. This feminist rewrite in *Griswold* offers the type of displacement that, according to political scientists, is hard for out of power groups to win.³¹⁴

In the rewritten opinions that post-date *Washington v. Davis*, the authors do not try to reverse that precedent, as doing so would violate the premise of the FJP.³¹⁵ In one of the post-*Washington* cases, *Price Waterhouse v. Hopkins*, however, the opinion author worked with disparate impact in another context that was also contrary to existing precedent.³¹⁶ In the rewritten *Price Waterhouse v. Hopkins* opinion, Professor Martha Chamallas writes a concurring opinion to emphasize the role of implicit bias in employment decisions,³¹⁷ and urges courts to play close attention to expert testimony³¹⁸. "Chamallas rejects the focus on conscious intent as the touchstone of 'real' discrimination ... [and] requires courts to look at the totality of a corporate culture."³¹⁹ As with the *Griswold* rewrite as described above, the rewritten *Price Waterhouse* decision takes advantage of its historical posture. The Supreme Court generally rejected these ideas on implicit bias and reliance on expert testimony in the *Wal-Mart v. Dukes* decision.³²⁰ Although there are certainly many intellectual uses for envisioning alternative lines of jurisprudence, by contradicting later firm precedent, this aspect of the *Price Waterhouse* rewrite is less useful for future persuasive arguments. Again, political science would characterize this as a displacement which is more difficult to instill.³²¹

Some of the Tax FJP opinions also attempt to establish disparate impact as a viable legal theory in contravention of existing precedent. For example, in the rewritten *Bob Jones University v. United States*,³²² Dean David Brennan's concurring opinion comes to the same outcome as the original opinion,³²³ specifically, that Bob Jones University is not entitled to §501(c)(3) status as a charitable organization because its admissions policies violate public policy,³²⁴ but offers different reasoning. The original opinion based this outcome on the fact that the University's admissions policies were, intentionally, racially discriminatory.³²⁵ Brennan finds the policies also violate public policy because they have a disparate impact on women.³²⁶ To find that the admissions policy violated public policy, both

³¹³ Rosenbury, *supra* note 31, at 111-112.

³¹⁴ Bleich, *supra* note 302, at 66. *See also* Mahoney & Thelen, *supra* note 283, at 19.

³¹⁵ *See generally* FEMINIST JUDGMENTS, *supra* note 4, at Chapters 11-27.

³¹⁶ Chamallas, *supra* note 32, at 345-60.

³¹⁷ Cecka, *supra* note 307, at 341, Chamallas, *supra* note 32, at 354.

³¹⁸ Cecka, *supra* note 307, at 341, Chamallas, *supra* note 32, at 351-53.

³¹⁹ Cecka, *supra* note 307, at 344.

³²⁰ *Id.* (noting that the "Supreme Court has never recognized implicit bias against women" and that in the *Wal-Mart* decision, the Court rejected expert testimony about stereotyping).

³²¹ Bleich, *supra* note 302, at 66; *See also* Mahoney & Thelen, *supra* note 283, at 19.

³²² Brennan, *supra* note 33, at 150-63.

³²³ *Bob Jones Univ. v. U.S.*, 461 U.S. 574 (1983).

³²⁴ Brennan, *supra* note 33, at 155; *Bob Jones*, 461 U.S. at 592-596.

³²⁵ *Bob Jones*, 461 U.S. at 605.

³²⁶ Elaine Waterhouse Wilson, *Commentary on Bob Jones University*, in FEMINIST JUDGMENTS: TAX OPINIONS, *supra* note 5, at 146; Brennan, *supra* note 33, at 156-58.

the original opinion and the rewrite reviewed legislative, executive, and judicial actions concerning discrimination to find evidence of public policy.³²⁷ Brennan's argument that gendered disparate impact as such a violation is contrary to *Washington v. Davis*, and indeed (as the commentary on his opinion acknowledges) to other cases indicating a mixed record on even intentional gender discrimination at that time.³²⁸ Thus, while perhaps not requiring direct displacement of *Washington v. Davis*, the rewritten opinion bases its argument on disparate impact as "public policy," a difficult premise to support.

The rewritten opinion in *Estate of Clack v. Commissioner*, similarly offers a disparate impact theory as the basis for its opinion, acknowledging its likely lack of support by writing as a dissent.³²⁹ In the original opinion, the Tax Court found that a marital deduction was still possible even where an executor could divest a surviving spouse of a property interest through qualified terminable interest property (QTIP) elections.³³⁰ In the rewritten opinion, Professor Wendy Gerzog challenges this holding for its reliance on gender stereotypes and disparate impact on women.³³¹ As the commentary on the opinion acknowledges, it is embracing a disparate impact theory rejected by *Washington v. Davis*, and indeed a number of other tax related opinions.³³² Nonetheless, the commentary argues for "the expressive force of dissents," asserting that "[p]erhaps Gerzog's opinion could have set the stage for a series of dissents over time point out the structural sexism, racism, and heterosexism of the Code [which] could in turn have influenced public opinion."³³³ Again, although useful for theoretical and intellectual pursuits, this alternative history of law offers less utility for crafting arguments to influence the current judiciary.

C. ALTERNATIVE METHODS OF PERSUASION

Overall, the above analysis identifies a category of FJP opinions engaged in displacement, which offer less useful arguments for persuasion, and a category of FJP decisions using PBD, which offers useful arguments for persuasion but only to non-originalists jurists. This section explores a third category of rewritten FJP opinions that uses a perhaps more moderate approach, what has been termed "ideational salience amplification" (ISA).³³⁴ ISA is a method of persuasion available to those without dominant power who wish to push judicial outcomes in a different direction.³³⁵ ISA is available because, typically, those within power shape their decisions based on a wide range of ideas.³³⁶ With ISA, "[r]ather than having to replace one set of established ideas with an alternative paradigm,

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Brennan's analysis is intersectional, finding both racial and gender discrimination within the policy. Brennan, *supra* note 33, at 155-60.

³²⁷ Wilson, *supra* note 326, at 142, 145-46; Brennan, *supra* note 33, at 156-58; Bob Jones, 461 U.S. at 592-96.

³²⁸ Wilson, *supra* note 326, at 146.

³²⁹ Gerzog, *supra* note 33, at 195-214.

³³⁰ Estate of Clack v. Comm'r, 106 T.C. 131, 140-42 (1996).

³³¹ Maynard, *supra* note 54, at 190; Gerzog, *supra* note 33, at 207-14.

³³² Maynard, *supra* note 54, at 194.

³³³ *Id.*

³³⁴ Bleich, *supra* note 302, at 66.

³³⁵ *Id.*

³³⁶ *Id.*

emergent actors may simply amplify the salience of certain ideas that already exist within the judicial field.”³³⁷ For example, conservative legal advocates used the norm of color blindness, first developed to aid the historically disadvantaged, to challenge affirmative action.³³⁸ ISA takes a more legalistic approach than PBD. In PBD, existing precedent evolves to apply to new social facts; these facts play a crucial role in the argument.³³⁹ With ISA, an existing legal principle receives greater emphasis, and this legal argument drives the outcome.³⁴⁰

A number of FJP opinions tap into the process of ISA. For example, in the Tax FJP, Professor Mary Louise Fellows re-wrote *Welch v. Halvering*³⁴¹ and revived the “necessary” prong of the existing ordinary and necessary business deduction test.³⁴² In the original opinion, the Supreme Court did not emphasize the necessary factor and deferred to the taxpayer’s view on this aspect.³⁴³ Professor Fellows removed this deference, and provided a more critical path for reviewing purportedly necessary deductions.³⁴⁴ By amplifying the salience of this factor, Professor Fellows “avoid[ed] the original’s reflexive abdication of power to the already powerful,” and critiques the acceptance of public related expenses as necessary and business related while relegating others to “women’s” private sphere.³⁴⁵

In the rewritten opinion of *Cheshire v. Commissioner*, Professor Danshera Cords, as a Tax Court judge, comes to the opposite conclusion as the original opinion on the crucial issue of what level of knowledge removes the innocent spouse defense to joint liability on a jointly filed married tax return.³⁴⁶ The original opinion held that a married taxpayer was not entitled to innocent spouse relief if the spouse knew of the transactions giving rise to the income underlying the tax liability.³⁴⁷ In contrast, Cords finds innocent spouse relief is only removed where the spouse has knowledge that the item is in fact taxable.³⁴⁸ Cords’ interpretation relies on extensive analysis of the legislative history of the relevant innocent spouse provision.³⁴⁹ As a feminist opinion, Cords discusses the gendered context of this tax law, detailing the traditional gender roles women assume within marriage and how that places them at particular risk from joint liability.³⁵⁰ Cords’ reasoning however, is not dependent upon finding the law has a disparate impact on women, and instead rests on giving greater ideational salience to the legislative history supporting her legal test.³⁵¹

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³³⁷ *Id.*

³³⁸ *Id.* at 79 (citing Desmond S. King & Rogers M. Smith, *Without Regard to Race: Critical Ideational Development in Modern American Politics*, 76 J. OF POL. 958-71 (2014)).

³³⁹ See *supra* Part III.

³⁴⁰ Bleich, *supra* note 302, at 66.

³⁴¹ 290 U.S. 111 (1933).

³⁴² Nicole Appleberry, *Commentary on Welch v. Helvering*, in FEMINIST JUDGMENTS: TAX OPINIONS, *supra* note 5, at 100, Fellows, *supra* note 33, at 109-17.

³⁴³ 290 U.S. at 113.

³⁴⁴ Fellows, *supra* note 33, at 109-17.

³⁴⁵ Appleberry, *supra* note 342, at 97, 101.

³⁴⁶ Cords, *supra* note 33, at 225-42.

³⁴⁷ Appleberry, *supra* note 342, at 197.

³⁴⁸ Cords, *supra* note 33, at 240-41.

³⁴⁹ *Id.* at 236-38.

³⁵⁰ *Id.* at 238-39.

³⁵¹ *Id.* at 236-42.

In some FJP opinions, the authors use ISA on the concept of stereotyping as a form of gender discrimination.³⁵² Courts, including the Supreme Court, have long recognized a connection between stereotyping and discrimination.³⁵³ This relatively non-controversial and accepted principle is therefore ripe for salience amplification. For example, in the rewritten opinion of *Rostker v. Goldberg*,³⁵⁴ Professor David Cohen reverses the original opinion that had upheld the male only registration for the military draft.³⁵⁵ Cohen's opinion concludes that the draft must apply to all, regardless of gender, refusing to adopt the original opinion's strong deference to the military.³⁵⁶ Instead, Cohen details and emphasizes the extensive gender stereotypes behind the male-only rule and ties them into the anti-stereotyping principles the Court in *Reed v. Reed*,³⁵⁷ *Frontiero v. Richardson*,³⁵⁸ and *Craig v. Boren*.³⁵⁹

As these examples show, one of the techniques of the FJP is to persuade using existing legal concepts to different effect. This ideational salience amplification is quickly recognized by legal scholars as a classic form of argument; but it also has the support of political science scholars who have studied theories of idea-based change. This field recognizes that an out-of-power group that seeks to replace ideas altogether faces a more difficult path than one that takes the more indirect path of enhancing the prominence of existing norms and values.³⁶⁰ Thus, to the likely extent that originalist judges will not be receptive to PBD and the displacement cases are contrary to existing precedent, ISA offers an alternative path of persuasion.

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³⁵² Jamie R. Abrams, *Commentary on Rostker v. Goldberg*, in FEMINIST JUDGMENTS: SUPREME COURT, *supra* note 4, at 276-77; Cohen, *supra* note 31, at 281-83. See also Thomas, *supra* note 31, at 236-38 (citing economic stereotypes about women in finding higher pension deductions for female employees to be discriminatory); Godsoe, *supra* note 32, at 266-68 (discussing sex stereotyping behind law punishing men and boys who had sex with female minors more severely than women and girls who had sex with male minors).

³⁵³ *E.g.*, Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 722 (2003) ("The impact of the discrimination targeted by the FMLA, which is based on mutually reinforcing stereotypes that only women are responsible for family caregiving and that men lack domestic responsibilities, is significant."); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 611, (1999) (Kennedy, concurring) ("Underlying much discrimination law is the notion that animus can lead to false and unjustified stereotypes, and vice versa."); *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 130-31 (1994) ("Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.").

³⁵⁴ Cohen, *supra* note 31, at 277-96.

³⁵⁵ Abrams, *supra* note 352, at 273-77; Cohen, *supra* note 31, at 277.

³⁵⁶ Abrams, *supra* note 352, at 273-77.

³⁵⁷ 404 U.S. 71 (1971).

³⁵⁸ 411 U.S. 677 (1973).

³⁵⁹ 429 U.S. 190 (1976).

³⁶⁰ Bleich, *supra* note 302, at 66, 78.

VI. CONCLUSION

As the above discussion demonstrates, any critique or analysis of the FJP must be as multi-faced as the opinions themselves. Each FJP author seeks to infuse the law with a feminist perspective, and was bound by existing precedent and facts when doing so,³⁶¹ but the outcomes and reasoning vary widely. A number of FJP authors referenced underemphasized or altogether unrecognized facts and tied them to existing law to construct an alternative argument.³⁶² Historical institutionalism describes this process as principle-based decision making.³⁶³ According to institutionalist scholars, in previous cases, this method caused legal rules to evolve in a progressive direction, even in a conservative court.³⁶⁴ These type of arguments offered by the FJP offer some prospect of efficacy, except to the extent the deciding judges are originalists,³⁶⁵ a perhaps daunting exception in the current climate. Some FJP opinions engage in displacement, offering arguments that directly contradict existing law, by imagining certain negative precedents would never come to be.³⁶⁶ Political science studies find that for out-of-power groups, this direct approach is unlikely to succeed.³⁶⁷ Thus, these alternative timeline scenarios might be intellectually stimulating, but offer less practical utility for constructing persuasive legal arguments. Finally, in a number of opinions, the authors delve into the law to construct arguments through ideational salience amplification.³⁶⁸ These highlight existing legal principles to a greater degree or in slightly different ways than the original opinion.³⁶⁹ Historical institutionalism finds this modest approach to have persuasive potential.³⁷⁰ Overall, the mixed range of FJP opinions offer a mixed level of utility for future arguments.

Looking beyond the type of arguments, where the FJP might find its greatest utility is in its broader reach of jurisdictions and areas of law. Future FJP projects, including employment discrimination and health law, will be able to emphasize statutory and regulatory arguments rather than the constitutional arguments that were necessarily part of the Supreme Court collection.³⁷¹ Political science scholars have found that in less controversial areas³⁷² or those with clearer legal bases such as statutory language,³⁷³ ideology will play less of a role in judicial decision-making. Moreover, the FJP plans to issue rewritten opinions in a number of fields governed by state law.³⁷⁴ Although there are far fewer studies of state courts, their

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³⁶¹ E.g., Crawford Introduction, *supra* note 2, at 10.

³⁶² See *supra* Part IV.

³⁶³ See *supra* Part III.

³⁶⁴ E.g., Kahn, *supra* note 143, at 273.

³⁶⁵ See *supra* Part V (A).

³⁶⁶ See *supra* Part III.

³⁶⁷ E.g., Bleich, *supra* note 302, at 66.

³⁶⁸ See *supra* Part V(C).

³⁶⁹ *Id.*

³⁷⁰ Bleich, *supra* note 302, at 66.

³⁷¹ *Series Projects*, *supra* note 6.

³⁷² E.g., Isaac Unah & Ange-Marie Hancock, *U.S. Supreme Court Decision Making, Case Salience, and the Attitudinal Model*, 18 LAW & POL'Y 295, 309-13 (2006).

³⁷³ E.g., JEB BARNES, *OVERRULED?: LEGISLATIVE OVERRIDES, PLURALISM AND CONTEMPORARY COURT-CONGRESS RELATIONS* 80, 90-91 (2004).

³⁷⁴ *Series Projects*, *supra* note 6.

different political position suggests they might be less rigidly ideological.³⁷⁵ Thus, the expansive reach of the FJP may hold the greatest promise for its ultimate effect on the law.

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³⁷⁵ *E.g.*, Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1656-58 (2010) (noting that state supreme courts are less politically isolated than the U.S. Supreme Court and are consequently less able to decide according to ideological preference and more likely to be affected by institutional concerns for legitimacy).