Where Words Can Do Work: Language of Feminism in *Whole Woman's Health*

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ABSTRACT: The language of Supreme Court opinions plays an important role in legal discourse and defining the law in this country. This Comments builds upon earlier work in this Journal which empirically examined the lack of the words "feminist" and "feminism" in Supreme Court opinions. This Comment suggests an inclusive language of feminism that speaks to a woman's autonomy, recognizes paternalistic structures in the law, and includes an intersectional look at how poverty, class, race, and gender all affect a woman's lived experience and access to rights. Using *Whole Woman's Health v. Hellerstedt*, this Comment imagines how an opinion with an outcome feminist might desire would be stronger for women if it had been written with the language of feminism and what positive outcomes such language could produce.

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† Yale Law School, J.D. 2018; George Washington University, B.A. 2013. Special thanks to Professor E. Donald Elliott for all his guidance and the students of Modalities of Legal Scholarship, Fall 2017, for their comments on early drafts of this paper. I want to thank my original, dedicated editors, Callie Wilson, Meenu Krishnan, and Andrea Gann for their constant support and guidance. Finally, I want to share my immense gratitude for all the amazing editors of the Yale Journal of Law and Feminism, past and present, especially Lauren Nathan for all her hard work, and McKaye Neumeister for her dedication to feminist scholarship.

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INTRODUCTION

"Language is 'a medium of social action' not 'merely a vehicle of communication' and the written judicial opinion is the primary, if not the sole, medium in which judges within our judicial system execute language."[1]

"The decision of whether or not to bear a child is central to a woman's life, her well-being, and her dignity."[2]

The Supreme Court of the United States is not known as a bastion of feminism. With only four female justices in its history, it can hardly even be considered an equitably staffed institution. However, for centuries, women have had to look to the Supreme Court to protect and define their rights – right to work, right to equal treatment, right to reproductive freedom. While the Court has been articulating women's rights, it has failed at using the language of feminism, the language of women, to define and support them. And though those opinions may have succeeded in upholding women's rights and

1. Rachael K. Hinkle et al., *A Positive Theory and Empirical Analysis of Strategic Word Choice in District Court Opinions*, 4 J. OF LEGAL ANALYSIS 407, 408 (2012) (internal citations omitted).

2. *Hearing Before the S. Comm. on the Judiciary on the Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States*, 103rd Cong. 207 (1993) (statement of Ruth Bader Ginsburg).

supporting the feminist cause, it is a loss to women and to society as a whole that those decisions are not articulated as feminist decisions. The language of opinions matters because opinions matter.

This comment builds on the empirical and theoretical works of other scholars to reimagine an alternative history where one of the most important reproductive rights cases of the last decade, *Whole Woman's Health v. Hellerstedt*,[3] was written not only with a strong articulation of the undue burden standard, but also with a language of feminism. This comment begins to construct a language of feminism. It is language that reaffirms the bodily integrity and autonomy of women over restrictive abortion regulations that states enact; a language that acknowledges the hierarchical and paternal structures that seek to control women's choices under the banner of protection; and a language that recognizes the intersectionality of race, poverty, and gender that creates a unique reality for every woman, which affects and limits the exercise of her constitutional rights.

I. THE LANGUAGE USED IN SUPREME COURT OPINIONS MATTERS

The language in Supreme Court opinions is important because of the quintessential role those opinions play in our country. This section discusses the variety of purposes in that Supreme Court opinions serve. It also demonstrates how words in opinions are carefully chosen and weighed for their individual value. Further, it explores feminist scholars' argument that structural biases in the system can go unnoticed when certain language is omitted from the language of law.

A. The Power and Purpose of Supreme Court Opinions

Supreme Court opinions, first and foremost, serve a vital role of speaking to other courts. Opinions provide lower courts with specific instructions on how they should apply the law and articulate the Court's reasoning for decisions. The Supreme Court recognizes the importance of providing guidance to lower courts.[4] Not only can opinions provide specific legal answers and instructions, but they can also signal to lower courts where the law may be going in the future, and the strength of certain judge's opinions. "Thus, the text of judicial decisions and opinions constitutes the law by which our common law system abides and the basis on which judges, lawyers, and citizens make reasoned legal judgments about future action."[5] Second, Supreme Court

3. 136 S. Ct. 2292 (2016).

4. *See* Hinkle et al., *supra* note 1, at 409.

5. *Id.*

opinions serve as a source of legitimacy for the Court among the public. For an institution that is notoriously secretive and unapproachable in the eyes of the public, opinions often serve as the general population's only insight into the thought process and decision-making strategies of the justices.[6] When the public can read the justices' words, it lends a sense of legitimacy to the decisions the Court is making. "In the common law tradition, the court's ability to develop case law finds legitimacy only because the decision is accompanied by a publicly recorded statement of reasons."[7] Finally, Supreme Court opinions serve a signaling function to lawyers, Congress, and the public at large. They "are a form of discourse between and among various groups," and serve as the voice of the Supreme Court.[8]

B. Strategic Word Choice in Opinions

In Supreme Court opinions today, "[w]hat a judge writes is as important as what a judge decides."[9] The language and rhetoric of an opinion is often the most salient part of a decision. "Ultimately it is the language of the Court that is used as a precedent for future decisions."[10] Because the language used in an opinion is so vital, choosing the correct words is an important part of conveying the judge's message. "The breadth and malleability of the English language allow a judge a wide range of options in selecting the 'right word,' and this selection may have 'special legal significance,' allowing a judge to 'make subtle distinctions between ideas by changing a single word.'"[11]

Each individual word matters when drafting an opinion, as it can often have an impact well beyond the case at hand. The choice of language that is used in opinions can have effects on future cases. Language choice "can be the difference in whether entirely new avenues of litigation are spawned or not."[12] Further, use of language can focus advocates on new courses of legislation.[13]

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6. *See* Meredith Dost, *Dim Public Awareness of Supreme Court as Major Rulings Loom*, PEW RES. CTR. (May 14, 2015), http://www.pewresearch.org/fact-tank/2015/05/14/dim-public-awareness-of-supreme-court-as-major-rulings-loom [https://perma.cc/P9N6-DYMC].

7. Hinkle et al., *supra* note 1, at 408 (citation omitted) (quoting Judge Ruggero John Aldisert).

8. *Id.* at 410.

9. *Id.* (citation omitted).

10. Frank B. Cross & James W. Pennebaker, *The Language of the Roberts Court*, 2014 MICH. ST. L. REV. 853, 856.

11. Hinkle et al., *supra* note 1, at 410–11 (internal citations omitted).

12. Adam Feldman, *A Brief Assessment of Supreme Court Opinion Language, 1946-2013*, 86 MISS. L.J. 105, 107 (2017).

13. For example, Justice Kennedy's language in *Gonzales v. Carhart*, 550 U.S. 124 (2007), in which he suggested that there was sufficient justification for states to pass informed consent laws based on the fact that women may regret their abortions, spawned a new focus by anti-abortion groups passing on informed consent laws, see *infra* note 71.

The justices recognize the importance of careful word choice as well. Chief Justice Roberts once said, "Language is the central tool of our trade. When we're construing the Constitution, we're looking at words. Those are the building blocks of the law. And so if we're not fastidious, as you put it, with language, it dilutes the effectiveness and clarity of the law."[14] Justice Scalia talked about being a "nitpicker" for words and "using a word precisely the way it should be used."[15] The authors of Supreme Court Opinions also recognize that down to the last word, the language of their opinions matter.

C. Lack of Language Can Obscure Structural Bias

Some scholars argue that language missing from the legal discourse can obscure structural bias within that legal system. Although "[s]ystematic inequalities are not intrinsic to law," they "may be rooted in the subjective (and often unconscious) beliefs and assumptions of the decision makers."[16] These inequalities can be rooted in the theory of law, "often bound in traditional assumptions and power hierarchies," but also in the language used.[17] Feminist legal scholars, especially Professor Kathryn Stanchi, argue that legal language "both reflects and consolidates existing social structures, including inequitable relations and power differentials."[18] Professor Stanchi argues, as detailed below, that legal language is "traditionally accessible only to the wealthy and powerful and notorious for its conservatism and imperviousness to ideas that challenge its basic assumptions."[19]

Professor Stanchi uses the muting theory to describe how the language of law has historically kept out marginalized voices. Muting theory asserts that those without power in society do not have equal access to the language of that society.[20] This theory is based on the idea that different groups have different experiences and perspectives that will generate different realities.[21] However, due to power differentials between groups, "all groups will not have equal access to the language through which experiences, realities, and perspectives are expressed."[22] Professor Stanchi asserts that law represents a unique

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14. Feldman, *supra* note 12, at 107.

15. Cross & Pennebaker, *supra* note 10, at 860.

16. FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT 5 (Kathryn M. Stanchi et al. eds. 2016).

17. *Id.* at 4.

18. Kathryn M. Stanchi, *Feminist Legal Writing*, 39 SAN DIEGO L. REV. 387, 388 (2002).

19. *Id.*

20. Kathryn M. Stanchi, *Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*, 103 DICK. L. REV. 7, 16–17 (1998).

21. *Id.* at 17.

22. *Id.*

language "that some linguists call a 'language of power' or 'high language' - a prestigious type of language that must be used if the speaker is to function effectively and to which only the most powerful members of society have access."[23] Language is, therefore, defined by those in power.

Professor Stanchi connects muting theory to the law when she notes that, "[T]he 'fit' between the subdominant reality or experience and the acceptable mode of expression . . . [i]ndividual members of subdominant groups are muted in the sense that they are forced to express their reality in an imperfect way by using the language of the dominant group."[24] The limitations in the vocabulary available for use in legal writing can mute outside voices and diminish the reality of individual's experiences.[25] Professor Stanchi offers sexual harassment as a feminist example of muting theory. Catharine MacKinnon is largely credited with bringing the term "sexual harassment" into existence; however, before she did, it was difficult for women to express the reality of the unwanted attention they were receiving at work.[26] Until there was a name for this type of behavior, it was difficult for women to communicate their experience.

Professor Stanchi goes further to argue that several elements of legal writing specifically reinforce traditional power structures. First, the law's emphasis on writing to a particular audience, those in positions of power who are often older, affluent, white men, contributes to muting the voices of outsiders.[27] In order to be successful at legal writing, one must tailor his or her writing to fit the current language of law designed by the dominant group and must assimilate into that language. Further, because of the focus on stare decisis and legal rules, "the assigned framework will almost always be one that reflects existing law" and "[a]s a result, it will also reflect the law's biases and hierarchies."[28] Traditional power structures and biases are engrained in the language of law and legal writing.

II. FEMINIST LANGUAGE IN SUPREME COURT OPINIONS

Use of the word "feminism" in Supreme Court opinions is rare. Yet as described above, Supreme Court opinions play an important role in our legal discourse, and "word choice is important because it influences reality."[29]

23. *Id.* at 9.

24. *Id.* at 17.

25. *Id.* at 40–43.

26. Stanchi, *Resistance is Futile*, *supra* note 20, at 17 n.61.

27. *Id.* at 20–21.

28. *Id.* at 28.

29. McKaye L. Neumeister, *By Any Other Name: The Vocabulary of "Feminism" at the Supreme Court*, 29 YALE J.L. & FEMINISM 241, 243 (2017).

Though there is little study of the prevalence of general feminist language and feminist theory in Supreme Court opinions, one empirical study undertakes to examine the use of the word "feminist" and "feminism" in opinions.[30] Though the words "feminist" and "feminism" are not the end point for considering feminist language in opinions, they are a good starting point. They also provides a basis on which to build a definition of the language of feminism for this comment.

A. Lack of "Vocabulary of Feminism" in Supreme Court Opinions

In 2017, McKaye Neumeister published a note in this Journal that included an empirical study of what she called the "vocabulary of feminism" in Supreme Court opinions.[31] Neumeister focused specifically on the words "feminist" and "feminism," to look not only at the absence of those words, but also to consider why the Court avoids them.[32] Neumeister argued that "[i]nsofar as the Court plays a role in normalizing gender equality, and acceptance of feminism as part of that project, the Court's non-use of the words matters."[33]

Neumeister's review of Supreme Court opinions found that only twenty-two decisions by the Supreme Court had used the words "feminist" or "feminism."[34] Neumeister found that, under her definition, the vocabulary of feminism has only been used substantively twice in Supreme Court opinions.[35] The first was in a dissent by Justice Scalia, arguing that "antifeminism" was not the basis for the male-only Virginia Military Institute's exclusion of women.[36] Chief Justice Rehnquist responded in his concurrence, "[w]e may find that diversity was not the Commonwealth's real reason without suggesting, or having to show, that the real reason was 'antifeminism.'"[37] The second usage,

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30. *Id.*

31. *Id.*

32. Neumeister notes that many other terms can be considered part the vocabulary of feminism including "intersectionality," "gender normativity," "patriarchy," and "sex stereotyping," a theory that this paper supports. *Id.* at 242 n.7.

33. *Id.* at 245.

34. *Id.* at 246. Neumeister's data are through December 2016. *Id.* It is important to note that feminism is not the only named theory or movement that gets little mention in Supreme Court opinions. For example, the word "environmentalism" only appears twice in Supreme Court opinions, both times appearing in footnotes. Rapanos v. United States, 547 U.S. 715, 798 n8 (2006) (Stevens, J., dissenting); Reeves, Inc. v. Stake, 447 U.S. 429, 442 n16 (1980).

35. Defining "substantively" as not in a name of organization, party, or amici, and not in decisions denying certiorari. Neumeister, *supra* note 29, at 246–48.

36. United States v. Virginia, 518 U.S. 515, 580 (1996) (Scalia, J., dissenting). Neumeister argues that Scalia attempts to be provocative by painting Justice Ginsburg's opinion with a feminist label that she does not herself adopt, though Neumeister argues the VMI is undoubtedly a feminist opinion. Neumeister, *supra* note 29, at 252.

37. 518 U.S. at 562 n.* (Rehnquist, C.J., concurring).

in a dissent by Justice Ginsberg in *Coleman v. Court of Appeals*, involved a substantive discussion of the legislative history of the Family and Medical Leave Act and the feminist activism and perspective on that law.[38]

Neumeister argued that there have been numerous opportunities to use and to cite to feminist legal theory and literature over the years, and that the Court's failure to do so represents a deliberate bypass.[39] The Court has decided many cases of "feminist litigation" and used feminist arguments in opinions without acknowledging their origins.[40] Neumeister explained that several factors may account for judicial aversion to using the "vocabulary of feminism" in its opinions. She suggested that this aversion could be due to a lack of feminism in lower court language that the Supreme Court may borrow, or to other intra-legal factors, such as the language of legal literature or the gender of the justices.[41] However, Neumeister ultimately argued that it is the continuing modern hostility to feminism that keeps this vocabulary from Supreme Court opinions.[42]

B. A Broad Conception of the Language of Feminism

Although Neumeister's note is a good starting point for a discussion of how the Supreme Court does and should deal with feminism, her definition of "vocabulary of feminism" is significantly narrowed for the purpose of her empirical study.[43] This narrow definition used in Neumeister's piece limits analysis of both the cause and effect of this lack of language. To merely add the words "feminist" or "feminism" into legal language would most likely not create the outcomes that this paper seeks.[44] This section articulates a broader conception of the language of feminism that looks beyond just the use of the words "feminism" and "feminist" by including additional words, phrases, and concepts that evoke the ideas of feminism and support feminist theory and ideology. Part III of this article then applies this suggested language of feminism to Justice Breyer's opinion in *Whole Woman's Health*.[45]

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38. Coleman v. Court of Appeals, 566 U.S. 30, 48–50 (2012) (Ginsburg, J., dissenting).

39. Neumeister, *supra* note 29, at 249.

40. *Id.* at 249–51.

41. *Id.* at 254–60.

42. *Id.* at 262.

43. Redefining the scope of feminist language, this comment goes far beyond Neumeister's research. It would be nearly impossible to conduct a full empirical study on such an undefined language of feminism, and to the author's knowledge no such study exists.

44. *See infra* Part IV. See also the lack of additional named theories or "-isms" in opinions, *supra* note 34.

45. 136 S. Ct. 2292 (2016).

Feminist language includes words that speak to a woman's autonomy. This includes specific words such as *autonomy*, *agency*, *dignity*, and *bodily integrity*, and language that reinforces the constitutionality of exercising choice.[46] Feminist language includes discourse that explicitly recognizes how the government and hierarchical systems take a paternalistic approach to regulating and controlling women's bodies, choices, and health. Words like *paternalistic* and *hierarchical structure* help acknowledge the realities of the current system that continues to reflect our country's patriarchal beginnings.

However, feminist language must also include an intersectional look at how poverty, race, and gender can inform the measurement of an individual's access to a constitutional right. *Anti-essentialism* and *intersectionality* are newer additions to the feminist theory cannon, but in recent years, they have become central tenets of the feminist movement. Anti-essentialism challenges the notion "that there is a fixed and identifiable 'essence' that characterizes a certain set of human beings, such as women."[47] Intersectionality is "a legal approach that recognizes that gender is only one potential axis of discrimination and that discrimination against women is often combined with and compounded by oppression based on race, sexuality, class, and ethnicity."[48] Therefore, addressing intersectionality in the language of feminism would include specifically referencing *poverty*, *class*, and *race* when discussing the ability of a woman to access her constitutional rights.

Feminist scholars also define methods of unique feminist legal writing and analysis. One method is feminist practical reasoning, which "brings together the voices and stories of individual women's lived experiences with the broader

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46. Though there are many theories of feminism, and this paper does not seek to define feminism or endorse one definition, it generally focuses on the battle for women's equality. Many feminist movements, especially "third-wave" feminism, take a broader social justice position that endorses justice for all people. *See* Stanchi et al., *supra* note 16, at 1. In defining feminist language, this paper focuses on language specifically recognizing autonomy, etc. for women. While this paper uses the terms of the gender binary, it does not seek to exclude trans women or other nonconforming individuals. A focus on autonomy for "women" in the language of feminism should not be read as abandoning a larger goal of autonomy and equality for all people, or a world which is no longer defined by two genders.

47. Stanchi et al., *supra* note 16, at 21. *See, e.g.*, Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) ("gender essentialism—the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience. The result of this tendency toward gender essentialism, I argue, is not only that some voices are silenced in order to privilege others . . . but that the voices that are silenced turn out to be the same voices silenced by the mainstream legal voice of 'We the People'—among them, the voices of black women.").

48. Stanchi et al., *supra* note 16, at 21. *See, e.g.*, NANCY LEVIT & ROBERT R.M. VERCHICK, FEMINIST LEGAL THEORY 150–51 (2d ed., 2016) ("Reproductive rights occur at the intersection of gender, age, race, and class. For poor women, and especially poor minors, the right of choice is meaningless without the ability to exercise it. . . . Race matters in myriad ways. Contraceptive use, for example, is distinctly related to race and socioeconomic circumstances. . . . Women of color also disproportionately suffer coerced sterilization . . . .").

historical, cultural, economic, and social context."[49] A second method, called the narrative feminist method, seeks a "method of subverting and disrupting dominant legal discourse . . . to reveal and oppose the bias and power dynamics inherent in law's purported neutrality . . . ."[50]

A good starting point to examine the sort of broad feminist language this paper discusses is Justice Blackmun's concurring opinion in *Planned Parenthood v. Casey*.[51] Blackmun argues that

> compelled continuation of a pregnancy infringes upon a woman's right to bodily integrity by imposing substantial physical intrusions and significant risks of physical harm [and it] deprives a woman of the right to make her own decision about reproduction and family planning – critical life choices that this Court long has deemed central to the right to privacy.[52]

In further language, Blackmun argues,

> [b]y restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption – that women can simply be forced to accept the "natural" status and incidents of motherhood – appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause.[53]

The language Justice Blackmun uses in his *Casey* concurrence, though not always in the exact words suggested above, is an example of feminist language in a Supreme Court opinion.

III. INSERTING FEMINIST LANGUAGE INTO THE MAJORITY OPINION IN *WHOLE WOMAN'S HEALTH V. HELLERSTEDT*

Abortion rights activists celebrated *Whole Woman's Health* for striking down all of Texas's controversial TRAP (Targeted Regulation of Abortion

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49. Stanchi et al., *supra* note 16, at 15.

50. *Id.* at 15–16.

51. 505 U.S. 833 (1992).

52. *Id.* at 927.

53. *Id.* at 928.

Providers) laws.[54] Advocates believed that the opinion would strengthen the undue burden standard and lead to successful challenges of TRAP laws in other states.[55] However, even an opinion that is supportive of women's rights can lack the language necessary to fully articulate and define the rights of women that are under attack in many states. Due to the nature of alternative history, it is impossible to measure the possible impact of feminist language in *Whole Woman's Health*; however, Part IV envisions some possible positive impacts.[56]

In *Whole Woman's Health*, advocates for abortion rights were challenging a Texas law that would have shut down a majority of the state's abortion clinics.[57] The Center for Reproductive Rights brought a challenge against the admitting privileges and the surgical center requirements imposed by the Texas law.[58] In the majority opinion striking down the law, Justice Breyer took a fact-based approach to analyzing the undue burden standard articulated in *Casey*.[59] After dealing with the claim preclusion issues in the case, Justice Breyer defined the legal standard and then applied it to both the admitting privileges and surgical center requirement. The Court found that both requirements were unconstitutional undue burdens on the right to abortion.

Whole Woman's Health is a good outcome for women, but its language could do more. Justice Breyer's articulation of the undue burden standard could prove to be a useful legal tool for advocates in future cases, but removing this test or taking away from the fact-based examination he uses would not further the goals of advocates. However, in its current form, *Whole Woman's Health* lacks language that could make it a more feminist opinion and strengthen women's position by changing the narrative about abortion and reaffirming their dignity.

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54. 136 S. Ct. 2292 (2016). TRAP laws are special regulations passed on medical centers that provide abortion that go above regulations that apply to centers providing other medical procedures.

55. "The decision in *Whole Woman's Health v. Hellerstedt* reaffirms a woman's constitutional right to access legal abortion, and will empower women to fight back against deceptive anti-choice laws in Texas and beyond. This decisive rejection of clinic shutdown laws marks the most significant abortion-related ruling from the Court in more than two decades, and will have national impact in states where similar laws threaten to shutter abortion clinics with medically unnecessary red tape." *Whole Woman's Health v. Hellerstedt*, CTR. FOR REPROD. RTS., http://www.reproductiverights.org/case/whole-womans-health-v-hellerstedt [https://perma.cc/GC37-HFSZ] (last visited Apr. 11, 2018).

56. 136 S. Ct. 2292 (2016).

57. All but nine or ten abortion clinics would have been closed, leaving more than 500 miles without a clinic. CTR. FOR REPROD. RTS., *supra* note 54.

58. The law required that doctors obtain admitting privileges at local hospitals and that every clinic meet building requirements to become an ambulatory surgical center. *Id.*

59. Planned Parenthood v. Casey, 505 U.S. 833 (1992).

A. Rewriting Whole Woman's Health

Below are several portions of the *Whole Woman's Health* opinion where Justice Breyer takes positions that support feminist goals, yet the language does not go far enough in articulating those goals to be considered the language of feminism. The bold, underlined text reflects where the passages have been edited to include the language of feminism.

Intro:

[*2300] We conclude that neither of these provisions confers medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of women seeking **to exercise their constitutional right to procure** a previability abortion, each constitutes an undue burden on abortion access, Casey, supra, at 878, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (plurality opinion), and each violates the Federal Constitution. Amdt. 14, §1.

III: Undue Burden – Legal Standard

[*2309] We begin with the standard, as described in Casey. We recognize that the "State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." Roe v. Wade, 410 U.S. 113, 150, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). But, we added, "a statute which, while furthering [a] valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." Casey, 505 U.S., at 877, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (plurality opinion). Moreover, "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." Id., at 878, 112 S. Ct. 2791, 120 L. Ed. 2d 674. **Imposing substantial obstacles on a woman's access to an abortion places a limit on the woman's autonomy and is an anti-feminist and paternalistic limit to her exercise of a constitutional right.**

IV: Undue Burden – Admitting-Privileges Requirement

[*2311] . . . The purpose of the admitting-privileges requirement is to help ensure that women have easy access to a hospital should complications arise during an abortion procedure. Brief for Respondents 32-37. But the District Court found that it brought about no such health-related benefit. The court found that "[t]he great weight

of evidence demonstrates that, before the act's passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure." 46 F. Supp. 3d, at 684. Thus, there was no significant health-related problem that the new law helped to cure. **It is unclear why Texas would pass such a regulation to add extra requirements to a relatively safe procedure unless its motives were not tied to health protection.**

[*2313] We recognize that increased driving distances do not always constitute an "undue burden." See Casey, 505 U.S., at 885-887, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (joint opinion of O'Connor, Kennedy, and Souter, JJ.). But here, those increases are but one additional burden, which, when taken together with others that the closings brought about, and when viewed in light of the virtual absence of any health benefit, lead us to conclude that the record adequately supports the District Court's "undue burden" conclusion. Cf. id., at 895, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (opinion of the Court) (finding burden "undue" when requirement places "substantial obstacle to a woman's choice" in "a large fraction of the cases in which" it "is relevant"). **When considering the substantial burden that clinic closings have on women seeking abortions, we cannot just consider driving distances as distinct from the other practical concerns that will be unique to every woman. As the District Court articulates, factors such as a "lack of availability of child care, unreliability of transportation, unavailability of appointments at abortion facilities, unavailability of time off from work, immigration status and inability to pass border checkpoints, poverty level, the time and expense involved in traveling long distances, and other, inarticulable psychological obstacles" may combine with travel distance to establish a "de facto barrier" to abortion. The District Court also recognizes that the clinic closings would have a larger impact on minority, immigrant, and poor women in the Rio Grande Valley and El Paso. For many poor women, having to travel great distances to procure medical care would certainly amount to a ban on services. When considering whether the impact of a law amounts to an undue burden, there must be consideration for all the factors in the lives of women that may affect access to service--especially for women from disadvantaged communities.**

V: Undue Burden – Surgical-Center Requirement

[*2315] The record makes clear that the surgical-center requirement provides no benefit when complications arise in the context of an abortion produced through medication. That is because, in such a case,

complications would almost always arise only after the patient has left the facility. See supra, at ___, 195 L. Ed. 2d, at 687; App. 278. The record also contains evidence indicating that abortions taking place in an abortion facility are safe—indeed, safer than numerous procedures that take place outside hospitals and to which Texas does not apply its surgical-center requirements. See, e.g., id., at 223-224, 254, 275-279. The total number of deaths in Texas from abortions was five in the period from 2001 to 2012, or about one every two years (that is to say, one out of about 120,000 to 144,000 abortions). Id., at 272. Nationwide, childbirth is 14 times more likely than abortion to result in death, ibid., but Texas law allows a midwife to oversee childbirth in the patient's own home. Colonoscopy, a procedure that typically takes place outside a hospital (or surgical center) setting, has a mortality rate 10 times higher than an abortion. Id., at 276-277; see ACOG Brief 15 (the mortality rate for liposuction, another outpatient procedure, is 28 times higher than the mortality rate for abortion). Medical treatment after an incomplete miscarriage often involves a procedure identical to that involved in a nonmedical abortion, but it often takes place outside a hospital or surgical center. App. 254; see ACOG Brief 14 (same). And Texas partly or wholly grandfathers (or waives in whole or in part the surgical-center requirement for) about two-thirds of the facilities to which the surgical-center standards apply. But it neither grandfathers nor provides waivers for any of the facilities that perform abortions. 46 F. Supp. 3d, at 680-681; see App. 184. These facts indicate that the surgical-center provision imposes "a requirement that simply is not based on differences" between abortion and other surgical procedures "that are reasonably related to" preserving women's health, the asserted "purpos[e] of the Act in which it is found." Doe, 410 U.S., at 194, 93 S. Ct. 739, 35 L. Ed. 2d 201 (quoting Morey v. Doud, 354 U.S. 457, 465, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1957); internal quotation marks omitted). **We should not allow the very nature of these laws purportedly in the interest of women's health to go unexamined in light of the relative safety of abortion procedures. It is paternalistic and contrary to the ideals of equality for legislatures to single out procedures that only women receive for extra regulation over other medical procedures of equal or greater risk that men or both genders undergo. This single-minded focus on abortion over other procedures should not be permitted to cloak itself in an interest in women's health.**

[*2318] More fundamentally, in the face of no threat to women's health, Texas seeks to force women to travel long distances to get abortions in crammed-to-capacity superfacilities. Patients seeking these services are less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered**, the kind of service that would give women the best health care possible.** Healthcare facilities and

medical professionals are not fungible commodities. Surgical centers attempting to accommodate sudden, vastly increased demand, see 46 F. Supp. 3d, at 682, may find that quality of care declines. Another commonsense inference that the District Court made is that these effects would be harmful to, not supportive of, women's health. See id., at 682-683. **The Texas Legislature is making a paternalistic assumption that legislatures, not women themselves, are in the best position to judge what is best for a woman's health regarding one procedure out of many she may have in her lifetime. Texas is making changes to abortion regulations in the name of women's health that would, in reality, have a negative effect on women's health.**

VI:

[*2320] Second, Texas claims that the provisions at issue here do not impose a substantial obstacle because the women affected by those laws are not a "large fraction" of Texan women "of reproductive age," which Texas reads Casey to have required. See Brief for Respondents 45, 48. But [19] Casey used the language "large fraction" to refer to "a large fraction of cases in which [the provision at issue] is relevant," a class narrower than "all women," "pregnant women," or even "the class of women seeking abortions identified by the State." 505 U.S., at 894-895, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (opinion of the Court) (emphasis added). Here, as in Casey, the relevant denominator is "those [women] for whom [the provision] is an actual rather than an irrelevant restriction." Id., at 895, 112 S. Ct. 2791, 120 L. Ed. 2d 674.

We must recognize, as the District Court has, that the Constitution and *Roe* have articulated the right to a previability abortion as a right for all women, not just women with means. By enacting laws that will lead to the closure of clinics in Texas, the Legislature has created a situation for many women in Texas that will effectively be a complete ban on abortions. As discussed above, these clinic closures would be especially hard on poor, immigrant, and minority women.

B. Examining the Language Added

There are three themes that the above added language addresses to articulate the language of feminism missing from *Whole Woman's Health.*

1. Feminist language would acknowledge the anti-feminist and paternalistic nature of actions that limit women's autonomy by placing substantial burdens on their exercise of a constitutional right.

> [*2300] . . . **to exercise their constitutional right to procure** . . .
> [*2309] . . . **Imposing substantial obstacles on a woman's access to an abortion places a limit on the woman's autonomy and is an anti-feminist and paternalistic limit to her exercise of a constitutional right**.

The goal of TRAP laws is undoubtedly to limit women's access to abortions with the goal of stopping all abortions from taking place.[60] These goals place the judgment of legislators above the autonomy of women in making one of the most personal choices an individual can make – the choice to become a mother. Opinions about TRAP laws should be clear on this point. This clarity includes language stressing that the action of procuring an abortion is an exercise of a woman's constitutional right. In the second section, *2309, the language calls these attacks on a woman's autonomy anti-feminist and paternalistic, specifically using two of the words discussed in Part II to call out attacks on women.

60. "A few months ahead of signing HB2 into law, Texas Governor Rick Perry declared at an anti-abortion rally, 'an ideal world is one without abortion. Until then, we will continue to pass laws to ensure that they are rare as possible.' In July 2015, Texas state representative and HB2 author Jodie Laubenberg stated, 'I am so proud that Texas always takes the lead in trying to turn back what started with Roe v. Wade.'" CTR. FOR REPROD. RTS., *supra* note 54.

2. *Feminist language would clearly state that it is paternalistic to write laws that purportedly protect women's health when they single out a procedure that only women undergo.*

> [*2311] . . . **It is unclear why Texas would pass such a regulation to add extra requirements to a relatively safe procedure unless its motives were not tied to health protection**.
> [*2315] . . . **We should not allow the very nature of these laws purportedly in the interest of women's health to go unexamined in light of the relative safety of abortion procedures. It is paternalistic and contrary to the ideals of equality for legislatures to single out procedures that only women receive for extra regulation over other medical procedures of equal or greater risk that men or both genders undergo. This single-minded focus on abortion over other procedures should not be permitted to cloak itself in an interest in women's health.**
> [*2318] . . . **the kind of service that would give women the best health care possible. . . . The Texas Legislature is making a paternalistic assumption that legislatures, not women themselves, are in the best position to judge what is best for a woman's health regarding one procedure out of many she may have in her lifetime. Texas is making changes to abortion regulations in the name of women's health that would, in reality, have a negative effect on women's health.**

Legislation about women's health is inherently paternalistic because of the "protective" way lawmakers single out procedures that affect only women and design regulations to make access to these procedures more onerous. In *2311, the opinion blatantly acknowledges that the laws that Texas claims to protect women's health are not tied to a health rationale at all.[61] Further expanding on that point, *2315 more specifically states that they are paternalistic, a word of feminism, and that legislatures cannot cloak their desire to stop all abortions in laws that claim to be about women's health. Finally, at *2318, the added language more forcefully calls out the legislature for enacting laws in the name of women's health that would, in reality, have no positive effect whatsoever and would provide worse service for women than exists under the current regulation regime.

61. This suggestion also takes on a feature of Professor Stanchi's feminist "antilanguage," using sarcasm as a negative rhetorical device to talk about women's experience with the patriarchy. Stanchi, *supra* note 18, at 408.

3. Feminist language in these opinions would explicitly recognize the intersectionality of race, poverty, and gender when applying the undue burden standard.

[*2313] . . . **When considering the substantial burden that clinic closings have on women seeking abortions, we cannot just consider driving distances as distinct from the other practical concerns that will be unique to every woman. As the District Court articulates, factors such as a "lack of availability of child care, unreliability of transportation, unavailability of appointments at abortion facilities, unavailability of time off from work, immigration status and inability to pass border checkpoints, poverty level, the time and expense involved in traveling long distances, and other, inarticulable psychological obstacles" may combine with travel distance to establish a "de facto barrier" to abortion. The District Court also recognizes that the clinic closings would have a larger impact on minority, immigrant, and poor women in the Rio Grande Valley and El Paso. For many poor women, having to travel great distances to procure medical care would certainly amount to a ban on services. When considering whether the impact of a law amounts to an undue burden, there must be consideration for all the factors in the lives of women that may affect access to service--especially for women from disadvantaged communities.**

[*2320] . . . **We must recognize, as the District Court has, that the Constitution and *Roe* have articulated the right to a previability abortion as a right for all women, not just women with means. By enacting laws that will lead to the closure of clinics in Texas, the Legislature has created a situation for many women in Texas that will effectively be a complete ban on abortions. As discussed above, these clinic closures would be especially hard on poor, immigrant, and minority women.**

Acknowledging the intersectionality of women's experiences is an important part of creating a language that truly represents the values of the modern feminist movement. In *Whole Woman's Health v. Lakey*, the district court recognized that this law would affect poor, immigrant, and minority women more harshly than it would affect affluent women who could afford to take time off from work and drive hundreds of miles to receive an abortion.[62] In *2313, the feminist opinion clearly articulates how this law will affect

62. 46 F. Supp. 3d 673, 683 (W.D. Tex. 2014).

different women in different ways because of the vulnerabilities they individually and uniquely bring to the table. Additionally, in *2320, the opinion further articulates that the right to abortion is no right if only women with means can exercise it.

IV. WHAT FEMINIST LANGUAGE IN *WHOLE WOMAN'S HEALTH* COULD ACCOMPLISH

The addition of the language of feminism in *Whole Woman's Health* could have real impact on both the law and the lives of women. The language could reaffirm the dignity and bodily integrity of women that TRAP laws attempt to erase through limiting women's choices. Feminist language could signal the commitment of law to female autonomy and the right to abortion to the public. The Court could send a signal to lower courts on the value of women's autonomy as they consider additional TRAP laws. Finally, the use of feminist language in *Whole Woman's Health* could open the door for incorporating additional language of feminism in future opinions at all levels of the federal judiciary.

While some may argue that such changes in language are trivial, there is real value in the addition of feminist language to opinions. Critics of such addition could fall into several categories. First, anti-abortion advocates could argue that decisions like *Gonzales v. Carhart*, which take a protectionist attitude toward both the mother and the fetus, are correctly decided.[63] This attitude undermines the dignity of women.[64] Second, one could argue that beyond the outcome of the decision, the language of Supreme Court opinions matters little. But, as Part I demonstrates, the language contained in opinions matters and reinforces existing power structures.[65] Finally, critics could argue that there would be little positive effect, even if opinions did include more feminist language. The arguments in this section seek to counter these by showing the positive impact of feminist language, specifically in *Whole Woman's Health.*

A. Reaffirm the Dignity and Bodily Integrity of Women

TRAP laws are merely another, more modern way that legislatures in some states are attempting to deny women access to abortion. Courts should specifically acknowledge this reality. Every abortion decision is an opportunity to remind the country that these laws are not just limitations on doctors and

63. 550 U.S. 124 (2007).

64. *See infra* Parts IV(A)–(B).

65. *See supra* Part I.

clinics, but are attempts to strip women of constitutional rights and autonomy.[66] In the current political climate, where the rights of women are easily discarded and cheapened, calling these laws what they are is vital to confirming to both women, and to the legislatures who would curb their rights, that the constitutional guarantee of abortion is not up for debate. There is a benefit to speaking specifically to the anti-feminist nature of TRAP laws beyond their unconstitutionality under the undue burden standard.

B. Support Women in Exercising Their Right to Abortion

As discussed in Part I, Supreme Court opinions serve as the Supreme Court's communication with the public.[67] Since *Roe*, Supreme Court opinions have directly contributed to the stigma surrounding abortion and the uncertainty of the right to an abortion both in law and in the public discourse.[68] Its jurisprudence has allowed the state to express a greater interest in fetal life and pursue laws to that end. These laws may make women feel marginalized as they try to navigate the laws of informed consent, waiting periods, and mandatory ultrasounds while attempting to exercise their constitutional rights.[69]

The language in these cases can also have a negative impact. In both *Planned Parenthood v. Casey*[70] and *Gonzales v. Carhart*,[71] the majority opinions seem to express a distaste for abortion through the way they describe the procedure and articulate the state's interest. In *Casey,* Justice O'Connor focuses on the states' strong interest in fetal life and includes language that speaks to the strong moralistic opposition to abortion.[72] In *Carhart*, Justice

66. Journalist Linda Greenhouse described the importance of equality affirming language: "When I first read Justice Breyer's opinion, my sense of relief struggled against a feeling that something nonetheless was missing: not necessarily the aspirational rhetoric of the Casey decision but some explicit acknowledgment of what it means to women's equality and dignity not to be trapped in an unwanted pregnancy." Linda Greenhouse, *The Facts Win Out on Abortion*, N.Y. TIMES, June 27, 2016, https://www.nytimes.com/2016/06/28/opinion/the-facts-win-out-on-abortion.html [https://perma.cc/NSA5-J487].

67. For example, Justice Kennedy's infamous line in *Gonzales v. Carhart* that "[w]hile we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained," 550 U.S. 124, 159 (2007), was discussed in many news publications. *See* Robin Toner, *Abortion Foes See Validation for New Tactic*, N.Y. TIMES, May 22, 2007, https://www.nytimes.com/2007/05/22/washington/22abortion.html [https://perma.cc/6JCT-JXG9]; *see also* Nina Totenberg, *High Court Ruling a Blow to Abortion Rights*, NPR MORNING EDITION, Apr. 19, 2007, https://www.npr.org/templates/story/story.php?storyId=9678520 [https://perma.cc/D2TU-27SG].

68. For further discussion on Supreme Court opinions and abortion stigma, see Paula Abrams, *Abortion Stigma: The Legacy of Casey*, 35 WOMEN'S RIGHTS L. REP. 299 (2014).

69. *Id.* at 302.

70. 505 U.S. 833 (1992).

71. 550 U.S. 124 (2007).

72. 505 U.S. at 850 ("Some of us as individuals find abortion offensive to our most basic principles of morality.").

Kennedy explains abortion procedures, and the moralistic concern with them, in great detail and uses paternalistic language to describe the state's interest in preventing women from regretting their abortions.[73] This language is the language of anti-abortion activists; activists who then capitalize on that language to help pass additional laws to reduce access to abortion.[74] As anti-abortion laws make it harder for women to access abortion, the stigma associated with abortion rises and women feel increasingly marginalized.[75]

Supreme Court opinions do not exist in a vacuum and their language has effects on women's ability to access abortion and how abortion is perceived. If the negative language and outcomes of *Casey* and *Carhart* can increase abortion stigma, perhaps the language of feminism in Supreme Court opinions can reverse this effect. As this paper demonstrates, it is possible to write an opinion that celebrates and accepts a woman's right to procure an abortion. Using feminist language can lead to greater inclusion of women's real and lived experiences and acknowledge the negative impact paternalism in our laws can have on these experiences.

C. Signal to Lower Courts

Twenty-three states have TRAP laws on the books that go beyond what is medically necessary for patient safety.[76] With the election of President Donald Trump, a new conservative Justice on the Supreme Court, and energized anti-

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73. 550 U.S. 159 ("While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained."). *See* Linda Greenhouse, *Justices Back Ban on Method of Abortion*, N.Y. TIMES, Apr. 19, 2007, https://www.nytimes.com/2007/04/19/washington/19scotus.html ("Most notable was the emphasis in the majority opinion, by Justice Anthony M. Kennedy, on the implication of abortion's 'ethical and moral concerns.'").

74. Justice Kennedy's statement in *Carhart* that, "it seems unexceptionable to conclude some women come to regret their choice," 550 U.S. at 159, cited to the amicus brief of a pro-life organization, the Justice Foundation. *See* Brief for Sandra Cano et al. as Amici Curiae Supporting Petitioner, Gonzales v. Charhart, 550 U.S. 124 (2007) (No. 05-380). "Many, on both sides, viewed that as an invitation from a newly conservative court to pass tough new counseling and informed-consent laws intended for women seeking abortions—'a green light for enhanced informed consent,' in the words of Clarke D. Forsythe, president of Americans United for Life, a leader in that legislative effort." Toner, *supra* note 63. *See also* Newsweek Staff, *Abortion: Battles on Three Fronts*, NEWSWEEK, Apr. 29, 2007, www.newsweek.com/abortion-battles-three-fronts-98013 [https://perma.cc/3KD7-Y7EE] ("In last week's opinion he didn't reject the landmark abortion-rights decision, but his language pleased pro-lifers. 'Kennedy is very much speaking in the code language of the anti-abortion activists,' says David Garrow, a legal historian at the University of Cambridge. The justice [*sic*] used 'kill' or 'killing' 11 times to refer to abortion and argued that 'some women come to regret their choice to abort the infant life they once created and sustained.'").

75. Abrams, *supra* note 64, at 302.

76. *Targeted Regulation of Abortion Providers*, GUTTMACHER INST., Apr. 1, 2018, http://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers [https://perma.cc/CC8A-4KLD] (last visited Apr. 11, 2018).

women state legislators, there most likely will not be any rollback of these laws in the near future.[77] Lower federal courts will likely see more challenges to these laws as advocates attempt to use the decision in *Whole Woman's Health* to strike down some of these regulations that will cause clinics to close across the country.[78] Feminist language could change the lenses through which the district courts examine these claims, forcing them to take into greater consideration how laws affect poor and minority women, the paternalistic nature of TRAP laws, and women's autonomy. Strong feminist language that reaffirms this Court's commitment to protecting the autonomy of women would signal to lower courts where the Supreme Court falls on this issue.

D. Open the Door for the Legal Language of Feminism

As Neumeister describes, "the Court's status as an important American institution means that it has the power to *shape* society as well as merely reacting to and reflecting it."[79] Language in Supreme Court opinions becomes the language of lower courts.[80] If the language of feminism becomes the language with which the Supreme Court talks about abortion restrictions, lower courts could also start incorporating this language into their opinions—not only in abortion cases, but also in other areas of law. If Supreme Court opinions used the language of feminism, they would make the language of feminism part of the language of law.[81] Making feminism part of the language of law "would establish that scholarship, jurisprudence, and reasoning adhering to this appellation are within the language of law."[82]

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77. *See, e.g.*, Linda Greenhouse, *The Worrisome Future of Abortion Rights*, N.Y. TIMES, Nov. 9, 2017, https://www.nytimes.com/2017/11/09/opinion/the-worrisome-future-of-abortion-rights.html [https://perma.cc/C2J9-BN99]; Danielle Paquette & Kim Soffen, *What Abortion Could Look Like in America Under Donald Trump*, WASH. POST, Nov. 15, 2016, https://www.washingtonpost.com/news/wonk/wp/2016/11/15/what-abortion-could-look-like-in-an-america-without-roe-v-wade [https://perma.cc/FWV3-TLNT].

78. For example, the Center for Reproductive Rights brought a lawsuit on the anniversary of the *Whole Woman's Health* decision challenging the entire abortion licensing regime in Louisiana. Press Release, Ctr. for Reprod. Rts., Center for Reproductive Rights Challenges Louisiana Clinic Shutdown Laws One Year After Historic Supreme Court Decision (June 27, 2017), https://www.reproductiverights.org/press-room/center-for-reproductive-rights-challenges-louisiana-clinic-shutdown-laws [https://perma.cc/ZDF7-V8N8] (last visited Apr. 11, 2018).

79. Neumeister, *supra* note 29, at 265 (citation omitted).

80. *See supra* Part I(A).

81. *See* Neumeister, *supra* note 29, at 265.

82. *Id.*

CONCLUSION

The language of Supreme Court opinions is salient and ever-lasting; it is a constant reminder of how the law treats and respects individuals at any given moment in history. In this moment, the rights of women are under attack and the language in Supreme Court opinions can play a unique role in meeting that attack head on. The decision in *Whole Woman's Health* was a good decision for women and for abortion access, but it could have been a better opinion for women if it had used the language of feminism to reaffirm the Court's commitment to a woman's right to an abortion. Adding the language of feminism to *Whole Woman's Health* could have played an important role in affirming the dignity of women, shown public support for the right to procure an abortion, signaled to the lower courts that TRAP laws are an attack on women's autonomy, and opened the door for the language of feminism in Supreme Court opinions. History is always watching, but it is also listening.