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Spring 2023

# Implications Within Interpretations and Legal Implementations of The Fourteenth Amendment

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Dr. Chiang

Capstone: The Senior Thesis

2023 April 27

## Implications Within Interpretations and Legal Implementations of The Fourteenth Amendment

### Introduction

The sun sank down behind the rolling hills leaving the sky in a swirl of orange, pink, purple, and blue. The air was still thick from the late summer heat while Christy Brzonkala headed through campus to reach her dormitory. As a freshman at Virginia Tech, Christy was buzzing with excitement at the thought of what her college experience had to offer her. She took in the beautiful scenery of her campus and contemplated how this would be the place she called home for the next four years. She couldn't wait for the friends that she would make, or the people she would meet; everything was exciting and fresh. The possibilities were endless for someone like Christy who was career oriented, dedicated to her studies, and didn't know a stranger. Unfortunately, the same place that held so much potential for Christy was the same place that would derail her future in a nightmarish way. In September of 1994, at eighteen years old, Christy Brzonkala was gang-raped in her own dorm room by two other male freshman on the varsity football team: Antonio Morrison and James Crawford. Only thirty-nine minutes after Christy had met Morrison and Crawford, Morrison used his pure strength and size to pin Christy down without her consent.<sup>1</sup> He began to rape her and then traded places with Crawford, who also

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<sup>1</sup> U.S. v. Morrison, 529 U.S. 598 (2000).

raped Christy.<sup>2</sup> Then again, Crawford and Morrison traded places, and Christy was raped for a third time.<sup>3</sup> Neither Morrison or Crawford used a condom while raping Christy, and yet Morrison threatened her by saying that she, “better not have any fucking diseases.”<sup>4</sup> After Morrison and Crawford left her dorm room, Morrison continued his predatory behavior by stalking Christy around campus and back to her dorm room frequently.<sup>5</sup> In the months that followed Morrison and Crawford’s assault of Christy, Morrison was caught publicly proclaiming that he, “liked to get girls drunk and fuck the shit out of them.”<sup>6</sup> Morrison and Crawford received support from other male athletes at Virginia Tech for this type of violent behavior towards women that they obviously displayed.<sup>7</sup> It was even overheard that another male athlete told Crawford that he should’ve “killed the bitch.”<sup>8</sup>

Christy suffered greatly after the sexual assault; she dropped out of Virginia tech, she became depressed, withdrew socially, and attempted to commit suicide.<sup>9</sup> In 1995, she filed a complaint with Virginia Tech against both Morrison and Crawford through the school’s sexual assault policy.<sup>10</sup> During the hearing for Christy’s complaint that was held before the Virginia Tech Judicial Committee, Morrison confessed that he had sexual contact with Christy despite the fact that she had told him “no” twice during their encounter.<sup>11</sup> The committee said that they had insufficient evidence to punish Crawford or hold him accountable, but they found Morrison

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<sup>2</sup> U.S. v. Morrison, 529 U.S. 598 (2000).

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

guilty of sexual assault.<sup>12</sup> Morrison was sentenced to an immediate suspension that would last two semesters.<sup>13</sup> Later in 1995, Morrison appealed the decision of the Virginia Tech Judicial Committee, but a second hearing still found Morrison guilty.<sup>14</sup> Morrison then appealed again through the University's administrative system, and his punishment was set aside and found to be too "excessive".<sup>15</sup> Christy, disappointed and let down by the remedies and lack of protection through the school's sexual assault policy, sued Morrison, Crawford, and Virginia Tech in Federal District Court.<sup>16</sup> The complaint filed on behalf of Christy alleged that Morrison's and Crawford's attack violated 42 USC section 13981, a section of the Violence Against Women Act of 1994 (VAWA). This act provides a federal civil remedy for those who are victims of gender-based violence like Christy.<sup>17</sup> Morrison and Crawford claimed that section 13981 of the VAWA was unconstitutional and moved to dismiss this motion.<sup>18</sup> After more appeals and litigation, the case reached the Supreme Court of The United States in which the legal question became whether or not Congress had the right, or authority to enact the Violence Against Women Act either under the Commerce Clause or the Fourteenth Amendment?

This case is shockingly horrific. Not only was Christy Brzonkala exploited and assaulted at the hands of two men, but also at the hands of the legal system. Stating the facts of this case is not for the purpose of shock value, but rather to contextualize the violence that women have and continue to face within our society. To this day, we have a patriarchal system that can fail to protect minorities or out groups. The Fourteenth Amendment is supposed to be a legally

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<sup>12</sup> U.S. v. Morrison, 529 U.S. 598 (2000).

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

enshrined mechanism in which those of a protected class can seek legal remedy for injury from unequal protection under the law. Christy Brzonkala was raped in 1994 and the Fourteenth Amendment was ratified as a Constitutional Amendment in 1868. The equal protection clause of the Fourteenth Amendment was established as a part of the amendment, and yet even in our modern history, women have failed to see the systematic repairs needed throughout history to prevent women like Christy from being able to seek legal remedies when they face gender-based issues such as discrimination, violence, and bodily control.

The *U.S. v. Morrison* case is one of many cases in which the Supreme Court failed to establish meaningful legal remedies in which women could use the Fourteenth Amendment to protect themselves. The way in which the Fourteenth Amendment is interpreted sets the precedent for how case law guides society and the standards by which Americans live. It determines who is equal under the way and how broadly or how narrowly those protections extend. When the Fourteenth Amendment is interpreted more broadly, it expands the definition of who is considered a protected class and clarifies the legal remedy that must take place in order for that person to be equal in the eyes of the law. If it is narrowed, that means who the equal protection clause protects is more limited in its scope. Because of this, who is considered a part of a protected class, and to what degree, is important for social equality. The law shapes who is more socially mobile, and a clear example of this is gender as it relates to the 14<sup>th</sup> Amendment. Gender highlights how the Fourteenth Amendment's legal interpretation largely reflects the way in which women are unequal under the law and how they move through space in America. In order to understand why we still see these type of blatant lack of protection under the law it is important to contextualize why the Fourteenth Amendment was created in the first place and

how it has evolved over time to be one of the most constitutionally significant amendments in America.

### The Language of the Fourteenth Amendment

The very first section of the Fourteenth Amendment is arguably the cornerstone of what it is known for: the Equal Protection Clause. The actual text states, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>19</sup> Two very important legal understandings come from just this one sentence alone. Firstly, this amendment establishes citizenship on the basis of naturalization which expanded the definition of who was a U.S. citizen for the first time since America’s independence in 1776.<sup>20</sup> Before this, there was no clear definition of what a citizen was, but rather what a citizen was not.<sup>21</sup> In *Dred Scott v. Sandford* (1857), the majority held that, “ ‘a negro, whose ancestors were imported into [the U.S.], and sold as slaves,’ whether enslaved or free, could not be an American citizen...”.<sup>22</sup> The language of the Fourteenth Amendment clarified that a citizen was now any person born in the United States, within the context of when this amendment was ratified, and this included ex-slaves. The second sentence establishes both equal protection under the law and the guarantee of due process under the law

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<sup>19</sup> Executive Order #6, The Ratification of The Fourteenth Amendment, (1868).

<sup>20</sup> Gross, Terry. “‘Second Founding’ Examines How Reconstruction Remade the Constitution.” NPR. NPR, September 17, 2019. <https://www.npr.org/2019/09/17/761551835/second-founding-examines-how-reconstruction-remade-the-constitution>.

<sup>21</sup> Ibid.

<sup>22</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

no matter who the individual is. Theoretically, anyone, even a non-citizen, could exercise their Fourteenth Amendment right to due process and equal protection under the law. When amendments are created, it is because the Constitution, or the way in which it is understood, needs to be altered to reflect the way in which American people wish to be governed. It then raises the question of why the Fourteenth Amendment was needed in the first place and what was its intended effect for the future?

### The History of the Fourteenth Amendment

Slavery would forever be illegal in the United States when the Thirteenth Amendment was ratified in 1865. This is considered a pillar of American history and is widely considered a peak in the restoration of justice and liberty in the United States in a post-slavery society. It was widely acknowledged that the immediate focus of policies and the law was to guarantee the essential rights of the recently emancipated slave population in America.<sup>23</sup> In the years that followed the ratification of the Thirteenth Amendment, the question of what it means to abolish slavery continued to come up in the law and within society. It became obvious that this amendment standing on its own was not enough to recover the damage that had been done prior to the Civil War.<sup>24</sup> Then, the Fourteenth Amendment was created, passed, and then finally ratified in 1868. This extended birthright citizenship and citizenship for those who had been naturalized in the U.S., while also providing equal protection under the law for both citizens and

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<sup>23</sup> Eric Foner: American Historian, 2018.

<http://www.ericfoner.com/articles/070918nation.html#:~:text=The%20language%20of%20the%2014th,most%20responsible%20for%20the%20wording.>

<sup>24</sup> Gross, Terry. "'Second Founding' Examines How Reconstruction Remade the Constitution." NPR. NPR, September 17, 2019. <https://www.npr.org/2019/09/17/761551835/second-founding-examines-how-reconstruction-remade-the-constitution.>

non-citizens.<sup>25</sup> Again, while this amendment was progressive, the Fifteenth Amendment was added to the constitution in 1870. This enfranchised black men the right to vote in elections. These amendments were all created and ratified during the era of Reconstruction in U.S. history where the federal government became known as a body in which individual and group rights would be protected and expanded far beyond any pre-Civil War notion.<sup>26</sup> The Fifteenth Amendment only extended to black men, despite the fact that the Fourteenth Amendment had established citizenship and equal protection under the law. This is telling because it effectively makes it the distinction between men and women, and who is entitled to tangible citizenship based on voting rights. Women did not have the ability to exercise rights to the extent that men were able to. This was a period in time where the effort of the country was set on coming to terms with the destruction of the institution of slavery, not a time period where people considered in what way gender was also a barrier to equality.<sup>27</sup> For just a moment, the push towards a better future for racial equality seemed near during Reconstruction as several black men held positions of political office in this post-war period.<sup>28</sup> Although, this was short lived. The radical Republicans lost a lot of their political influence and control when President Abraham Lincoln was assassinated and Andrew Johnson, his Southern Democrat predecessor became the President of the United States. Lincoln chose Johnson as his Vice President as a showing of solidarity. Even though they differed politically, Lincoln wanted to unite North and South through political

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<sup>25</sup> Gross, Terry. "'Second Founding' Examines How Reconstruction Remade the Constitution." NPR. NPR, September 17, 2019. <https://www.npr.org/2019/09/17/761551835/second-founding-examines-how-reconstruction-remade-the-constitution>.

<sup>26</sup> Eric Foner: American Historian, 2018.

<http://www.ericfoner.com/articles/070918nation.html#:~:text=The%20language%20of%20the%2014th,most%20responsible%20for%20the%20wording>.

<sup>27</sup> Gross, Terry. "'Second Founding' Examines How Reconstruction Remade the Constitution." NPR. NPR, September 17, 2019. <https://www.npr.org/2019/09/17/761551835/second-founding-examines-how-reconstruction-remade-the-constitution>.

<sup>28</sup> Ibid.



representation. Although, this decision would have great implications for the future of Reconstruction in America. Lincoln's assassination is arguably the historical turning point that led to years of executive, legislative, and judicial decisions that derailed the progress of Reconstruction and gave way to the creation of the Jim Crow South.

Johnson, as a Southern Democrat, was very sympathetic to the concerns of Southern whites who felt that their way of life was forever ruined. In their eyes, Reconstruction policies and the addition of the Thirteenth, Fourteenth, and Fifteenth Amendments, removed their greatest source of wealth and labor which were slaves. Now that slaves were considered American citizens, the backbone of the Southern economy was broken and the social hierarchies that once informed the Southern way of life had shifted. The threat of the equality of black Americans was real to Southern whites who feared competition economically, socially, and politically. Because Johnson was from the South, and was a slave owner himself, he understood the implications and impacts that the passage of these policies had on Southerners. Within the first few years of Reconstruction, the lack of a mechanism in which to enforce progression towards racial equality separate from the reach of political dispositions nullified the effect of almost all progressive policies and legislation. The Fourteenth Amendment was intentionally vague. The non-descriptive nature of the amendment allowed lots of room for interpretation, specifically the ways in which the Supreme Court of the United States saw fit. The result was that, "... the Supreme Court severely restricted the amendment's scope as a weapon for racial equality."<sup>29</sup> Early on, the Court made the clear distinction that the Fourteenth Amendment was

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<sup>29</sup> Eric Foner: American Historian, 2018.

<http://www.ericfoner.com/articles/070918nation.html#:~:text=The%20language%20of%20the%2014th,most%20responsible%20for%20the%20wording.>

only going to be used to recognize the idea of “state action”.<sup>30</sup> This meant that instead of the Court setting the precedent that racially discriminatory actions between private individuals fell under the Fourteenth Amendment, they made it so that it only barred racially discriminatory actions by the state government or its officials.<sup>31</sup> An example of this is *Plessy v. Ferguson* (1896) in which the state of Louisiana enacted the Separate Cars Act that which segregated white and black passengers into separate railway cars when they were riding the train.<sup>32</sup> Homer Plessy, who was 7/8ths white, wanted to challenge this act and so he decided to sit in the “whites only” railway car.<sup>33</sup> When he was asked to move, Plessy refused, and was consequently arrested.<sup>34</sup> In court, his lawyer argued that the Separate Cars Act was unconstitutional under the provisions in the Fourteenth Amendment.<sup>35</sup> The judge in the case found that the Louisiana state law could be enforced as long as it was only enforced within the boundaries of the state.<sup>36</sup> This case was appealed until it reached the United States Supreme Court in which Plessy continued to challenge the constitutionality of the Separate Cars Act under the Fourteenth Amendment.<sup>37</sup> The Supreme Court held that Louisiana state law was in fact constitutional, while also creating the separate but equal doctrine.<sup>38</sup> Plessy, even though he was 7/8<sup>th</sup> white, was considered a black man. The Court established what is known as the one drop rule, which meant that even if you

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<sup>30</sup> Eric Foner: American Historian, 2018.

<http://www.ericfoner.com/articles/070918nation.html#:~:text=The%20language%20of%20the%2014th,most%20responsible%20for%20the%20wording.>

<sup>31</sup> Ibid.

<sup>32</sup> “Plessy v. Ferguson (1896).” National Archives and Records Administration. National Archives and Records Administration. Accessed December 8, 2022. <https://www.archives.gov/milestone-documents/plessy-v-ferguson>.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

had "one drop" of blood that was non-white, you were considered a non-white person.<sup>39</sup> Not only was state-imposed segregation now considered constitutional through the Court's interpretation of the Fourteenth Amendment, but it was also deemed that separate facilities for white and black Americans did not mean that they were inherently unequal. *Plessy v. Ferguson* highlights how the interpretation of the Fourteenth Amendment at this time was extremely narrow which only served to limit certain groups from reaching equality, the opposite of its original intention. The judicial branch set the precedent of interpreting the Fourteenth Amendment narrowly during Reconstruction and the Antebellum period, which led to a legacy of not extending protections to groups seeking equal protection under the law.

#### The Fourteenth Amendment and Gender

Judicial precedent is one of the main resources through which lower courts make decisions in their cases. Although the Fourteenth Amendment was created to promote and enshrine racial equality into the fabric of the American constitution, later it was expanded to include other protected classes including gender, or sex in the mid-twentieth century. What is true of the Fourteenth Amendment when it was ratified is that the framers of this amendment did not contemplate sex equally.<sup>40</sup> The Supreme Court accepted the framer's perspective and said that although women and children are considered citizens under the logic of the Fourteenth Amendment, both were placed into categories separate from men.<sup>41</sup> American society also reflected these beliefs and from the creation of the Fourteenth Amendment until the 1960s, not

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<sup>39</sup> "Plessy v. Ferguson (1896)." National Archives and Records Administration. National Archives and Records Administration. Accessed December 8, 2022. <https://www.archives.gov/milestone-documents/plessy-v-ferguson>.

<sup>40</sup> Lapidus, Lenora M. 2019. "Ruth Bader Ginsburg and the Development of Gender Equality Jurisprudence under the Fourteenth Amendment." *Review of Law & Social Change* 43 (1/2): 149–54.

<https://search.ebscohost.com/login.aspx?direct=true&db=edb&AN=138408438&site=eds-live&scope=site>.

<sup>41</sup> Ibid.

many sex discrimination claims were made.<sup>42</sup> This was because during the first century or so that the Fourteenth Amendment was ratified, women's status as second class citizens was widely accepted and ingrained into the ways in which patriarchal American society functioned. A perfect example of the ways that misogyny was integral to American life was *Reed v. Reed* (1971). In this case after the death of their adopted son, Sally and Cecil Reed both sought to be the administrator of their son's estate, due to the fact that they were separated.<sup>43</sup> This dispute took place in the state of Idaho and the Idaho Probate Code specified that "males must be preferred to females" when the court is appointing someone to administer the estate of another.<sup>44</sup> Due to the Idaho Probate Code, Cecil was appointed as the administrator of the estate and Sally wanted to challenge this code in the court of law.<sup>45</sup> Ultimately, the Court made the morally correct and judicially correct choice to rule the Idaho Probate Code unconstitutional on the grounds that it gave preference to one sex over the other.<sup>46</sup> But, what *Reed v. Reed* emphasizes is the power in how the Fourteenth Amendment is interpreted. The Idaho state law in this case that existed until it was overturned in 1971, is testament to the previous failures and limitations of how the Fourteenth Amendment has been interpreted over time. This amendment is supposed to be an avenue through which women could successfully seek legal jurisprudence that would tangibly change their circumstances and the circumstances of women like them.

To help fully contextualize why the interpretation of the Fourteenth Amendment is vital to the ways in which women experience and exercise their rights, we must look to case law as it

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<sup>42</sup> Lapidus, Lenora M. 2019. "Ruth Bader Ginsburg and the Development of Gender Equality Jurisprudence under the Fourteenth Amendment." *Review of Law & Social Change* 43 (1/2): 149–54.

<https://search.ebscohost.com/login.aspx?direct=true&db=edb&AN=138408438&site=eds-live&scope=site>.

<sup>43</sup> *Reed v. Reed*, 404 U.S. 71 (1971).

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

relates to sex and sex discrimination. The Civil Rights Act of 1964 was a policy that was heavily sponsored and advocated for by the Civil Rights Movement and its leaders. This act not only targeted the main ideological goal of the Civil Rights Movement, the eradication of racial discrimination, but all different types of discrimination based on group identity. Originally, the protected classes listed in the Civil Rights Act were race, religion, national origin, and color.<sup>47</sup> This Act sought to prohibit discrimination legally in many facets of American life, such as in public places, throughout the process of employment, and within schooling and other public facilities.<sup>48</sup> As American society changed, and the judicial branch became more expansive with its interpretation of the Fourteenth Amendment, the other branches of government began to follow their lead. In 1974, the legislative branch, also known as Congress, made a major contribution to the list of protected classes- sex.<sup>49</sup> Time and time again, the liberal Supreme Court of the 60's and 70's upheld this doctrine of sex equality, making the addition of gender to the Civil Rights Act constitutional.<sup>50</sup> Women during this time period, more so than at any other point in history, litigated claims of discrimination due to their sex because they had several legal avenues in which to seek repair for the harms that they had experienced. It also must be noted that the Civil Rights Act was the first piece of constitutional legislation that listed sex as a protected class when it came to matters of civil rights and equality under the law.<sup>51</sup>

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<sup>47</sup> "Civil Rights Act (1964)." National Archives and Records Administration. National Archives and Records Administration. Accessed December 8, 2022. [https://www.archives.gov/milestone-documents/civil-rights-act?\\_ga=2.249516167.1694715944.1670508555-745424331.1670508555](https://www.archives.gov/milestone-documents/civil-rights-act?_ga=2.249516167.1694715944.1670508555-745424331.1670508555).

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Lapidus, Lenora M. 2019. "Ruth Bader Ginsburg and the Development of Gender Equality Jurisprudence under the Fourteenth Amendment." *Review of Law & Social Change* 43 (1/2): 149–54. <https://search.ebscohost.com/login.aspx?direct=true&db=edb&AN=138408438&site=eds-live&scope=site>.

<sup>51</sup> Ibid.

As previously stated, the expansion of the interpretation of the Fourteenth Amendment by the Supreme Court encouraged women to seek remedy to discrimination through the legal system. In 1965, one of the first significant rulings regarding a women's issue was issued by the Supreme Court. This specific case dates back to 1879 when the state of Connecticut passed a law that, "banned the use of any drug medical device, or other instrument in furthering contraception."<sup>52</sup> In 1879, it was understood that women were to be subservient to men, even within their home lives and marriages. It was the men who made decisions regarding contraception, and women had no say in the matter as their duties consisted of providing children to continue to family bloodline. But, in the early 1960's, C. Lee Buxton, a gynecologist at the Yale School of Medicine, along with Estelle Griswold, the head of Planned Parenthood in Connecticut, thought that this dynamic should change as society began to progress.<sup>53</sup> They believed that women should have the right to family plan and should not be expected to get married and have children if they do not wish to do so.<sup>54</sup> Family planning included access to contraception via condoms, the pills, and other forms of birth control. Following this ideological belief, Buxton and Griswold opened a birth control clinic in New Haven, Connecticut. But, back in 1879, the Connecticut state law prohibited anything that would prevent conception, thus making the Planned Parenthood center in direct violation of the law. Griswold and Buxton would be arrested for their efforts and convicted of knowingly breaking the Connecticut state law that prohibited interference in the realm of contraceptives.<sup>55</sup> Griswold and Buxton were found guilty in Connecticut state court.<sup>56</sup> Even after this guilty verdict was challenged in a higher state court,

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<sup>52</sup> Griswold v. Connecticut, 381 U.S. 479 (1965).

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

the state of Connecticut stood by their ruling.<sup>57</sup> In 1965 Griswold and her legal team took this case to the Supreme Court of The United States to challenge the constitutionality of the Connecticut state law under the Fourteenth Amendment.<sup>58</sup> The legal question became does the U.S. Constitution protect the rights of married couples' privacy against state restrictions that would prohibit a couple's ability to use contraceptives if they choose to do so?<sup>59</sup> The Supreme Court held that the Constitution does protect the right of marital privacy against any state restrictions on contraceptives of any kind.<sup>60</sup> What is especially fascinating about this case, and what is vital to unpack is that a seemingly progressive ruling in favor of women's autonomy over her body is tied to the institution of marriage and privacy rights. A women's access to contraception was dependent on the interpersonal relationship that she had in her marriage with her husband. It was not based on whether the woman, as an individual outside of the union of her marriage, wanted to prevent pregnancy. Contraception, and access to contraception, was framed as a marital privacy issue, not as a women's rights issue. While this might seem like a step in the right direction, the way in which the constitutionality of this law was interpreted as a matter of privacy rights (liberty rights), it does not actually issue any substantive reform for rectifying women's' reproductive rights.

Reproduction is exclusively a burden that women must bear. Biologically, only the female sex can create a womb in which a fetus forms into an infant in just nine months. While this is a very unique and special experience, not all women want to carry children to term or start families. In the 1960's women rebelled against the narrative of the perfect nuclear American

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<sup>57</sup> Griswold v. Connecticut, 381 U.S. 479 (1965).

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

family created and socially celebrated in the 1950's with the rise of the emerging Women's Rights Movement of the 1960's. Previously, the women's role within the nuclear family was that of a home maker; men were the main financial earners within the family unit. Women wanted the opportunity to participate in society to the extent that men did; they wanted to pursue careers, not just marriage. This revolutionized family planning in a way that America had not ever seen before. Now women could use birth control, condoms, or other preventative measures to put off having a family while they pursued other interests and opportunities. More women were being educated and pursuing careers, which meant putting off starting a family until later in life. Because of this, the constitutionality of abortions began to become a more mainstream social issue. More liberal minded Americans viewed abortion as a way for the woman to take control of her bodily autonomy, and make sacrifices that would prioritize her career. It is harder for women to establish themselves within a capitalist society if they are also responsible for the care of children and the domestic labor of the home. A case that shows that the Supreme Court has an extensive understanding of the historical role that sex discrimination has played within America's patriarchal society is *Nevada of Human Resources v. Hibbs* (2003). Hibbs, an employee with Nevada Human Resources, under the Family Medical Leave Act of 1993 was entitled to twelve work weeks of unpaid leave if there was a onset of illness within the family.<sup>61</sup> Hibbs submitted his request for the full twelve weeks with his place of work and was approved.<sup>62</sup> When Hibbs was supposed to report back to work, he failed to do so and was fired.<sup>63</sup> This case may not seem like it explicitly relates to gender, but what this case accomplished was that it recognized the systematic pigeon-hole that women have been placed into when the Court

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<sup>61</sup> Nevada State Department of Human Resources v. Hibbs, 538 U.S. 721 (2003).

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.



observed, “Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be.”<sup>64</sup> This quote shows the issue of reproduction when it comes to the equality of women within society and within the law has long been debated and thought about. *Roe v. Wade* (1972), one of the most infamous Supreme Court decisions in American history tackled the issue of women’s reproductive rights and health head on.

In 1970, a woman whose identity is concealed with the name Jane Roe in this case, filed a lawsuit against Henry Wade to challenge Texas law regarding abortion.<sup>65</sup> Jane Roe was a resident within the state of Texas, and filed the lawsuit against Henry Wade, who was the district attorney of Dallas County.<sup>66</sup> She pursued litigation challenging the Texas law that made all abortion illegal, except in a circumstance where a doctor ordered the procedure in order to save the woman’s life.<sup>67</sup> Roe believed that it should be the right of the woman to determine that fate of her own pregnancy and make decisions regarding her own reproductive health.<sup>68</sup> The lawsuit alleged that the Texas state laws were unconstitutionally vague and abridged her privacy which was protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.<sup>69</sup> The defense on behalf of Wade claimed that although citizens have a right to privacy under the Fourteenth Amendment, the government has legitimate interest in protecting the health of pregnant women and in protecting potential human life.<sup>70</sup> Under this lens, the Texas Law did not disrupt this

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<sup>64</sup> Nevada State Department of Human Resources v. Hibbs, 538 U.S. 721 (2003).

<sup>65</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

balance by making abortion illegal.<sup>71</sup> Wade argued that abortion should not be used as a way to terminate a pregnancy unless the life of the mother is at risk.<sup>72</sup> It is in the best interest of the women and of the unborn child, according to the state of Texas, to only terminate the pregnancy if there is an immediate threat to the life of the mother that would not allow for her to have a safe pregnancy.<sup>73</sup> The Court then had to determine if the U.S. constitution recognize a women's right to terminate her own pregnancy via abortion without the approval of a doctor, or without the presence of a threat to the women's life.<sup>74</sup> The Court, which during this time period was headed by Chief Justice Earl Warren, was one that was more liberal and in favor of expanding equal protections to historically discriminated against groups. This Supreme Court ruled that the case was not moot and that there was a constitutional question that needed to be answered in *Roe v. Wade*.<sup>75</sup> In a 7-2 decision, the Supreme Court of The United States ruled that a women's right to terminate her pregnancy through choosing to have an abortion is protected and this is because she has a right to privacy under the Fourteenth Amendment.<sup>76</sup> A state that invades individual privacy and prohibits the ability of a woman to have an abortion, without respect to the stage the pregnancy is in, violates those rights.<sup>77</sup> The state does have legitimate interest in protecting human life and the health of pregnant women, therefore, laws must be nuanced to fit this understanding.<sup>78</sup> Again, this decision was a huge victory in terms of providing women with complete control over when, and if they decide to have a child. But, again, this monumental case was passed due to the interpretation of abortion as an issue of personal privacy, not as a

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<sup>71</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

mechanism through which sex discrimination would cease to exist. Women now had the Constitutional right to receive an abortion, but an important element is that they still would be required to consult with their doctor.<sup>79</sup> This many seem like an unimportant detail, but it is not when you consider that men make up a majority of doctors in America at this time.<sup>80</sup> This shows that this liberal Court had the desire to end sex discrimination, but it did not rule in a way that meant that significant societal change would be mandated.<sup>81</sup> This decision was still grounded in the patriarchal logic that men should tell women what they can and cannot do with their bodies. Ultimately, the legal reasoning behind the legalization of abortion was not sufficient enough to secure true bodily autonomy for women. Because no legal change was mandated, and the Fourteenth Amendment was interpreted within the context of privacy rights, sex discrimination continued to exist within society and allowed for the creation of situations that would lead to more and more cases containing issues of sex discrimination.

Sex discrimination not only negatively affects women, but these harmful expectations permeate the experience of men in America as well. In *Frontiero v. Richardson* (1973), the role of gender affected the status of who was a dependent and what benefits they could receive due to that status.<sup>82</sup> Sharron Frontiero was a lieutenant in the United States Air Force and she sought a dependent's allowance for her husband.<sup>83</sup> At the time, the federal law was such that the wives of members of the military automatically became dependents.<sup>84</sup> This was different from the experience of husbands of female members of the military because they were not accepted as

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<sup>79</sup> Roe v. Wade, 410 U.S. 113 (1973).

<sup>80</sup> Admin. "We're Going to Look Physician Statistics Summary (1970-1999)." Pinnacle Health Group, September 28, 2022. <https://www.phg.com/2000/01/physician-statistics-summary/>.

<sup>81</sup> Roe v. Wade, 410 U.S. 113 (1973).

<sup>82</sup> Frontiero v. Richardson, 411 U.S. 677 (1973).

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

dependents unless they were dependent on their wives for over one-half of their support.<sup>85</sup>

Because her husband was not dependent on her for over a half of his support, Frontiero's request for dependent status for her husband was turned down.<sup>86</sup> The liberal Warren Court ruled that this practice was clearly unconstitutional and blatantly showed a “dissimilar treatment for men and women who are similarly situated,” which was consistent with this Court’s understanding of the Fourteenth Amendment.<sup>87</sup> Although what is significant about this case is not the fact that it recognized discrimination along the lines of sex, but the fact that this court declined to rank sex among what is considered a “suspect” category.<sup>88</sup> A “suspect” criterion is when the court is dealing with specific issues, “...warranting the close review the Court gives above all to race discrimination, but also to discrimination based on national origin and religion.”<sup>89</sup> Four out of the nine justices on the Supreme Court, at the time this case was tried, thought that sex should be listed, and from here on out enumerated as a “suspect” criterion.<sup>90</sup> Five justices are needed in order for there to be a majority within the Supreme Court, therefore sex was, and never has been, listed a “suspect” criterion despite the country’s long history with misogyny, and unequal treatment of women under the law and within society. This case again proves how judicial precedent makes a difference. Although the court has been willing and eager to recognize the existence of discrimination on the basis of gender, it has not taken the steps to ensure that societal change and upheaval will result from these decisions. The court redresses the issue at

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<sup>85</sup> *Frontiero v. Richardson*, 411 U.S. 677 (1973).

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> Wildman, Stephanie M. “Privilege, Gender, and the Fourteenth Amendment: Reclaiming Equal Protection of Laws”, 2003.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

hand, but does not further ensure that issues of sex discrimination cease to exist because they did not provide a substantive legal remedy.

The Court further proved that it had an understanding of the ways that sex discrimination has played out over time when it recognizes that harmful stereotypes about groups can create a negative experience for the individual. Ruth Bader Ginsburg, one of the most progressive Supreme Court Justices to exist and a champion of equality stated, “Thus in *Hibbs*, a case brought in the workplace context, the Court could perceive women and men as part of groups receiving treatment based on biased stereotypes.”<sup>91</sup> Justice Ginsburg is pointing out that the Court had an understanding of the way in which group identity could impact the individual. What is significant about this particular ruling is that it simultaneously recognized how biased stereotypes can affect the treatment of both women and men within society. Therefore, the Court has a duty to protect individuals from being discriminated against or seen as unequal under the law just because of the bias that one who identifies with a group may face. Under the Fourteenth Amendment, the Supreme Court of the United States is required to protect the equal rights of citizens under the law, no matter the stereotypes that are associated with the individual bringing the claim.

### The Fourteenth Amendment and Privilege

Although the court has expressed in *Nevada Department of Human Resources v. Hibbs* that they are aware of the fact that sex biased stereotypes exist, they still work to ignore any type of bias that would require radical social change. The Court’s unwillingness to understand how

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<sup>91</sup> Lapidus, Lenora M. 2019. “Ruth Bader Ginsburg and the Development of Gender Equality Jurisprudence under the Fourteenth Amendment.” *Review of Law & Social Change* 43 (1/2): 149–54.  
<https://search.ebscohost.com/login.aspx?direct=true&db=edb&AN=138408438&site=eds-live&scope=site>.

individuals and groups seek protection under the Equal Protection Clause make is so the court can ignore biases that remain as roadblocks to achieving equality under the law.<sup>92</sup> Furthermore, "...the Supreme Court's development of equal protection jurisprudence, while seeking to retain that primacy, has ignored the relationship of that individual person to the significant identity groups in which that individual might be a member."<sup>93</sup> Because they can choose to ignore biases, they should focus the arm of the Fourteenth Amendment on privilege instead of discrimination.<sup>94</sup> Privilege is systematic and acknowledges systems that might have generationally oppressed people. By focusing on privilege, an individual's connection to the group cannot be ignored. If we focus on discrimination when it comes to the Fourteenth Amendment, it will always be the case that the individual's experience is addressed and the institutions that surrounded the situation are not addressed. In order for an individual to prove that they have a case under the Fourteenth Amendment, they have to prove the intent requirement.<sup>95</sup> This is not explicitly stated in the amendment but, "...the Supreme Court has held that a litigant, pursuing a claim of discrimination in violation of the equal protection clause, must prove intent to discriminate."<sup>96</sup> The burden of proof falls on to the petitioner, meaning that they have to prove there was an incident of discrimination. It is not the responsibility of the defendant to prove that they have not been discriminatory. This system allows for the Court to ignore any kind of bias that may come into play with a specific case and chose to validate or invalidate the petitioner's claim on bias, not necessarily on fact.

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<sup>92</sup> Wildman, Stephanie M. "Privilege, Gender, and the Fourteenth Amendment: Reclaiming Equal Protection of Laws", 2003.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

Privilege has a more complex and substantive explanation than discrimination. We have seen in recent history the ways in which discrimination has succumb to the bias of who is in control of the judicial branch and not pay attention to the legacies and implications of privilege. An example of this is the *Dobbs v. Jackson Women's Health Organization* (2022) in which the Supreme Court overturned the judicial precedent of *Roe v. Wade* and *Planned Parenthood of Southeast PA v. Casey*. Because substantive change had not been ingrained into *Roe v. Wade* or *Planned Parenthood of Southeast PA v. Casey*, the Supreme Court was able to interpret the Fourteenth Amendment in a way that narrowed the scope of influence that these progressive decisions had. More so than any other case, *Dobbs* exemplifies the danger in non-substantive judicial decisions that do not require systematic social change. Because *Roe v. Wade* and the protections that it provided to women were not fortified into law, the current sitting Supreme Court had the power to reverse the legal precedent set back in 1973. It also shows how holding that have in the past expanded rights for women are threatened and can be taken away just because one Court interprets the Fourteenth Amendment differently.

### Politics and the Supreme Court of the United States

Currently, the Supreme Court of The United States has a highly conservative bench. Six out of the nine justices that serve on the Supreme Court are conservative. Politics have always played a role in the judicial branch, as presidents appoint federal judges, but this Court more than ever legally analyzes constitutional issues according to their political views. There have been several warning signs that the interpretation of the Fourteenth Amendment is becoming dangerously close to destroying any avenue in which people within protected classes who are discriminated against can seek remedy even before the *Dobbs* decision was released to the

public. One of those warning signs is unfortunately what happened in the *U.S. v. Morrison*. After years of litigation, it was finally time for the Supreme Court to issue its holding in the case. Did Congress have the authority to enact the Violence Against Women Act of 1994 under the Fourteenth Amendment or the Commerce Clause? The court said no; Congress did not have the authority to enact the Violence Against Women Act through the Fourteenth Amendment because it did not redress any harm caused by the state, and that a true civilized system of justice would provide Brzonkala a remedy for the conduct of Morrison.<sup>97</sup> Christy was told that the state had not caused her any harm and therefore it could not seek to provide a solution. What is interesting about this decision is that one could argue that the state did in fact harm Christy by not criminally charging her perpetrators with the crime that they committed. It is a flaw, or failure of the state, that the two men who sexually assaulted Christy did not go to jail. If the systems were functioning how they were supposed to, these two men would have served time in jail. But because the state was not responsive or effective, they harmed Christy by not being interested in her safety or well-being. The Supreme Court's decision reflected how just as the Fourteenth Amendment could expand protections, it could also narrow them just based upon the interpretation by the justices.

### Conclusion

*U.S. v. Morrison* highlights the stark reality that the broad interpretation of the Fourteenth Amendment is not enough. In the 1960's and 1970's when the Court made several progressive decisions, they failed to ensure that real and substantial social change would come of it. They focused on the way in which individuals had been discriminated against, and used words to

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<sup>97</sup>*U.S. v. Morrison*, 529 U.S. 598 (2000).



express a knowledge of group based bias, and did not use their legislative power to redress the harms that are rampant within society. Issues of gender-based discrimination and gender-based violence are systematic. These are specific issues that directly impact women at a disproportionate rate because of the legacies of misogyny within American society. The fact that a case like *U.S. v Morrison* is as recent as it is, highlights years of systematic failures that have failed to redress issues of sex discrimination and violence that are built into American customs and culture. Sharing this case is not for the shock value, or for us to pick apart one women's horrific assault, but to break down why the Fourteenth Amendment is interconnected with gender. This reflects upon what we see today with the reversal of important decisions regarding the equality of the sexes like *Dobbs*. The fourteenth Amendment has real life consequences. For a lot of people, there is severe harm at stake when the equal protection of the law is not more explicit.

The rights that women have seen be expanded under the Fourteenth Amendment are potentially the same rights that they could see ripped away. We continue to see the ways that discrimination plagues our society, despite the fact that the Fourteenth Amendment was supposed to be a way for Americans to redress their experiences of discrimination. We must look at why the Fourteenth Amendment can be such a powerful tool, and at the same time such a dangerous weapon. We must ask ourselves is the promise of equality under the law enough, or does the judicial branch need the support and vested interest of the other branches of government to systematically address situations of discrimination? Why is it that the interpretation of one singular amendment to the constitution is that vital to the ways in which people experience equality within society? We must seek to reframe the way in which the Fourteenth Amendment has historically been interpreted different based on who holds judicial power. When protections

are expanded, we must seek to remedy discrimination in a way that will outlast the political whims of courts who wish to narrow the scope of equality amongst Americans. We must reframe that Americans think about the Supreme Court and the power that they hold to make decisions that inform all our lives. The interpretation of the Fourteenth Amendment is vital to the way that people, specifically women, experience and exercise their rights within the context of American society.

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