

State University New York at New Paltz

**The Reactionary Movement Spawned by the Deregulation of the Uterus:
The Christian Conservative Legal Movement's Decades-Long Battle in Response to Roe**

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Abstract: The debate on the right to choose has become one of the most polarizing issues within American law and politics. Since the landmark decision of *Roe v. Wade* (1971), the conservative legal movement has been looking for ways to overturn it and began to find its niche in the 1980s, only after the liberal legal movement dominated largely from the 1960s through the 1970s. Shortly thereafter, the conservative legal movement gained momentum and the pro-life movement found where it belonged. This research will address how the Christian right has been able to efficiently mobilize to incrementally challenge the right to choose and the organizational tactics behind this movement. The relative successes of the conservative legal movement can be attributed to a vast network of attorneys, donors, academics, and elected officials. The influence of dark money groups will be discussed in regards to abortion rights in the United States, as well. Given the current trajectory of the conservative legal movement, it appears that the right to choose will likely remain intact, but will face difficult challenges in the near future.

Key Words: political science, conservative legal mobilization, right to choose, abortion rights, Christian legal movement, right to privacy, American government, politics, Supreme Court of the United States

Although unintended pregnancy rates have been on the decline in the United States throughout the last several decades, approximately 45% of all pregnancies in 2011 constituted as unplanned—either mistimed or unwanted (Finer and Zolna, 2016). Of these unplanned pregnancies, 42% of them ended in some sort of abortion while 58% of them were birthed.

Although disagreements between liberals and conservatives exist on a myriad of issues, one of the most contentious matters within American politics has been the right to choose. Oftentimes, this battle serves as a “litmus test” to divide the party lines of what it means to be a Democrat or Republican even though pro-life liberals and pro-choice conservatives exist. The pro-life movement had been relatively dormant until the landmark case of *Roe v. Wade* (1973). As a reaction, conservatives have organized their own movement to combat the acceptability of safe and accessible abortions, as well as the notion of being pro-choice in general. For nearly five decades, Christian conservative legal activists have attempted to overturn the monumental decision; however, various subgroups of the pro-life movement have employed more strategic approaches. This paper will highlight the difference between the policy-driven approach of anti-choice organizations, funders, intellectuals, etc. and the legal approach used by them, as well as any intersections between policy and law. Pro-life legal activists have been able to mobilize effectively through the assistance of Christian conservative legal organizations and vast networks consisting of donors, intellectuals, lawyers, and educators from the Conservative legal movement. Although the pro-life movement has been able to chip away at precedents established in *Roe v. Wade*, it seems unlikely that the women’s right to choose will be overturned or struck down. The right to choose has been deeply entrenched in modern American society; so if even there were attempts to overturn it all together, the outrage of the general public would not allow it to be law of the land for a substantial length of time.

This paper will be divided into five sections that will begin from the genesis of the right to choose in the United States and lead us to the present moment. The first section will encompass the historical context of the right to privacy and the argumentation used by the liberals to ensure victory in the courtroom in regard to the right to choose. The second section will discuss the defeat faced by the conservative legal movement and how the pro-life movement began to find their place, especially throughout the 1980s during the Reagan Administration. The third section will lead into the more contemporary conservative legal movement, upheld by the Christian conservative right and its successes thus far during the 21st century. This section will examine several appointments of Supreme Court Justices, as well as other tactics used by the conservative legal movement to advance its cause. Additionally, this section will highlight key organizations and institutions that assist the Christian conservative legal movement, including the masterminds behind them. Section four will analyze the liberal legal movement's response to the decade-long mobilization of their conservative counterparts and briefly delve into the liberal strategy. Lastly, the final section will consist of projections on the future of the right to choose. Although in a highly-polarized United States abortion has become a litmus test for what it means to be a liberal or conservative, the intent of this paper is to demonstrate the intricacies of abortion rights that do not necessarily fit into a dichotomy.

I. Historical Context of the Right to Privacy: How Liberals Dominated Without Really Trying

The liberal legal movement gained momentum in the 1960s and lasted throughout the 1970s with one of its numerous victories being *Roe v. Wade* (1973). The case was successfully argued by a novice lawyer named Sarah Weddington, a recent law school graduate. Upon graduating, she became involved with a group of women who offered birth control counseling

and legal advice to women dealing with unwanted pregnancies (Garrow, 1992). One of their missions was challenging abortion restrictions—specifically in Texas, and Weddington reached out to a former law school peer, Linda Coffee, to collaborate. Weddington and Coffee were looking for the ideal plaintiff to represent in the Dallas Federal Court and initially settled on a young married couple (Garrow, 1992). However, they were instead persuaded to take Norma McCorvey, a young unmarried woman who was denied an abortion, under their wings.

The landmark case holds immense significance because it set the legal protection that a woman's right to choose is encompassed in the right to privacy; however, it would not have been successful without the precedent of *Griswold v. Connecticut* (1965) to serve as a foundation. The Supreme Court ruled that the Connecticut law criminalizing the use and/or distribution of contraceptives violated the “right to marital privacy.” This decision was derived from the “penumbra of privacy” which includes the right of association found in the First Amendment, the protection against quartering of soldiers found in the 3rd Amendment, zones of privacy protected from the government found in the Fourth Amendment, the self-incrimination clause found in the Fifth Amendment, and the enumeration of rights clause in the Ninth Amendment (Deflem, 1998). The right to privacy, as well as the right to choose, have been ensured through the substantive due process clause as opposed to the procedural due process clause. In layman's terms, substantive due process means that the Constitutional right to “life, liberty, and property” is essential, therefore they should not be stripped away by the government barring compelling reasons. Both of these cases were argued under relatively progressive Supreme Courts and won by an overwhelming majority in 7-2 decisions.

In his majority opinion in *Roe*, Justice Blackmun concluded, “With respect to the State's important & legitimate interest in potential life, the “compelling” point is at viability. This is so

because the fetus then presumably has the capability of meaningful life outside the mother's womb." Therefore, the right to choose is one's privacy that cannot be infringed upon unless there is a "compelling state interest," which was to be determined by lawmakers. Pro-life conservatives heavily criticized this opinion on the grounds that the justices should be practicing judicial restraint at all times, rather than using the Supreme Court for the expansion of individual rights via judicial activism. While several Republicans support the controversial decision because they acknowledge abortion as an individual right, the majority of conservatives do not and are working to overturn it.

II. Finding Its Niche: How the Pro-Life Movement Found Where It Belonged

Although the decision of *Roe v. Wade* was a blow to the conservative legal movement, it served as a wake-up call for the pro-life movement to construct a network of donors, lawyers, and intellectuals to effectively mobilize in the courtrooms. It's important to note, however, that victory is difficult to define for the Christian conservative legal movement because "winning" can be perceived differently. The pro-life agenda can be achieved in either one of two ways: overturning *Roe v. Wade* or chipping away at it incrementally through various loopholes. Even the pre-*Roe* approach can be looked at in two ways: does the conservative legal movement want a return to states' rights or is a national ban being strived for? Chipping away at *Roe v. Wade* is the "death-by-a-thousand-cuts" approach, which would be achieved by imposing egregious restrictions on access to abortion. Over a generation, conservative intellectuals, donors, activists, and funders have methodically plotted a path to pack courts with like-minded justices.

Typically, the leaders of the conservative legal movement tend to opt for the latter because gaining smaller victories would be more strategic at a time when the makeup of the Supreme Court is not in their favor. At its genesis, though, the pro-life movement wanted to pass

a Constitutional amendment that would rule *Roe* as “overreaching,” ban abortion throughout the country and have it go back to state-by-state regulation (Ziegler, 2015). The conservative legal movement abandoned this approach though because it was the epitome of judicial activism which they despised.

Instead, the pro-life movement chose to make the fetus the next “minority movement,” identifying close with the left (i.e. civil rights, women’s rights, etc). Conservative legal movement leaders adopted a similar approach as the liberals, the due process clause of the Fourteenth Amendment. While conservatives usually follow an originalist interpretation of the Constitution, this time the legal movement took a play from the opposition’s handbook. Rather than applying the concept of personhood to the mother, like their liberal counterparts did, the conservative legal movement applied it to the fetus. One of the most prominent Catholic lawyers and professors, Thomas Shaffer of The University of Notre Dame, claims that the Fourteenth Amendment provides for the equal protection of the life of the fetus as well, making abortion inherently a crime (Ziegler, 2014). Shaffer, among other anti-abortion activists, believes abortion to be a form of discrimination because it deprives a potential life form of its “natural rights.”

However, after that was not as successful as the conservative legal movement had hoped, these legal activists realigned themselves with the Evangelical religious right and joined Jerry Falwell’s Moral Majority in the 1980s (Dowland, 2009). One of the key anti-abortion litigators of the 1980s was James Bopp Jr.—the prominent lawyer known for successfully arguing *Citizens United v. F.E.C.* in 2010. Prior to arguing this case, Bopp was an incrementalist who believed a Constitutional amendment banning abortions was too much to ask for and would require compromise at first (Ziegler, 2015). Rather than changing the Constitution, Bopp and the religious right would change the Justices interpreting it and for that, there was a three-step plan

that would not only require getting a hold of the judiciary, but all three branches of government. The first step was to pass primarily state-level legislation that made access to abortions less accessible through hurdles such as waiting periods, state-mandated counseling, or parental or spousal consent. The second step was to defend this legislation in courts and the third step would be ensuring the election of presidents who would nominate and U.S. Senators who would confirm conservative judges. According to Bennett, “[With the rise of Christian Conservative Legal Groups] in the 1980s and 1990s, it is, therefore, no surprise that defending anti-abortion protesters and supporting limited access to abortion were staples of the conservative legal movement’s advocacy” (Bennett 2017, 42).

The conservative legal movement has been able to make strides by making the right to choose a First Amendment issue, as well. Bennett explains that “by emphasizing the value and importance of religious freedom to individual liberties, CCLOs [Christian Conservative Legal Organizations] are able to portray their advocacy as less about infringing upon the rights of...pro-choice Americans and more about defending the First Amendment” (2017, 65). Usually, healthcare professionals with “deep-seated negative attitudes” resort to moral and ethical arguments which they claim are protected by the aforementioned amendment. Currently, 45 states permit individual providers to refuse to perform an abortion, while 42 states allow institutions to refuse to take part in abortions. “The refusal bar is set very low, permitting health care providers to refuse to participate in a procedure with only vague justifications” (Swartz, 2006). However, several states — Illinois and Mississippi in particular — have enacted statutes with a clear definition of “conscience” to protect personal choices of their health practitioners.

i. *Planned Parenthood v. Casey* Changes the *Status Quo*

A mere nineteen years after the *Roe* decision, the matter of abortion reappeared in the Supreme Court in a case called *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992). The landmark case assessed the constitutionality of the Pennsylvania Abortion Control Act of 1982, which attempted to impose restrictions on abortion rights. The majority of justices upheld the constitutionality of *Roe* under the “unenumerated” due process clause, as well as its three vital requirements:

“(1) Right to abort non-viable fetus without state interference, (2) States can restrict abortions after viability with expectations for pregnancies that endanger a woman’s life or health, (3) States have a legal interest in protecting a pregnant women’s health and life of the fetus.” - N. Siegel and R. Siegel, 2018

Although the justices chose not to strike down *Roe*, there were major limitations that came along with the *Casey* ruling. One of these restrictions was the scrapping of the trimester divisions that was initially established in *Roe*, allowing the state to regulate fetal viability no longer bound to a specific time slot in the pregnancy. Fetal viability, the ability for a fetus to survive outside the uterus, has always been a controversial aspect of abortion because the circumstances will always differ; each fetus will develop at its own pace which makes the concept of trimesters tricky. Instead, Justices O’Connor, Kennedy, and Souter believed the matter of abortion should be examined under the “undue burden standard,” meaning that if an abortion restriction served as an excessive obstacle to the mother, it would inherently be an “undue burden” (Schlueter).

However, it was revealed nearly a decade later that the 5-4 decision in *Casey* was one vote away from striking down *Roe* altogether. The American public was unaware of how close *Roe* was to being repealed. Documents found in Justice Blackmun’s library after his passing suggests that Justice Kennedy was initially going to vote for the overturning of *Roe* (Greenhouse, 2004). It goes to show how a change of heart of merely one justice could halt a major victory for the pro-life movement, or vice versa. Since the *Casey* decision, cases tend to rise to the Supreme

Court when it's unclear whether restrictions place an undue burden on the woman's right to choose; these cases will be examined further in the following section.

ii. Abortion-Related Cases of the 21st Century: When the Battle is Too Close to Call

The matter of fact has become that many anti-abortion advocates have been advancing their cause by embracing the notion of being “second best” and establishing themselves as the minority. Of course the leaders of the conservative legal movement want to change policy through legal action; however, there are instances where they interpret their losses as wins because of the publicity associated with these cases. Conservative legal mobilization has allowed for precedents established in *Roe v. Wade* to be chipped away at which has been evident in 21st century Supreme Court cases. Bennett writes that “the Christian Right mobilized and organized an effective presence on an unavoidable front in the battles over social policy: the courtroom” (2017, 3). *Gonzales v. Carhart* (2007) and *Whole Woman's Health v. Hellerstedt* (2016) were recent cases in which conservatives have attempted to challenge women's accessibility to safe abortions. The case of *Gonzales v. Carhart* arose when a Republican Congress banned a safer, more modern abortion procedure since an alternative still existed, although was more dangerous (Schlueter, 2013). It brought into question whether the Partial-Birth Abortion Ban Act of 2003 was constitutional or not, on the premise of what constitutes an “undue burden.” The Court wound up at a 5-4 decision where it was ruled that the aforementioned act could still protect constitutional rights and would not serve as an “undue burden” to women's right to an abortion. Although the decision may seem like a major victory for the pro-life movement, it was a rather close call and merely banned one type of incredibly rare, late-in-pregnancy abortion. In addition to an alternative surgical procedure, women continue to have access to emergency contraception and intrauterine devices as well.

Whole Woman's Health v. Hellerstedt, on the other hand, attempted to restrict the locations in which women would be able to gain accessibility to abortions. Although this endeavor was unsuccessful, it was a much closer call to regulating the controversial procedure with a 5-3 decision. Earlier this year in 2020, a case similar to *Hellerstedt* was brought before the Supreme Court relating to abortion rights in Louisiana and previous decisions were upheld, reaffirming *Hellerstedt*. (Tottenberg et al., 2020). *June Medical Services v. Russo* (2020) decided that the Louisiana law would unconstitutionally burden those with unwanted pregnancies similar to the *Hellerstedt* case in Texas four years prior (Wilson et. al, 2020). In Roberts' opinion, he wrote that requiring doctors who provide abortions to have "admitting privileges at [nearby hospitals]" was a burden that was nearly identical to the Texas law. He reasoned that the Supreme Court should follow precedents that have already been established. The cases in Texas and Louisiana are two examples of the multi-layered conservative strategy of creating pro-life legislation that will then be defended in the courtrooms to incrementally challenge *Roe v. Wade*. Although these cases have been unsuccessful, thus far, the makeup of the Court has changed greatly under the Trump presidency.

iv. The Packing of the Courts by Republican Presidents: Ensuring a Pro-Life Bench

A central tactic employed by the conservative legal movement to ensure our country moves increasingly towards a pro-life one is the packing of the courts with conservative ideologues. While Democratic presidents, in particular Bill Clinton and Barack Obama, have pursued judicial nominations that reflect bipartisanship, Republican presidents tend to appoint judges that would uphold policies they prefer (Dayen, 2017). The conservative legal movement has been seeking revenge for the "Block Bork" coalition of 1987 against Robert Bork for being a highly conservative, extremist originalist. Conservatives have similarly, and successfully,

attempted to block the judicial nominations of Harriet Miers in 2005 and Merrick Garland in 2010. Although Miers was nominated by conservative Republican President George W. Bush (Bush II) to replace moderate, swing-Justice O'Connor while Merrick Garland was nominated by Democratic President Obama to replace conservative Justice Scalia, both were going up against a Republican Senate. In recent times, conservative legal groups have applied pressure on Republican presidents to appoint ideologically conservative justices. Republican Senators have also felt this pressure—even going to the extent of enacting a filibuster to get their way (in 2016). In order to achieve pro-life courts, there must be a president willing to nominate such justices and a pro-life majority in the Senate willing to confirm them. However, the cases with Miers and Garland reveal how powerful the conservative legal movement is—Republican presidents were able to appoint pro-life justices, whereas, Democratic presidents faced obstruction on their nominees. Since abortion has become a single-issue policy, Republican presidents are pressured to nominate explicitly pro-life and otherwise conservative Justices. Even if moderate candidates were to be nominated, they risk defeat in the Senate. This wastes valuable political capital and opens Republican presidents to criticism from their ideological flank for not being loyal to their conservative, pro-life base.

Although the conservative legal movement was not initially keen on supporting Trump at the beginning of his bid for president, and would have much rather seen a candidate like Senator Ted Cruz on the ballot, Trump's three nominations for the Supreme Court likely have not been different from whom another Republican president would have chosen. Donald Trump promised to appoint pro-life justices and has delivered with Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett. While the Supreme Court has become a right-leaning institution during this administration, it is important to note that conservative justices do not all hold the same

ideological beliefs. The *June Medical Services v. Russo* (2020) case was one example, where Roberts voted to strike down Louisiana’s restrictive law regarding admitting privileges, and *Bostock v. Clayton County* (2020) was another instance where Trump appointee, Justice Gorsuch (joined by Chief Justice Roberts and the three centrist-to-slightly-liberal Justices), “wrote that sexual orientation [and gender identity] [are] protected under the federal Civil Rights Act” of 1964 (Wilson et al., 2020).

The Federalist Society has been successful in advising presidents on judicial nominations, resulting in conservative justices on the Supreme Court, as well as in state courts (Seville, 2020).

The group is described as:

...ostensibly [an] academic organization that serves as a training camp for conservative jurists, where candidates are recruited, vetted and prepared for the confirmation process. The Trump administration has effectively outsourced the selection of judges for the federal bench to the Federalist Society...The judges on the shortlist for the Supreme Court supplied to President Trump all carried conservative bona fides approved by the organization. (Moran, 2020)

The organization prioritizes appointing ideologically conservative judges on the federal courts and has successfully done so with the confirmations of John Roberts, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and most recently Amy Coney Barrett. Barrett’s nomination and confirmation is a prime example of how the Federalist Society operates and how she was essentially groomed for the position. Although she is not as experienced in terms of fighting cases before the Supreme Court, she was an esteemed student and professor at the law school at the University of Notre Dame. Notre Dame, among other academic institutions, is part of a legal network that has been established by the conservative legal movement (Farrell, 2020). In an interview, co-author of “Separate but Faithful,” Joshua Wilson elaborated:

This conservative reputation has allowed Notre Dame to become a recruiting ground for judges and justices looking for clerks from the ranks of elite conservative law students. ...Now, it's also becoming a source of conservative judicial appointments. (2020)

Barrett describes her judicial philosophy as “originalist,” similar to her mentor Justice Scalia who she clerked for (Shear et al., 2020).

While the Federalist Society had an important role in Amy Coney Barrett’s nomination, additional players have helped secure her spot on the Supreme Court through dark money. Evidence reveals that funders of the Federalist Society’s annual \$20 million budget are in line with the pro-fossil fuel Koch Industries, as well as the ring-wing Bradley Foundation (Hewett, 2020). In turn, these organizations expect Barrett to represent their pro-business and pro-big oil interests in the Supreme Court, as well as socially conservative causes, such as the pro-life agenda. Conservative organizations, such as the public Judicial Crisis Network—a public relations organizations—and think tanks like the Heritage Foundation are involved in the judicial nomination process as well (Dayen, 2017). For instance, the Judicial Crisis Network is responsible for organizing a \$7 million campaign to block President Obama’s nomination of Merrick Garland and keep Scalia’s seat vacant (Seville, 2020).

v. Leonard Leo & Company: The Dark Money Behind the Conservative Legal Movement

Arguably, the single most important individual behind the modern-day organization of the conservative legal movement is Leonard Leo, an attorney and conservative legal activist. Leo was the longtime vice president, as well as the current co-chair of the board of directors of the Federalist Society, with additional ties to the Judicial Crisis Network, and President Trump. An investigation from 2019 succinctly described his impact as:

the maestro of a network of interlocking nonprofits working on media campaigns and other initiatives to sway lawmakers by generating public support for conservative judges, which has received \$250 million from anonymous donors. IRS rules do not require 501(c)(4) nonprofits to disclose corporate funders, allowing corporations to exert an unlimited amount of financial influence behind a veil of nonprofits, which go largely unregulated. (Moran, 2020)

In 2016, Senate Majority Leader Mitch McConnell (R-KY) and Leo made it their priority to keep Scalia's seat on the Supreme Court vacant until after the election with the help of the Judicial Crisis Network. Leo is also responsible for the dark money groups that mobilized after the passing of Justice Ruth Bader Ginsburg in September 2020, less than two months before the presidential election. Whenever there is a vacant seat on the Supreme Court under a Republican president, such as George W. Bush and Trump, Leo leaves the Federalist Society in order to mobilize "the outside coalition efforts" (Seville, 2020). Those linked to Leo include Jason Torchinsky, who is a notable attorney for conservative dark money organizations, as well as a plaintiff counsel on Michigan lawsuit regarding alleged voter fraud in the 2020 election. Leo sits on the board of directors of Students for Life of America with Greg Mueller, who is head of an influential conservative public relations firm called Creative Response Concepts (Seville, 2020). Last, findings reveal that political strategist and Judicial Crisis Network senior advisor, Gary Marx, leads two prominent tax-exempt groups in Leo's network.

Leo and his affiliate groups are additionally tied to the conservative-leaning nonprofits Independent Women's Forum (IWF) and Independent Women's Voice (I WV), who receive substantial funding from "organizations in his network" (Moran, 2020). The two organizations describe themselves as nonpartisan to appear neutral on the outside, allowing them to benefit from the tax code and make contributions by donors tax-deductible. However, behind this façade, they do not support feminist causes in the slightest. In reality, both organizations are opponents of Title IX, the Violence Against Women's Act, and paid leave. With their previous president, Nancy Pfotenhauer—a former member of Americans for Prosperity—on board, their interests began to reflect those of the Koch brothers. IWF and I WV have conservative stances on issues including marriage equality, climate action, the Affordable Care Act, and of course,

reproductive freedom. Tax filings reveal that Leo's Freedom & Opportunity Fund donated upward of \$4 million to IWV between 2016 and 2017 while his affiliate, the Judicial Education Project donated approximately \$300,000 to IWF (Moran, 2020). Meanwhile, corporate donors of the Independent Women's Forum and Independent Women's Voice include Facebook, Juul, Walmart, Amway, and oil companies.

The IWF and IWV are heavily involved in the conservative legal movement and support the nominations of conservative Supreme Court Justices, as well as opposing ones nominated by Democratic presidents, such as Merrick Garland in 2016. Experts trace the influence of the Independent Women's Forum back to the nomination of African American conservative Clarence Thomas, whom former-employee-turned-law-professor Anita Hill (who is African American herself) accused of sexual harassment while serving as the head of the Equal Employment Opportunity Commission (EEOC) (Moran, 2020). Similarly, in 2018, the organization showed support for the confirmation of Brett Kavanaugh, who Christine Blasey Ford accused of sexual assault, onto the Supreme Court by drafting a memo that was later used by Republican Senator Collins (R-ME). More recently, the two organizations advocated the confirmation of Amy Coney Barrett by appropriating the slogan "I'm With Her," a slogan used by Clinton supporters during the 2016 election. IWF and IWV have also spent their time getting pro-Barrett op-eds into conservative newspapers including *The Washington Examiner*, *The Washington Times*, and *The National Review* (Moran, 2020).

III. In-Depth Look into Conservative Donors: How Big Bucks are Allowing the Christian Conservative Legal Movement to Catch Up with their Liberal Counterparts

The conservative legal movement has grown substantially, going from a handful of Christian conservative legal organizations in the 1980s to at least a dozen in the 21st century. The

leaders of this movement are well aware that, even though culture wars might not be successful for them, investing the time, money, and energy in legal advocacy may very well bring about political change (Bennett 2017, 4). The wide array of non-profit organizations that support and uphold Judeo-Christian morality in bioethics consist of advocacy groups, legal organizations, and political groups, such as Alliance Defending Freedom, American Center for Law and Justice, and Liberty Counsel (den Dulk and Hoover, 2004). As prime leader of the Christian Evangelical movement, Pat Robertson founded multiple institutions to promote a socially conservative America. He proudly created the Christian Broadcasting Network, established Regent University in Virginia to train conservative lawyers, and led the American Center for Law and Justice. Jay Sekulow, an intellectual behind the American Center for Law and Justice, was influential in Justice Roberts' nomination to the Supreme Court (Bazelon, 2007). James Dobson was integral in shaping the religious right legal movement by forming Focus on the Family in 1977, Family Research Council in 1981, and Alliance Defending Freedom in 1993 (Rubinson, 2004). Recently, Focus on the Family spent \$2.5 million on an anti-abortion-related Superbowl advertisement starring Tim Tebow and his mother. The nonprofit he helped co-found, Alliance Defending Freedom, offers legal services and hosts training programs for conservative attorneys, as well. Alliance Defending Freedom boasts a large network, including Roger Gannam, a now-prominent litigator of the Liberty Counsel (Dallas, 2017).

As seen with the confirmation of Justice Barrett onto the Supreme Court, academic institutions have played an influential role in the Christian conservative legal movement and appear to be effectively shaping law through legal education. In addition to Notre Dame, the facilities provided at Christian-affiliated universities, such as Baylor and Pepperdine, have proved valuable to the Christian conservative legal movement (Wilson & Hollis-Brusky, 2018).

This would be especially strategic considering that these are already established institutions with favorable reputations, networks, etc. Regent University still maintains a strong relationship with its founder, Pat Robertson, and his organization—the American Center for Law & Justice. Similarly, Liberty University’s Law School is connected to the Liberty Counsel—founded by Matthew Staver who eventually became the school’s dean (Wilson & Hollis-Brusky, 2018). Liberty Law works with the group to provide training and job opportunities for students interested in religious litigation. Additional funders of these universities include Jerry Falwell Jr., as previously mentioned, Thomas Monaghan, and Alan Sears.

The Susan B. Anthony List—an active pro-life organization—receives massive donations from the Chiaroscuro Foundation, the Goldman Sachs’ Philanthropy Fund, and the Saeman Family Foundation in order to gradually enact pro-life laws through tactics such as direct lobbying and grassroots campaigns (Resnick, 2013). The Susan B. Anthony List has purchased \$200,000 worth of airtime of television and radio advertisements to publicly shame pro-choice politicians while endorsing its preferred candidates. The Charlotte Lozier Institute is a creation of the Susan B. Anthony List, which was made as a conservative alternative to the pro-choice Guttmacher Institute. One of the prominent minds at Lozier is Michael J. New, a political science professor at University of Michigan-Dearborn, who is affiliated with the Cato Institute and the Heritage Foundation (Resnick, 2013). Like Guttmacher, Lozier conducts research on the medical effects of abortion with two of their intellectuals being David Reardon and Priscilla Coleman (although it must be noted their discoveries have been called into question or disproved on multiple occasions).

Similarly, Americans United for Life—currently run by Catherine Glenn Foster—has publicized on its website that “[AUL] is the legal architect of the pro-life movement. We are

accumulating victories, building momentum, and advancing a culture of life in America.” The organization’s strategy is to draft legislation based on state constitutions, which legislatures tend to directly copy and paste from AUL (“*This Is the ‘Legal Arm Of The Pro-Life Movement,’*” 2018). With the assistance of religious organizations and private donors, the public-interest law firm has collected over \$4.3 million not too long ago. Several conservative pro-bono or nonprofit legal organizations provide ordinary Americans with litigators to represent them in court, local trial courts and the Supreme Court alike. Such organizations include the Thomas More Society, the Christian Legal Society (which brought *Springfield Right to Life et al v. Felicia Norwood et al. to Illinois Court*, according to its website), and the Liberty Counsel, which helped bring *National Institute of Family and Life Advocates v. Becerra* (2018) to the Supreme Court.

Individuals who donate to several of the previously mentioned anti-abortion organizations include New Jersey hedge-fund billionaire Sean Fieler. He donated approximately \$275,000 to the Susan B. Anthony List and \$295,000 to the Americans United for Life. Additionally, he has given \$650,000 to the Becket Fund for Religious Liberty, a firm that collaborates with Alliance Defending Freedom to challenge portions of Obamacare. On a similar note, Art Pope, an affluent businessman from North Carolina, has been the co-founder of conservative think tanks, including Americans for Prosperity, Civitas Action, and the John Locke Foundation (Kotch, 2016). His family foundation, the John W. Pope Foundation has donated an estimated \$1 million to the North Carolina Family Policy Council in his native state, as well as the Family Research Council in general. Although he has briefly served on the North Carolina House of Representatives, he now works on electing politicians with conservative ideals—i.e. limiting accessibility to abortion services.

IV. How the Conservative Legal Mobilization Motivated Liberals to Strike Back

Although conservative legal mobilization seems to be prevailing with the financial backing of massive donors, the liberal legal movement has been making steady progress in the meantime as well. For instance, the Susan Thompson Buffett Foundation has worked on providing abortion access and training, as well as contributing billions over the last decade to pro-choice causes, such as Planned Parenthood (\$427 million) and the National Abortion Federation (\$168 million). The foundation has given an estimated \$88 million to the University of California at San Francisco and \$40 to the Guttmacher Institute to conduct research on the impact of medical abortions (Martin, 2016). Their findings have debunked many of the scientific arguments made by pro-life organizations, therefore having the upper hand when it comes to challenging pro-life policies and even influencing Justice Breyer's decision in the *Hellerstedt* case. Martin elaborates that various, smaller progressive organizations supporting such scientific research include the John Merck Fund, the Educational Foundation of America, the David and Lucile Packard Foundation, and the William and Flora Hewlett Foundation. The liberal legal movement continues to outspend the conservative legal movement through its own network of dark money, including Arabella Advisors (Seville, 2020).

VI. Who's Winning and Why? A Close Call...But the Liberals

In order to tell who's winning, it is essential to understand what "winning" entails, which may look different for various people both on the left-leaning and right-leaning sides of the political spectrum. For instance, *Roe* remains the law of the land up this present moment, but would the liberal legal movement constitute this as "winning" when there are egregious restrictions placed on the right to choose in parts of the country? Conservatives and liberals alike can take various paths to attain "victory," whatever that may look like. The conservative legal movement has been strategically savvy in planning its upcoming moves, especially by finding

alternative ways to limit access to abortions first in order to reverse *Roe v. Wade* over time as a whole. Conservatives have pushed for a constitutional amendment in many states, including the proposal in Wisconsin that would define personhood as the period “from a fertilized egg to a fetus” (Mills, 2020). If this amendment were to be passed, the state constitution would protect the same civil rights for embryos as people, and it would be up to the Wisconsin legislature what these protections would consist of. In 2018, Alabama and West Virginia have already amended their state constitutions to elaborate that the right to an abortion is not included in them (Raman, 2020). Additionally, there have been attempts to challenge common abortion procedures in state supreme courts. For instance, the Kansas Supreme Court blocked a law that would ban a common abortion procedure in 2019 (Mills, 2020).

On the left, there has been an intra-party dialogue on the possibility of expanding the number of seats on the Supreme Court and federal courts to balance its hard-conservative leanings. By adding seats to the Supreme Court—although there has not been a specific number as to how many—Democrats can then fill the courts with justices who are ideologically liberal and “balance the scales” (Phillips, 2020). Democratic Congresswoman Ocasio-Cortez (D-NY) noted that the Constitution does not define the number of justices the Supreme Court can have and expansion could be possible if Democrats win the House, the Senate, and White House. The expansion would require President-elect Biden to attain majority votes in the House and Senate, and if the law passed then the Democratic Senate would be able to add justices with a simple majority vote (Phillips, 2020). However, Republican Senators could still attempt to filibuster this expansion and this strategy may contribute to the increasing polarization between the two parties. President-elect Biden has also expressed concern with expanding the court and would rather

“appoint a bipartisan commission to examine options for reforms.” Another possibility suggested in an opinion piece in *The Washington Post* was a “poison pill” measure that would

“[Work within the] constitutional framework the justices themselves have set, and encourage a more tempered and consensual approach to public policy. Most important, that policy would originate (as it should) in the political branches, rather than in an ever more unrepresentative judiciary.” - Huq & Miller, 2020

The “poison pill” approach would be favorable to Democrats and could work in one of two ways. The first potential “poison pill” measure would be based on the legal principle of *inseverability* where if a provision of a law is inseverable from the rest of the law, if the court were to strike down the inseverable clause, then the entire law would fall (Huq & Miller, 2020).

The second “poison pill” measure that can be utilized that would benefit the Democrats, yet unfavorable to the Republicans, would be a fallback provision that would be completely constitutional. For instance, Huq and Miller explain that Congress could hypothetically pass a measure that would impose term limits for justices and accompany that “with a fallback provision that would eliminate the justices’ discretion over which cases to hear” (2020).

Therefore, if a certain justice wanted to maintain their indefinite seat on the Supreme Court, they would not be able to choose which cases they’d like to hear.

There is no denying the conservative legal movement has worked extremely hard when it comes to finding loopholes to place restrictions on abortion, but it will not be victorious in striking the monumental case as a whole. Even if the pro-life side were to overturn *Roe*, that precedent would not be sustained long enough for it to become entrenched in American society. As of 2020, our population is progressively becoming more liberal—especially when it comes to social issues like abortion—as the younger generations reach voting age. Simply put, pro-life America is not feasible when women have become accustomed to having abortion services available, as well as knowing the alternatives such as emergency contraception, intra-uterine

devices (IUDs), contraceptive rings, and birth control exist for future reference. This leads to the final approach the liberal movement could pursue. Known as “winning by losing,” a conservative victory would re-ignite liberal legal mobilization and enrage majorities of Americans to defeat Republicans in future elections. The winning by losing approach can be best described as follows:

“Losing movements might experience a new (or renewed) motivation, while winning movements might relax, believing judicial victory has secured the desired change. Movement advocates, therefore, have an interest in highlighting legal defeat. Indeed, they may even frame ambiguous outcomes as defeats in order to create a new threat against which to rally.” (NeJaime, 2011)

Therefore, even if the conservative legal movement were to “win” by striking down *Roe*—either banning it across the country or returning laws back to states—it would still likely lose in the long run.

All in all, the most important aspect of this battle is whether women are provided with enough choices and whether those choices are safe or not. As long as accessible, safe options are available to people of all ages in every part of the country, rather than just for wealthy or middle-class white women, few women will need to take dangerous routes to terminate unwanted pregnancies. Perhaps the federal and state governments can lower the number of abortions within the United States by offering comprehensive sex education and affordable, accessible birth control. However, if the pro-life agenda continues to seep into a seemingly pro-choice nation it will be terrifying to those who lack sufficient resources to access abortion-providers. A victorious conservative legal assault on abortion rights would enrage women requiring reproductive services and the majority of Americans who support reproductive freedom.

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