

State University of New York at New Paltz

The End of *Roe*:
How the Conservative Legal Movement Eroded Protections for Abortion and Contraceptive Care

Molly Racsko
Honors Thesis
Professor D. Lipson, Ph.D.
December 2022

ABSTRACT:

Many battles over reproductive rights have occurred in the legal sphere, behind the scenes of mainstream politics, through litigation and interest group influence over politicians and the courts. This research will focus on the conservative legal movement against the rights to abortion and contraception. The paper will be divided into three sections: the first will establish the major organizations and religious influences involved in the conservative movement, their coalition-building strategies, and the challenges they have faced. The second will examine the incrementalist approach of slowly chipping away at abortion and contraception rights, with focus on limiting financial access and increasing allowance for government regulations. The third will discuss the movement's attempts to completely overturn *Roe v. Wade* (1973), culminating in the recent *Dobbs v. Jackson Women's Health Organization* (2022) decision, and the future of reproductive autonomy in law. The conservative legal movement has been incredibly successful in limiting access to reproductive healthcare and reversing *Roe*, but now faces an uncertain future.

Key Words: political science, conservative legal movement, *Roe v. Wade*, *Griswold v. Connecticut*, legal mobilization, abortion rights, contraception rights, Supreme Court of the United States, American government, politics, Christian legal movement

Introduction

For decades prior to *Dobbs v. Jackson Women's Health Organization*, the Supreme Court understood constitutional liberty to include sexual and reproductive autonomy. Nonetheless, these rights have remained controversial since their creation. It is perhaps now more important than ever to understand what forces are at play behind the legal and political discourse surrounding abortion and contraception rights. This paper will analyze existing literature on the conservative legal movement as a whole as well as on factions of the movement against abortion specifically. Several primary sources of conservative legal thought, journalism, and organizational materials will also establish the goals and rhetoric of the movement. The conservative legal movement has successfully employed a long-term strategy of chipping away at abortion and contraception rights, creating exceptions that allow government regulation and litigating requirements for financial coverage until it could create opportunities to attack the rights more directly. Controversies within the movement have presented challenges to its cohesion but have ultimately not prevented the movement's progress, as religious and social conservatives have centralized movement organization, accumulated incremental successes, and increasingly gained opportunities to further their agenda.

1: Building a Movement

The conservative legal movement initially struggled to advance its agenda and gain legitimacy. However, a shift to coalition-building strategies would soon cement a number of organizations and movement leaders as influential forces in American law. This section will detail the movement's networking strategies, the role of religious conservatism, and the initial challenges these groups faced in creating a cohesive movement.

I: Movement Actors

Previous Shortcomings:

Over the course of the early to mid-1900s, liberal values became entrenched in American law as New Deal lawyers began influencing the judiciary and legal scholarship. Conservatives in law initially had little success in combatting this growing shift towards liberal thought. The emerging movement of the 1970s and 1980s was largely focused on business interests, with law firms often being geographically based rather than focused on particular conflicts or public interest issues (Teles 2008 58-59). A number of liberal landmark cases would be decided in this time period, including *Griswold v. Connecticut*, which legalized contraception, and *Roe v. Wade*, which legalized abortion and would later be upheld in *Planned Parenthood v. Casey* (1992). The scattered organization of conservative resistance initially left the movement ill-equipped to respond successfully. There were additionally few challenges in the early conservative legal movement against rulings and laws which legalized birth control. Although opposition to legal abortion began as early as the 1930s, over the next several decades, organizations stopped taking anti-contraception stances as they became less entwined with the Catholic Church and began prioritizing secular arguments against abortion (Ziegler 2018).

The Federalist Society:

The conservative legal movement would eventually find greater success through the creation of a growing network of lawyers, politicians, judges, and other legal and political experts. This pivot in the movement emerged from the development of leadership built on “the cultural, social, and human capital essential to...legal politics...[and] the increasing prominence and sophistication of conservative foundations” (Teles 2008 221). One of the most prominent and well-studied formal organizations of the conservative legal movement is the Federalist

Society. Founded in the early 1980s by Yale and University of Chicago law students, the Federalist Society emerged as a reaction to the entrenchment of liberal philosophies in law and politics of the decades prior. The organization quickly grew into hundreds of chapters and tens of thousands of members by the early 2000s, eventually gaining the attention and support of conservative donors and philanthropists such as the Koch brothers (Avery and McLaughlin 2013a). The Federalist Society has significantly shaped conservative mobilization against abortion and contraception rights in particular. In fact, “members of the Federalist Society have presented the oral argument to the Supreme Court in every significant abortion case since 1992” (Avery and McLaughlin 2013b, 141).

In addition to their direct work in arguing cases, Federalist Society members have implemented strategies of coalition building and influencing political “insiders” in public office. Federalist Society events draw major politicians to attend, and leaders of the organization are often involved in Supreme Court nominations (Toobin 2017). This focus on insiders is central to both the legal and political movements against abortion rights. Beginning with the Reagan administration, many founding members of the Federalist Society secured positions in the Department of Justice, and Federalist Society members have continued to work in prominent executive agency roles under every Republican president in the following decades. These positions would grant them the ability to set and direct the conservative and Republican agendas on resistance to recent liberal Supreme Court decisions. In 1988, the DOJ’s Office of Legal Policy published reports on the future of abortion law. The issues in these reports, such as parental consent restrictions, government subsidies, and constitutional privacy questions, remain pressing issues to this day. These documents would create the framework for the conservative legal movement’s strategy on abortion (Avery and McLaughlin 2013b, 151-152).

Additional Organizations:

Several other organizations have also emerged in the conservative legal sphere since this battle began in the mid-20th century. The Heritage Foundation, founded in 1973, promotes cooperation and forums between lawyers and legal scholars of different branches of the larger movement. This organization has also amassed a number of donors, taking in over \$53 million in revenue in 2006. Although it started with mostly libertarian-focused goals, it eventually adopted social and religious objectives through its attempts to unite conservatives of different backgrounds and ideals (Southworth 2008, 126-130). On the issue of abortion, the Heritage Foundation website proclaims objectives to “Make pro-life policies a priority at the federal level” (2020).

Another notable organization is the Alliance Defending Freedom (ADF). The ADF website details how the organization has successfully supported and represented parties in 64 Supreme Court cases since its foundation in the mid-1990s, seven of which involved issues of abortion and contraceptive coverage. This support includes directly arguing cases, submitting *amicus* briefs, and financial assistance (2021). The ADF has additionally taken a role in legislative politics, with increasing action in the late 2010s and 2020s especially. The organization, described as a “legal army” and “the engine behind the Christian right’s legal agenda,” has designed model legislation for several states. This includes the 15-week ban in Mississippi which led to the Supreme Court’s 2022 overturning of *Roe* (Littlefield 2021).

II: Conservatism, In Theory and In Practice

Christian Influence:

Religious conservatives, in particular Christian conservatives, have sought bans on abortion for decades. These attitudes and goals have directed much of the conservative legal

movement despite objections from libertarians (Southworth 2008, 103). Many Christian pro-life organizations lobby and advocate in social and political settings beyond the legal sphere. One prominent example is Focus on the Family, a fundamentalist Christian group that is active in electoral politics, lobbying, and public awareness. These organizations sometimes also take positions on legal theory and judicial policymaking, however: “Focus on the Family...expressly ties originalism to its family values agenda. It lobbies against judicially created privacy rights that have ‘mandated new social policies, such as the right to abortion’” (Avery and McLaughlin 2013b, 143).

It is additionally important to note that the influence of Christian conservative thought reaches much further than explicitly religious organizations. Many leaders and members of the broader movement are ideologically aligned with the viewpoints of these Christian groups. Within The Federalist Society is the Religious Liberties Practice Group, which has spearheaded much of the movement’s opposition to abortion rights (Avery and McLaughlin 2013b, 143). Additionally, Leonard Leo, current co-chairman and former Executive Vice President of the Federalist Society, is a devout Catholic, and implements this faith in his leadership of the organization. This is especially true of his stance on abortion rights; the possibility of Leo supporting a pro-abortion rights Supreme Court Justice “seems nonexistent...No one has been more dedicated to the enterprise of building a Supreme Court that will overturn *Roe v. Wade*” (Toobin 2017).

Shifting Legal Scholarship:

The legal theories underpinning conservative opposition to abortion often cite originalist constitutional interpretation as their justification. Both external movement activists and insiders such as Supreme Court justices have harshly criticized liberal interpretations of the 14th

Amendment's guarantee of liberty as implying a right to privacy. Antonin Scalia in particular has rebuked the decisions in *Roe* and similar cases for alleged judicial activism in the creation of an unenumerated right to sexual and reproductive freedoms. Instead, conservative arguments posit that the federal government does not have constitutional authority to legalize abortion nationally and that legislatures must settle this issue themselves unless Congress passes a constitutional amendment (Cassidy 2016). The decision in *Dobbs v. Jackson Women's Health Organization*, written by Justice Samuel Alito, also follows this legal framework. The majority opinion notes that abortion is not mentioned or referenced at any point in the Constitution and that most common law criminalized abortion at the time the Constitution was written; as such, the opinion asserts, abortion cannot be interpreted as a fundamental right protected by constitutional law.

In response to the 20th century success of liberal legal experts in creating networks through law schools, conservative networks have focused much of their efforts to promoting these originalist theories and related arguments in legal academia. The Federalist Society in particular has played a significant role in these changes. The organization sends members to speak at law schools and conferences, advertises membership to law professors, and runs scholarship programs for "top young legal thinkers" (Avery and McLaughlin 2013a). The effects of this academic activism are especially evident in case studies of individual campuses. In a 2006 analysis of Harvard law students, George W. Hicks notes that on average, students at this university have become more conservative over time, and conservative students have become more vocal. This is true on a number of issues, including the legality of abortion. Hicks directly attributes this shift to the activism of the Federalist Society; he argues that the presence of this conservative organization on campus has resulted in "conservative-friendly personnel changes and, ultimately, a rightward shift in the beliefs of the HLS student body."

Arguments for changing legal theory on abortion rights have at times necessitated that the movement distance itself from its less popular goals, such as those on the issue of contraception. In the early 20th century, anti-abortion and anti-contraception legal activism had significant overlap. The underpinning theories of this movement were often founded in principles asserted by religious leaders, including appeals to the sanctity of human life and the societal dangers posed by promiscuity and obscenity. In the 1960s, however, anti-abortion Catholic lawyers began to instead rely on claims of the right to life interpreted from the Fifth and Fourteenth Amendments, and “[by] grounding their argument...in constitutional rights claims...[they] contributed to the separation between the Church’s campaign against contraception and its campaign against abortion” (Williams 2016). Conservative legal scholars, faced with this growing separation, prioritized opposition to abortion over other moral issues, leading the movement to generally refrain from opposing the legality of contraception in the following decades. However, the movement has nonetheless retained some anti-contraception fronts; later sections will detail conservative efforts to limit access to birth control.

Challenges to Movement Cohesion:

Although organizations have increasingly centralized conservative legal activists and scholars, it is important to note that the conservative legal movement is not a monolith, particularly on ideologically charged issues such as abortion rights. Despite commonality in underpinning theories such as constitutional originalism, in practice, the movement encompasses individuals with a variety of sometimes competing interests. Although a sizable wing of the movement is beholden to Christian influence and conservative moral views, many lawyers and prominent conservative legal thinkers take a far more secular and libertarian approach. In a 2008 analysis of the professionalization of the conservative legal movement, Ann Southworth details a

variety of positions held by conservative lawyers. The main ideal underscoring business-interested and libertarian lawyers is summarized as a “‘leave us alone’ position,” but religious and social conservatives have different views on government action and intervention:

Religious conservatives want government to fix our corrupt society and prevent further erosion of traditional social mores. Some of them seek to criminalize gay sex and prohibit gay marriage, outlaw abortion, ban pornography and obscenity...These initiatives are not in harmony with libertarian ideals. They reveal, instead, the sharp limits of religious conservatives’ commitments to individual freedom as libertarians define it (103).

These conflicts present a challenge both to the individuals who comprise the movement and to the leaders and organizations which attempt to guide it. The fundamental disagreements between anti-abortion social conservatives and pro-choice business-focused conservatives are not easily reconciled, forcing the movement to prioritize the concerns of one side over the other.

There are additionally divides within anti-abortion wings of the conservative legal movement regarding the appropriate tactics and end goals when combatting abortion rights. Social and Christian conservatives are often results-oriented on moral issues such as abortion; their end goals are restrictions or bans. Judicial conservatives, on the other hand, “care more about [the] *process*” of “judicial restraint and originalist constitutional interpretation” (Avery and McLaughlin 2013b, 143). This can be problematic when directing movement actors or arguments in individual cases; legal reasoning that would justify a complete ban on abortion is inherently distinct from the argument that abortion should be left to the states and legislative action. Conservatives in electoral politics have additionally butted heads on this issue following the release of the *Dobbs* opinion. Senator Lindsey Graham recently proposed a bill which would ban all abortions in the country after 15 weeks of pregnancy, which received little support from GOP leaders; according to minority leader Mitch McConnell, “most Republican senators ‘prefer this be handled at the state level’” (Everett et. al. 2022).

These divides are not necessarily insurmountable; conservative legal coalitions exist and are held together because of shared disdain towards liberals, support for Republican candidates and politicians, and historical fears of communism and socialism. However, social and religious conservatives are often less inclined to compromise than their libertarian counterparts, creating strain on the cohesion of the movement and its objectives (Southworth 2008 99-105). The strength of ideological conservatism led the movement to continue to prioritize overturning *Roe v. Wade*, though this internal division has resulted in competing strategies for this activism. The following sections will detail the differing strategies and results of these competing approaches: first, the more gradual methods favored by traditional conservatives; second, the more recently successful approach of attempting to completely overturn the precedents of *Roe* and *Griswold*.

2: Slow and Steady Victories

In attempts to operate within the framework of precedent, the conservative legal movement previously pursued a long-term strategy of slowly chipping away at abortion rights. This approach involved promoting legislation which curtails financial and material access to reproductive healthcare and litigating in favor of regulations which create exceptions to the right to abortion. This section will analyze these tactics and the extent of their success between the late 20th century and the modern day.

I: Limiting Financial Access

The Hyde Amendment:

Many Americans rely on government programs to fund their health insurance, and many reproductive healthcare facilities are run or funded by government agencies. The conservative legal movement has thus found significant opportunity to limit access to abortion and contraception by exerting its influence over government spending. In *Abortion and the Law in*

America: Roe v. Wade to the Present (2020), Mary Ziegler discusses the context and ramifications of the 1976 Hyde Amendment, an amendment to a larger appropriations law inserted by Republican Henry Hyde which bans Medicaid funding for most abortions. Pro-life lawyers championed this policy after the shift away from direct challenges to *Roe* led to a greater focus on opposing public funding. The amendment was passed following a long public awareness campaign of pro-life and anti-welfare activists. The legal movement would both support the policy in Congress and join this battle as it was brought into the courts. Anti-abortion lawyers and organizations, such as Dennis Horan of the group Americans United for Life, had attempted for several years to shift their strategy towards litigation, and found strengthened legal arguments in the movement against public funding:

AUL lawyers contended that if abortion was a privacy right, the Constitution at most protected women from government interference. But according to AUL, the obstacle facing low-income women came not from the government but from their own poverty...In the years to come...the debate moved away from the two absolute constitutional rights (44)

The Hyde Amendment additionally “strengthened the hand of pro-life incrementalists,” further legitimizing the slow approach used by the legal movement of chipping away at abortion rights rather than attempting to overturn them completely (Ziegler 2018). The future of the amendment is currently uncertain, with growing calls to repeal it from liberal activists and with President Biden excluding it from his 2021 budget proposal. Conservative legal organizations such as the Heritage Foundation have responded by attempting to reignite support for the policy through public awareness campaigns and pressure on politicians (Israel 2021).

Opposition to the Affordable Care Act:

In more recent Supreme Court cases, contraception coverage mandates have become a subject of debate. *Hobby Lobby v. Burwell* is one such case which became well known for its controversial holding. The 2010 Affordable Care Act (ACA) had mandated certain provisions for

employer-provided health insurance plans, including coverage of contraceptives. Hobby Lobby and several other companies operated under religious principles, and advocates argued that this mandate violated their freedoms under the Religious Freedom Restoration Act of 1993. The social and cultural debate surrounding this case extends far beyond the strictly law-focused wings of conservative thought. However, these movements and debates sometimes directly influence the courts and the outcomes of cases (Horwitz 2014). This interconnection of law, politics, and culture thus remains central to the decision and effects of *Hobby Lobby*.

In the past, public funding restrictions gained support through the alliance of pro-life activists with growing opposition to the welfare state; conservative mobilization against the ACA has followed a similar pattern. The ACA became an ideal target for the conservative legal movement, as it attracted a variety of objections in addition to the issue of contraception. Libertarian and business-focused conservatives, who are not necessarily as ideologically swayed as their Christian conservative counterparts, often oppose the ACA due to provisions such as its individual mandate, which requires individuals to have health insurance. Members of the Federalist Society and the Heritage Foundation have brought forward constitutional challenges to the policy on this issue, separately from challenges based on coverage for contraception (Toobin 2017).

Leaders of the conservative legal movement have fully seized this opportunity found in the common enemy of the ACA. In a 2014 Federalist Society panel discussing *Hobby Lobby*, the rhetoric of religious liberty is central to the panelists' argument, creating a bridge between the goals of libertarians and religious or moral conservatives. The Supreme Court decision is referred to as "a tremendous victory for religious liberty" following "our nation's long tradition of accommodating religion." However, panelists also continue with the movement's long-

standing strategy of incrementalism. The decision in this case carves out yet another exception that meaningfully limits access for those employed by religiously oriented organizations, but nonetheless recognizes that the government has a compelling interest in providing free access to FDA-approved contraceptives (Saunders et. Al. 2016). By focusing on slow and seemingly unobtrusive change that is framed in terms of protecting liberty, organizations leading the conservative movement aimed to limit contraception and abortion access without alienating members of their base.

II: Chipping Away at *Roe*

Exceptions to the Rule:

One of the most successful tactics utilized by the conservative legal movement is arguing that courts should establish exceptions to precedents which limit state regulation of abortions. When legal arguments centered around fetal personhood and the 14th Amendment's guarantee of due process were not successful at the Supreme Court, conservative lawyers instead argued in favor of restrictions that could be upheld without overturning *Roe*. This incrementalist approach quickly made its way into judicial opinions as conservative legal activists successfully shaped the composition of the courts under Republican presidents. The Supreme Court soon established the undue burden test and allowances for informed consent regulations, which provided opportunity for state and local legislatures to make abortion access increasingly difficult despite its general legality. Proponents of incrementalist methods within the movement also believed that this strategy could pave the way towards a complete victory by making abortion precedent so convoluted and self-contradicting that the Supreme Court would eventually believe it best to do away with the right entirely (Ziegler 2018).

The creation of exceptions for regulations also provided opportunities for the movement to advance federal legislation that would limit abortion access, such as the Partial Birth Abortion Ban Act of 2003, defended by conservative legal activists in *Gonzales v. Carhart* (2007). Despite supporting legislation that could increase danger to individuals seeking out abortions, the conservative legal movement would soon shift rhetoric towards claims of support for women's health and well-being. After the decision in *Planned Parenthood v. Casey*, anti-abortion legal messaging "quickly became entangled with claims involving the harm abortion did to women" (Ziegler 2017). This shifted the legal and moral arguments against abortion away from seemingly anti-feminist restrictions on bodily autonomy, and towards an image of philanthropic concern. By co-opting progressive language, conservative legal activists could appeal to a wider audience, further legitimizing their pushes for increased regulations and obstacles in reproductive healthcare.

TRAP Laws:

Mobilization against reproductive rights and legal rhetoric focused on the protection of women's health have culminated in a number of restrictive policies which significantly limit access to abortions and contraception. The 2010s in particular saw a sharp increase in Targeted Regulation of Abortion Providers, also known as TRAP laws, particularly in Republican-controlled states such as Louisiana and Texas. Examples of these policies included admitting privileges and surgical center requirements. These standards, framed by proponents of the bills as vital to protecting women's health during the abortion process, in practice had negative effects on accessibility of the procedure. According to the Guttmacher Institute, in Texas alone, "the number of Texas women whose closest abortion clinic was more than 100 miles away more than tripled" between 2013 and 2014. Conservative legal actors were swift to defend these policies in

the courts, and although some were struck down under the undue burden standard, others were upheld, resulting in a severe curtailing of access (“Targeted Regulation”; Nash 2020).

3: The End of *Roe*

Although the conservative legal movement was relatively successful in its past slow approach, the anti-abortion movement came to a head this year with the case that would overturn *Roe v. Wade* completely. This section will explore the success that the movement has achieved through this more decisive approach, as well as the immediate impacts of the *Dobbs* decision and future implications for reproductive rights law and access.

I: Modern Strategies

Winning by Losing:

Prior to *Dobbs v. Jackson Women’s Health Organization*, many constitutional challenges failed to completely overturn *Roe v. Wade* and *Griswold v. Connecticut*. However, the conservative legal movement nonetheless made notable progress not only in spite of these setbacks, but at times because of them. Losses in litigation provide unique opportunities to galvanize the base of a social movement and reorient the movement’s goals within the new framework created by the court. The Christian right has used the tactic of “winning through losing” in order to “construct organizational identity...mobilize outraged constituents...appeal to other state actors, including courts and elected officials...[and] appeal to the public through images of an antimajoritarian judiciary” (NeJaime 2010). Appeals to government actors are a vital component of the “winning by losing” strategy, as conservative members of the Supreme Court have succeeded in creating marginal victories for the conservative legal movement in the details of lost cases. Led by Chief Justice Roberts, these justices have “put forward a clear path

to eviscerate abortion rights” by “rendering reproductive health care available in theory but inaccessible in reality for low-income people and people of color” (Manian 2020).

This tactic is especially powerful when combined with incremental political action through electoral systems. The conservative legal movement has used opposition to *Roe* to galvanize a pro-life base for decades, increasing support for Republican victories in the broader sphere of American electoral politics. In the 2016 presidential election, Republican candidates repeatedly emphasized their commitment to outlawing abortion in hopes of gaining the support of the religious right (Jaffe 2015). In this way, the movement’s decades of losses on eliminating abortion rights have actually worked in its favor through political and elected offices; instilling anti-abortion advocates in political offices and court nominations has facilitated the movement’s attacks on access and its long-term strategy of chipping away at abortion rights. Gaining merit in the eyes of the public is thus a vital component of the movement’s legitimacy and sway over the broader political system.

Judicial Appointments:

One of the most dramatic changes that the conservative legal movement has successfully manifested is in the composition of the American court system. Decades of activism have culminated in a now 6-3 conservative supermajority on the highest court in the nation. The Federalist Society in particular has become synonymous with vetting Supreme Court nominees under Republican presidents; all three of Donald Trump’s Supreme Court nominations were members of the organization, and all three rebuked the central holding of *Roe* even before the decision in *Dobbs* was handed down. Trump’s most recent appointment, Amy Coney Barrett, is particularly involved with the Christian conservative legal movement and is staunchly pro-life

(Talbot 2022). This majority then strengthened calls in the conservative legal and political movements to abandon incrementalism entirely. One conservative journal argued:

...with a 6-3 allegedly conservative court, anything less than...the dismissal of *Roe* and *Casey* should be viewed as a failure. Despite the goal-post-shifting going on in establishment Republican legal circles, there is no “long game” here...We have played the long game for the last 50 years (Bovard 2021).

The momentum of anti-abortion conservatives would thus culminate in attempts to overturn *Roe* completely. Frustration had built up among many conservatives towards the continuous use of winning by losing, and religious conservatives and activists who have dedicated decades to this movement were no longer satisfied with chipping away at standing precedents.

State Challenges:

The movement’s past incrementalism ultimately created the conditions which would today allow anti-abortion conservative legal activists to find greater success in challenging *Roe* in state legislatures. The slow approaches of the past led abortion rights to stand on increasingly weak grounds, making it significantly easier to attempt to pass severe restrictions and, more recently, bans. A rising member of the conservative legal movement on this front is Johnathan F. Mitchell, a Texas lawyer who developed the theory behind the state’s pre-*Dobbs* ban on abortions after six weeks. The law utilizes a bounty-hunter enforcement mechanism through private citizen lawsuits rather than direct enforcement by the state in order to avoid the policy being struck down through judicial review. Mitchell is a former solicitor general of Texas and a former Supreme Court clerk for Antonin Scalia; although he remained relatively unknown prior to the creation of this legislation, he is well entrenched in conservative legal thought and activism (Schmidt 2021).

Mitchell has also put forward a controversial interpretation of the mechanisms of American law which could be particularly powerful for the anti-abortion right. According to

Mitchell's legal theory, "old laws don't go away and can be resuscitated" because "courts don't have the power to broadly 'strike down' or 'erase' laws they think are unconstitutional." This reasoning is not universally accepted in the conservative legal movement; one Federalist Society member, Mitchell's former law professor, has commented that it fundamentally contradicts current legal understandings of precedent. However, if this legal theory becomes mainstream, it will present anti-abortion state governments with a significant opportunity to limit reproductive rights (Littlefield 2022).

Additionally relevant is the pre-*Dobbs* rise in state legislatures introducing and passing "trigger bans," which are often supported or drafted by conservative legal organizations. Mitchell's theory on old laws being resuscitated is not necessary in states with trigger bans; these laws were passed with intentions to take effect immediately in the event that *Roe* was overturned. Many trigger bans have been introduced in recent years, particularly in early 2022, in tandem with rises in the introduction of 15-week bans and "Texas-style" private enforcement bans. Just between January and June 2022, 86 of these forms of bans were introduced in state legislatures, and eight were passed (Nash et. al. 2022).

The Dobbs Decision:

This past June, news of the conservative legal movement's greatest success was nearly unavoidable. Prior to the actual decision being released, the first draft of the majority opinion for *Dobbs v. Jackson Women's Health Organization* was leaked to the press, published in a May *Politico* article. When this case was initially argued, liberal activists and pro-choice advocates had little optimism about the likely results; following oral arguments, leading abortion law experts predicted that *Roe* was likely to be overturned (Ziegler 2021). The leaking of the draft opinion confirmed these fears: "The draft opinion [was] a full-throated, unflinching repudiation"

of *Roe* and *Casey* (Gerstein and Ward 2022). The actual opinion did not have many significant changes from this draft; Justice Alito was joined by Justices Thomas, Gorsuch, Kavanaugh, and Barrett in returning the issue of abortion rights to the states. Mere rational scrutiny is now the standard applied to abortion law cases.

The overturning of *Roe* does not seem to be a universally welcomed among conservative legal actors. Proponents of the previously detailed incrementalist approach had recently focused their attention on attempts to eliminate the viability standard, which would allow states to ban abortions significantly earlier rather than allowing them to ban it entirely. It was expected prior to oral arguments in *Dobbs* that the elimination of the viability cutoff would be likely this year, especially if Chief Justice John Roberts were to maintain influence over other justice's votes; he has criticized *Roe* in the past but seemed reluctant to support its complete reversal (Ziegler 2021). However, with the Supreme Court's 6-3 conservative makeup, compromise with Roberts' comparatively moderate conservatism was not necessary to reach a majority opinion. Republican success in electoral politics, a growing number of permissible restrictions on abortion and contraception, and conservative influence over legal academia and the courts created an ideal moment for the movement to achieve its most sought-after goal, despite attempts from more moderate actors to continue pushing for incremental change.

II: The Fate of Reproductive Rights

Immediate Impacts of Dobbs:

Many state governments acted quickly to pass or enact bans and restrictions on abortions following the Supreme Court's decision in June. As of December 2022, thirteen states¹ with

¹ Alabama, Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, South Dakota, Tennessee, Texas, West Virginia, and Wisconsin

Republican-controlled legislatures have banned abortion completely; five² have enacted bans after a certain gestational age, ranging from six to twenty weeks; and eight³ have passed bans or similar restrictions which were later blocked by courts, and are thus not currently in effect. However, in several states where courts have blocked these laws, state government officials are now seeking appeals or developing new legislation which they hope would not be struck down (“Tracking the States” 2022).

These laws have directly resulted in dramatic changes to abortion access. Now, twice as many people must travel more than an hour to reach an abortion provider, and travel times for those living in states with complete or six-week bans have increased by an average of four hours. Racial disparities in access are also growing, with black women facing the largest average increase in travel times. Distance, cost, and decreased availability of providers were estimated to result in “about 10,500 fewer abortions [being] performed in the United States in the months immediately following the *Dobbs* decision” (Scott 2022).

Dobbs has also begun to affect much more than the matter of whether abortion is legal. Because of increased state restrictions, medical practitioners in training are now finding themselves unable to complete a previously typical course of study. As of October 2022, approximately 44% of American OB-GYN programs were hosted in states where abortion was either illegal or likely to become illegal. Because of this, some medical programs must now consider creating simulations or sending students to other states for training. This creates a number of issues, even for programs which are not solely focused on training abortion providers; as one practitioner points out, “There are aspects of what we do in abortion care that are used in

² Georgia at 6 weeks; Arizona and Florida at 15 weeks; Utah at 18 weeks; North Carolina at 20 weeks

³ Indiana, Iowa, North Dakota, Michigan, Montana, Ohio, South Carolina, and Wyoming

so many other settings...that are often lifesaving...a doctor with limited abortion training may not know how to care for a patient experiencing a miscarriage, for example, or an ectopic pregnancy” (Riddle 2022).

Griswold in a Post-Dobbs Era:

Growing fervor in the conservative legal movement could also potentially be troubling for the future of *Griswold* and related cases that rely on a right to privacy not explicitly enumerated in the language of the Constitution. In the leaked *Dobbs* opinion draft, despite Justice Alito’s assurance that the judgement should only be interpreted as applying to abortion rights, legal analysts noted that justification for contraceptive rights was significantly weakened through the implication that the right to privacy is far more limited than precedent had previously established (Gerstein and Ward 2022). With the final published opinion in *Dobbs* maintaining this same language, it is likely that this reasoning could foster increased litigation from the conservative legal movement on contraception bans and similar religious, moral, and social issues. Recently, three Republican candidates for Michigan Attorney General indicated that they may support the reversal of *Griswold* in the name of states’ rights (Mauger 2022). Some state lawmakers, emboldened by *Dobbs*, have also indicated that they hope to ban or restrict forms of birth control soon (Lozano 2022).

It is important to note that not all conservative legal actors believe that *Griswold* should be overturned; one Federalist Society columnist argues that despite criticism, this decision is necessary to ensure liberty and create limits on government overreach, especially because anti-contraception laws enforced through fines arguably deprive people of the right to property. Additionally, the controversy surrounding *Griswold* is not always based exclusively on partisan or ideological debates. As previously discussed, process-oriented conservatives primarily orient

their activism around originalist constitutional interpretation and the belief that these cases were wrongly decided from a legal standpoint. Originalist conservatives have especially criticized the *Griswold* opinion for its creation of an unenumerated right, which stands on dubious legal grounds without explicit inclusion in the Constitution (Bernick 2017). With criticism of *Griswold* mounting once again, and without a right to privacy, bodily autonomy, or reproductive freedom explicitly outlined in the Constitution, the right to contraception remains a possible next target of the conservative legal movement.

The Liberal Response:

The liberal legal movement now faces an uphill battle in the restoration of abortion and rights and the preservation of contraceptive rights. Despite recent use of the winning by losing method, involving liberal politicians galvanizing a base of voters around this issue, electoral politics have so far failed to deliver significant results. Two initiatives introduced this year attempting to codify *Roe* as federal law failed to pass the Senate. (Ollstein and Levine 2022). Additionally, with six conservatives on the Supreme Court, it is unlikely that federal litigation will return this right in the foreseeable future. Some liberal activists and politicians have argued that expanding the Supreme Court will be necessary in order to improve chances of success on future abortion cases (Warren 2021). However, this strategy has not yet gained mainstream support.

Either the court-packing or winning by losing strategy could be effective in the future, however, considering the results of the 2022 midterm elections. Abortion rights were central to Democratic campaigning this year. Soon after the *Dobbs* decision, in a New York special election for Congress, candidate Pat Ryan strongly emphasized commitment to restoring *Roe* as central to his platform and won what was regarded by many as a bellwether election (Segers

2022). Pro-choice messaging then pervaded Democratic midterm campaigns. President Biden delivered an address on this issue in October, condemning “the extreme Republicans who have spent decades trying to overturn *Roe*” and urging the public to remember “the anger, the worry, the disbelief” felt in the days following *Dobbs* (Liasson et. al. 2022). As election results have become available, Republicans did not perform nearly as well as anticipated, an outcome attributable at least in part to widespread outrage towards the Supreme Court’s decision. With the re-election of Georgia Senator Raphael Warnock, Democrats unexpectedly won a majority in the Senate. Though Senator Kirsten Sinema recently announced that she will be switching her party alignment from Democratic to Independent, the Democrats will still maintain a slim majority through 50 Senate seats and the Vice President (Everett 2022). With Democratic control of the Senate and the Presidency, conservative actors will have virtually no opportunity in the next several years to pass a federal ban on abortion.

Agency and State Action:

Much of the battle for abortion rights may now return to the conservative movement’s earlier target: access. Mail-order abortion pills are one method that abortion rights advocates have proposed as a possible way to circumvent bans in Republican-controlled states. These pills have now been legalized by the Food and Drug Administration (FDA) but are still facing issues of restrictions and lack of access in some states (Craven 2022). The FDA’s approval for mifepristone and misoprostol has also created a new legal dilemma that may take years to be resolved by the courts. According to The Pew Charitable Trusts, “No federal law definitively establishes that FDA rulings on the safety and efficacy of medications preempt state law,” leading to potential conflicts over federal authority and enforcement mechanisms of abortion bans. This could especially complicate cases where doctors prescribe these medications through

telehealth visits in other states or overseas (Vestal 2022). This legal battle has already begun, with the Alliance Defending Freedom recently filing suit on behalf of a number of religious and anti-abortion organizations (Leonard 2022).

In the 2022 midterms, liberal legal and political activists also turned their efforts to state-level action, particularly through direct democracy. In Vermont, Michigan, and California, voters approved ballot initiatives to codify the right to abortion in their state constitutions, while in Kentucky, an initiative to ban almost all abortions in the state failed. Montana voters also rejected an initiative which “would have criminalized health-care providers who do not make every effort to save the life of an infant ‘born during an attempted abortion’” (The Editorial Board 2022). This is promising for the liberal legal movement; increased electoral support for abortion rights is now directly influencing legislation. Going forward, liberal legal actors will be tasked with maintaining this public enthusiasm and momentum for pro-choice policies.

Conclusion

Many of these projections for the future are likely to remain in flux as state governments react to *Dobbs* and as liberal activists begin to mobilize. Nonetheless, all evidence currently points to this case being the conservative movement’s greatest victory after decades of struggle. Movement actors are now beginning to turn their attention away from legal challenges and the courts, and towards American politics and society as a whole, on a broad range of topics beyond abortion rights. In building a far-reaching network of activists, legal thinkers, politicians, and donors, the conservative legal movement has not only reached its goal on abortion rights but has also created the conditions for action on a wide variety of issues, ranging from campaign finance law to environmental policy to LGBTQ rights. Leonard Leo in particular is now utilizing his experience in the Federalist Society developing “dark money” donor networks in a broader push

to “roll back liberal dominance in other areas of American cultural, policy and political life” (Vogel 2022). However, the electoral support for Democrats generated by *Dobbs*, as well as now-exacerbated divisions between wings of the conservative movement, may be difficult for conservative activists to surmount. The conservative legal movement has achieved arguably its greatest success in the overturning of *Roe*, but whether more successes will follow remains to be seen.

Bibliography

- Alliance Defending Freedom. “Who We Are: History.” (2021).
- Avery, Michael, and Danielle McLaughlin. “The Jurisprudence of Personal Sexual Autonomy.” *The Federalist Society: How Conservatives Took the Law Back from Liberals*, Vanderbilt Univ. Press, Nashville, TN. pp. 141–169. (2013).
- Avery, Michael, and Danielle McLaughlin. “How Conservatives Captured the Law.” *The Chronicle of Higher Education* (April 15, 2013).
- Bernick, Evan D. “‘Uncommonly Silly’—and Correctly Decided: The Right and Wrong of *Griswold v. Connecticut* and Why It Matters Today.” *The Federalist Society*. (April 18, 2017).
- Bovard, Rachel. “If Kavanaugh and Barrett Betray Pro-Lifers, We Must Blow Up the Conservative Legal Movement.” *The Federalist*. (November 9, 2021).
- Cassidy, Robert. “Scalia on Abortion: Originalism...But, Why?” *Touro Law Review*: Vol 23: No. 4, Article 3. (2016).
- Craven, Julia. “The FDA made mail-order abortion pills legal. Access is still a nightmare.” *Vox*. (March 29, 2022).
- The Editorial Board. “Abortion rights won big. Here’s what to do next.” *The Washington Post*. (November 10, 2022).
- Everett, Burgess, Marianne Levine, and Sarah Ferris. “Graham’s Abortion Ban Stuns Senate GOP.” *Politico*. (September 13, 2022).
- Everett, Burgess. “Sinema switches to independent, shaking up the Senate.” *Politico*. (December 9, 2022).
- Gerstein, Josh, and Alexander Ward. “Supreme Court has voted to overturn abortion rights, draft opinion shows.” *Politico*. (May 2, 2022).
- The Heritage Foundation. “Solutions: Life.” (2020).
- Horwitz, Paul. “The ‘*Hobby Lobby*’ Moment.” *Harvard Law Review* 128, no. 1: 154–89. (2014).

- Israel, Melanie. "Abortion Funding: Save the Hyde Amendment." *The Heritage Foundation* (July 30, 2021).
- Jaffe, Alexandra. "GOP Focus Turning to Abortion in 2016 Race." *NBC News* (August 11, 2015).
- Leonard, Ben. "Anti-abortion groups seek to overturn FDA approval of abortion pill." *Politico*. (November 18, 2022)
- Liasson, Mara, Alejandra Marquez Janse, Sarah Handel, Roberta Rampton, Ailsa Chang. "Why Biden gave a speech about abortion rights." *NPR*. (October 18, 2022).
- Littlefield, Amy. "The Christian Legal Army Behind the Ban on Abortion in Mississippi." *The Nation*. (November 30, 2021).
- Littlefield, Amy. "The Man Behind the Texas Abortion Ban Now Has an Even More Radical Plan to Reshape American Law." *Mother Jones*. (April 4, 2022).
- Lozano, Alicia Victoria. "Some birth control could be banned if *Roe v. Wade* is overturned, legal experts warn." *NBC News*. (May 12, 2022).
- Manian, Maya. "Winning by Losing: Chief Justice Roberts's Strategy to Eviscerate Reproductive Rights and Justice." *Harvard Law & Policy Review* (August 10, 2020).
- Mauger, Craig. "Republican AG Candidates Criticize 1965 Ruling Against Contraceptive Ban." *The Detroit News* (February 21, 2022).
- Nash, Elizabeth, Lauren Cross, and Joerg Dreweke. "2022 State Legislative Sessions: Abortion Bans and Restrictions on Medication Abortion Dominate." *The Guttmacher Institute* (March 16, 2022).
- Nash, Elizabeth. "Louisiana Has 89 Abortion Restrictions Since *Roe*: It's About Control, Not Health." *Guttmacher Institute* (February 11, 2020).
- NeJaime, Douglas, "Winning Through Losing." *Iowa Law Review*, Vol. 96, p. 941, 2011, Loyola-LA Legal Studies Paper No. 2011-03 (April 19, 2010).
- Ollstein, Alice Miranda and Marianne Levine. "Senate fails to pass abortion rights bill – again." *Politico*. (May 11, 2022).

- Riddle, Katia. “Changes to abortion laws mean OB-GYNs have less opportunities to learn procedure.” *NPR*. (October 6, 2022).
- Saunders, William, Diarmuid F. O’Scannlain, Kim Colby, William Marshall, Robin Fretwell Wilson. “Religious Liberty after *Hobby Lobby*: A Panel of the 2014 Federalist Society National Lawyers Convention.” *Connecticut Law Review*, Vol. 48, No. 3, 2016, University of Illinois College of Law Legal Studies Research Paper No. 17-16 (2016).
- Scott, Cameron. “Model Shows Where Women Lost Access to Abortion After *Dobbs*.” *University of California San Francisco*. (November 1, 2022).
- Schmidt, Michael S. “Behind the Texas Abortion Law, a Persevering Conservative Lawyer.” *The New York Times*. (September 12, 2021).
- Segers, Grace. “How Pat Ryan’s Fast-Acting Campaign Turned Abortion Rights Into a Winning Message.” *The New Republic*. (August 30, 2022).
- Southworth, Ann. *Lawyers of the Right: Professionalizing the Conservative Coalition*. University of Chicago Press (2008).
- Talbot, Margaret. “Amy Coney Barrett’s Long Game.” *The New Yorker* (February 7, 2022).
- “Targeted Regulation of Abortion Providers (TRAP) Laws.” *Guttmacher Institute* (January 2020).
- Teles, Steven M. *The Rise of the Conservative Legal Movement: The Battle for Control of the Law*. Princeton: Princeton University Press (2012).
- Toobin, Jeffrey. “The Conservative Pipeline to the Supreme Court.” *The New Yorker* (April 17, 2017).
- “Tracking the States Where Abortion Is Now Banned.” *The New York Times*. (December 12, 2022).
- Vestal, Christine. “Abortion Medications Set to Become Next Legal Battlefield.” *The Pew Charitable Trusts*. (July 13, 2022).
- Vogel, Kenneth P. “Leonard Leo Pushed the Courts Right. Now He’s Aiming at American Society.” *The New York Times*. (October 12, 2022).

Warren, Elizabeth. "Expand the Supreme Court." *The Boston Globe*. (December 15, 2021).

Williams, Daniel K. "From Anti-Contraceptive Campaigns to Fetal Rights: The Pro-Life Movement's Attempt to Separate Itself from the Politics of Birth Control." *U.S. Catholic Historian* 34, no. 1 p. 77–102 (2016).

Ziegler, Mary. *Abortion and the Law in America: Roe v. Wade to the Present*. Cambridge University Press (2020).

Ziegler, Mary. "After Life: Governmental Interests and the New Antiabortion Incrementalism," *University of Miami Law Review* 73, no. 1 p. 78 (2018).

Ziegler, Mary. "The End of *Roe* is Coming, and It Is Coming Soon." *The New York Times* (December 1, 2021).

Ziegler, Mary. "Facing Facts: The New Era of Abortion Conflict After *Whole Woman's Health*." *Wake Forest Law Review* 52, no. 5 p. 1231–1283 (2017).