

Abstract:

This chapter examines the religiopolitical debate surrounding abortion in the United States. The chapter gives a summary of how politics and religious issues became sorted between the two major political parties, Democrats and Republicans, leading to their great divide on the issue of abortion. Additionally, this chapter discusses how, in the aftermath of *Roe v. Wade* (1973), which held women have a constitutional right to an abortion, conservative Christians and Catholics embarked on a legal strategy through the development of Christian Conservative Legal Organizations (CCLOs) to overturn this decision, which ultimately occurred nearly fifty years later in *Dobbs v. Jackson Women's Health Organization* (2022). The chapter also discusses the current state of CCLOs and their efforts to restrict further access to abortion. The chapter concludes by providing a road map for the rest of the book, which covers the Alliance for Hippocratic Medicine's lawsuit against the Food and Drug Administration and the fight over abortion access between Red and Blue states headings into future elections.

### **Chapter 1: *Dobbs*: How Did We Get Here?**

On May 2, 2022, “the worst breach of confidentiality in the court’s history” became public as *Politico* reported Associate Justice Samuel Alito’s leaked opinion on *Dobbs v. Jackson Women's Health Organization* (de Vogue, Sneed, and Cole, 2023). The leak ignited abortion-rights protest across the country, causing the high-Court to take extra security measures (Howe, 2023). For seven weeks, the American people anxiously waited for the Supreme Court to release the final opinion, as speculation circulated on whether the decision would overturn nearly fifty years of precedent. On June 24, 2022, the wait was over, and the Court released a repudiating blow to *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992), stating both decisions were overturned because the Constitution did not confer a right to abortion.

With over 60% of Americans stating abortion should be legal in all or most cases at the time of the *Dobbs* decision, how did the Court get here (Pew Research Center, 2022)? Didn't Associate Justice Brett Kavanaugh, who voted with the majority in *Dobbs*, tell the American people during his 2018 Senate confirmation hearing for the Supreme Court that *Casey* was “precedent on precedent” (Liptak, 2018)? To begin to answer these questions several issues must be examined. One being how abortion politics falls along religious and political lines, especially among evangelical Protestant and conservative Catholic religious elites. Two, how stances on abortion have become sorted between Republicans and Democrats, along with the religious influence that has infiltrated the political party system on this debate. And three, how critical parts of the *Dobbs* decision disregarded the doctrine of substantive due process, unraveling federal protection to abortion access, setting the stage for more high-stakes reproductive rights battles.

#### **Abortion & Party Politics**

The political debate on abortion in the United States has been largely influenced by religious conservatives, particularly within the Catholic Church and among Evangelical Protestants (Scanlon, 2023). To understand this influence, it is important to look at a brief history of both groups' involvement in abortion politics.

Starting in the 20<sup>th</sup> century, Evangelical Protestants began to take issue with the teaching of evolution in public schools. A particular instance, the Scopes “Monkey” Trial in 1925, a catalyst for the beginnings of the Christian Right, a social movement led by religious conservatives that still exists today (Wilcox, 1988; Claassen, 2018; Conger, 2018). The Scopes trial dealt with a substitute teacher, John T. Scopes, who was prosecuted for violating the state of Tennessee’s Butler Act, which prohibited the teaching of evolution in public schools. Though Scopes lost at trial, his conviction was overturned by the Tennessee State Supreme Court (Foster, 2009). However, Evangelicals still carried influence on the topic, with evolution being effectively banned from biology textbooks across the country for several decades (Claassen, 2018). However, as support for the anti-evolution campaign in public schools subsided, conservative Protestant leaders shifted their attention to an anticommunism theme to combat the belief in atheism, which many communist leaders professed. During this time, Protestant leaders also threw their support behind prohibition and again anti-communism in the McCarthy era (Wilcox, 1998).

However, the Christian Right’s fight for influence over education was not done with the Scopes’ trial. In the aftermath of *Brown v. Board* (1954), the famous Supreme Court ruling desegregating public schools, white evangelicals in the South began creating racially segregated private schools, such as the Lynchburg Christian Academy in Virginia, established Rev. Jerry Falwell in 1967. In response to these private segregation initiatives, Black parents filed lawsuits to enjoin private schools to stop the practice or lose their Internal Revenue Service (IRS) tax exemption status. However, the question remained whether religious discrimination was permissible in private school admissions practices. The Supreme Court did not take up the issue until it heard *Bob Jones University v. the United States* (1983), finding the IRS was correct to revoke the school’s tax exempt status for such discriminatory practices (Claassen, 2018). Some argue that it was this case and Ronald Reagan’s commitment to protect religious institution’s tax exemption status, that helped crystalize the Christian Right’s alignment with political conservatives (Claassen, 2018).

However, both conservative Protestants and Catholics were disturbed by the Supreme Court’s decision in *Engel v. Vitale* (1962) and *Abington v. Schempp* (1963), which prohibited school-sponsored prayer and reading of the bible in public schools. Furthermore, *Roe v. Wade* (1973), which held that the 9<sup>th</sup> and 14<sup>th</sup> Amendment granted a woman a constitutional right to an abortion, up until the point of viability, not only further strengthened the social conservative connection between evangelical Protestants and Catholics but also began to develop their strong pro-life connection (Payne, 2023).

Though some point to *Roe* as the beginning of Christian conservatives taking on abortion with a pro-life agenda, it is important to recognize the Catholic Church has a long standing position that life begins at conception and is against abortion (Catechism of the Catholic Church, 2016). The Catholic Church in the United States began speaking out politically on the issue in the 1940s, when the American bishops created a model list of human rights, which included the right to life (Scanlon, 2023). Regarding conservative Protestants, many of the organizations that are affiliated with the Christian right post-date *Roe*, such as Focus on the Family, founded in 1977 and the Moral Majority, established in 1979 (Claassen, 2018). The Moral Majority arguably became one of the most prominent organizations of the Christian right, which served as an umbrella association for conservative Protestants, Catholics, and Jews

to mobilize voters to elect politicians that would defend their values, especially opposition to abortion and other perceived threats to the family (Payne, 2023).

In looking at how the abortion debate became sorted between the two major political parties, it is also important to note that in the summer before *Roe*, *Gallup* polling reported that 64% percent of Americans (the majority Catholic) agreed that the decision to have an abortion was solely between a woman and her physician, with more Republicans holding this position at 68% than Democrats (Greenhouse and Siegal, 2011). So, what are other factors that led anti-abortion positions to become a mainstay for Republican Party politics? Some argue it was a party realignment election strategy by Republicans in 1972, designed to take away Catholic voters from the Democratic Party. For example, in the years leading up to *Roe* (1964 to 1973), more than a dozen states modified restrictive abortion policies. For example, in 1967, Colorado was the first state to decriminalize abortion, permitting it in cases of rape, incest, or a pregnancy that would cause severe physical disability to the woman. In 1970, New York was the first state to legalize abortion through the twenty-fourth week of pregnancy (Baker, Gerber Fried, Kaplan, Yanow, and Cupaiuolo, 2022). Knowing the Catholic Church's pro-life position, Republicans looked to take away Catholic support from social conservatives that were for President Richard Nixon's opponent, George McGovern in the 1972 election. This realignment began in 1971, with Nixon's shift of position on abortion when he directed the Department of Defense to cancel therapeutic abortions in military hospitals, a position his administration implemented the year prior. Influenced by advisor, Patrick Buchanan, who pressed Nixon that abortion was a growing issue among Catholics, the President became more verbal with his change of position during the election, stating that unregulated and on demand abortion policies were incompatible with the sanctity of human life (Greenhouse and Siegal, 2011; Adams 1997). To court social conservatives away from the Democratic Party, Republican strategists were able to tie the abortion issue to larger cultural conversations about permissive youth, the erosion of traditional family values, and the loss of respect for authority. Nixon won reelection with most of the Catholic vote, though abortion was not a main determinant for voters. However, the realignment of the Republican Party on the abortion issue was taking shape especially as support for the Equal Rights Amendment (ERA) was percolating, a constitutional proposal guaranteeing equal legal rights for all citizens regardless of sex (Nixon Library, 2022). In the early 1970s, Republicans such as Richard Nixon supported the ERA, it was even endorsed in the GOP platform; however, in years shortly after *Roe*, Republicans began to debate more vigorously about family values, the role of women in society, and abortion. Abortion would first be mentioned in the Republican Party platform in 1976, noting the divide between those in support of the procedure and those looking to protect the lives of the unborn (Fisher, 2012).

However, by the late 1970s, not only did Republicans begin to solidify their position on social conservative issues and consolidate electoral support, but also foster party discipline in Congress. As noted above, this coincided with Rev. Jerry Falwell and the Moral Majority's desire to maintain their IRS tax exempt status while resisting racial integration of Christian private schools. Yet, conservatives such as Bob Jones and Jerry Falwell knew that a "Stop the tax on segregation!" was not a winning rallying cry for the broad conservative movement they were working to build in the United States. The more agreeable strategy to build a new Christian Right movement was to consolidate Christian conservative support around abortion, which at

first would be challenging given that when *Roe* was decided not only did most Republicans support it, but the Southern Baptist Convention passed resolutions in 1971 and 1974 supporting less restrictive abortion laws, and in 1967, then Republican Governor of California, Ronald Reagan, passed one of the country's most liberal abortion laws (Steward, 2022). As part of a strategy to build a broader Christian Right and Evangelical movement in the United States, the Republicans began to embrace the pro-life agenda more fully to promote traditional societal and family values and use it as a tool to divide the base of support in the Democratic Party (Greenhouse and Siegal, 2011; Adams, 1997). During the late 1960s and 1970s, Political Action Committees (PACs) began to form, such as The National Right to Life Committee (the oldest pro-life lobby in the United States) and The National Association for the Repeal of Abortion Laws (NARAL). With these organizations' fundraising and lobbying ability, congressional votes on abortion became more clearly sorted along party-lines with Republicans voting increasingly more pro-life and Democrat pro-choice (Greenhouse and Siegal, 2011; National Right to Life, 2023; NARAL, 2023). And by 1980, the abortion issue was settled among Republicans with their party platform seeking a constitutional amendment to protect the life of the unborn (Fisher, 2012). The abortion debate was now firmly divided between the two major political parties. And the Christian Right was well aware that their best bet to restrict abortion access and possibly even overturn *Roe*, was by constructing a strong sphere of legal influence through the development of Christian Conservative Legal Organizations, which would eventually lead to their role in *Dobbs* and a new era of abortion politics.

### **Christian Conservative Legal Organizations**

Scholars such as Jack Balkin (2024) argue that the *Dobbs* decision was a long sought after goal of the Christian conservative legal movement following the *Roe* decision and subsequent election of Ronald Reagan. Balkin argues that *Roe* was finally overturned because in 2018, members of the Christian Legal Movement finally dominated the court and that previously though Republican Presidents had made more appointments to Supreme Court from 1969 to 2020 compared to Democrats that not all conservative appointees were affiliated with the movement. Essentially having the additions of Gorsuch, Kavanaugh, and Barrett to conservatives such as Thomas, Alito, and Roberts (though he argues the latter is somewhat institutionally restrained due to his position as Chief Justice) helped *Roe* to get overturned more quickly once three newer associate justices joined this conservative contingent of the high court. Furthermore, Balkin argues that though the majority of American public opinion supports some sort of abortion to be constitutionally permissible, the court has become a place of entrenched partisanship where the conservative elites on the bench do not reflect the center of America. He argues that this partisan entrenchment is a result of several key factors. One, Republicans benefiting from Senate malapportionment, which allows states that are less populated to vote more conservatively, hence influencing the make up of the chamber and influencing federal judicial appointments. Two, Senate Republicans getting rid of the filibuster with Neil Gorsuch's appointment and therefore lowering the super majority threshold vote needed to push nominations to the Supreme Court through. Three, Senate Republicans going back on their word not to consider Supreme Court judicial appointments during election years when Ruth Bader Ginsburg passed away and Amy Coney Barrett was approved on October 26, 2020, just a week before the 2020 Presidential Election. Balkin argues these events have all

been part of the Christian Conservative Legal Movement's vision for a constitutional revolution that brings together the group's concerns over increased secularism, women's liberation, and traditional family values all under a single issue, abortion, paving the way to overturn *Roe*.

However, the rise of the Christian Legal Movement and the efforts for Christian Conservatives to insert themselves more profoundly into abortion and *Dobbs* era politics would not have occurred without the involvement of the Federalist Society. The Federalist Society, formed in 1982 by students at Yale Law School, Harvard Law School, and the University of Chicago Law School, came together with the goal of creating a network among young legal conservatives. The Federalist Society soon morphed into an influential organization, that today consist of 90,000 members made up of lawyers, law students, and legal scholars from around the country with student divisions at all 204 American Bar Accredited law schools across the country (Balkin, 2024; The Federalist Society, 2024). The Federalist Society touts a commitment to limited government and conservative Constitutional principles. The organization does not take official stances on issues of law or policy because its mission is to cultivate and facilitate a conservative legal network that gives their member attorneys access to state legislature and influence in the federal judicial appointment process. Though the Federalist Society claims, "we do not lobby for legislation...or endorse nominees and candidates for public service" (The Federalist Society, 2024), members and leadership actions seem to speak otherwise. For example, Kristen Waggoner, Federalist Society member and general counsel for the Alliance Defending Freedom, worked alongside the state of Mississippi's legal team in preparing for arguments in *Dobbs v. Jackson Women's Health Organization* (Green, 2022). And, Leonard Leo, Co-Chairman and former Executive Vice President of the Federalist Society, drafted lists of potential justices for 2016 Trump Campaign to consider and advised President Trump on the nominations of Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett to the Supreme Court of the United States (Kroll, Bernstein, and Marritz, 2023). Trump's lasting legacy the federal judiciary has been largely influenced by the decades of work by the Christian conservative legal movement. From Ronald Reagan to Joe Biden, Donald Trump is the President with the highest number of appointments to the federal bench, at a total of 218 (Heritage Foundation, 2024). With the *Dobbs* decision, this movement achieved its long term goal of overturning *Roe*. However, the movement has also been focused on other religious liberty rights as well as now restricting access to abortion even more so via challenging the Food and Drug Administration's authorization of the mifepristone, which is discussed later on in this book in detail as well as the outcome of the movements legal case against the government agency.

As discussed above, conservatives were aware that utilizing organizations, such as the Moral Majority was an important tool for mobilizing evangelical Protestants and other conservative Christians into politics during the 1980s (Ruby, 2007). However, religious conservatives were also aware that to push their public policy agenda, centered on traditional marriage, religious liberty, and right to life, they would also need to employ a legal strategy where they could influence legislation and take up legal battles in the courts to challenge statues that worked against these initiatives (Cole Smith, 2022; Bennett, 2015 and Bennett, 2018). As Lewis (2017) argues, within the last several decades, conservatives have taken a page out of liberals' play book in pushing a rights based legal approach. Conservatives have been doing this by turning religion into an individual rights argument in the form of conscientious protection legislation and the enactment of religious freedom restoration acts in conservative

states. This has led some conservatives to use legal challenges to push for individual rights for those who personally object to practices, such as abortion. Overall, religious conservatives have seen the need to embark on a more organized and coordinated legal strategy in the aftermath of *Roe*, hence the Christian Legal Movement was born with the development of Christian Conservative Legal Organizations (CCLOs) (Bennett, 2015; Bennett, 2017). The first CCLO, the Center for Law and Religious Freedom, was formed ten years after *Roe v. Wade* (National Catholic Report, 2017). Today, there are several dozen high-profile legal Christian advocacy organizations across the country (Cole Smith, 2022). Many of these CCLOs began with the support of Christian elites who saw the potential positive impact legal advocacy would have for their causes. For example, Pat Robertson established the National Legal Foundation and the American Center for Law and Justice, while James Dobson, Dennis James Kennedy, and Bill Right were pivotal in organizing the Alliance for Defending Freedom (ADF), and Jerry Falwell provided the Liberty Counsel with institutional support (Bennett, 2015).

CCLOs have been effective, as witnessed in their advocacy in the *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018) case, where the ADF represented the petitioner and bakery owner, Jack Phillips, who was accused of violating state law for denying making a wedding cake for a same-sex couple. The ADF helped successfully argue before the Supreme Court that the Commission violated Phillips' First Amendment "right to freedom of speech by compelling him to exercise his artistic talents to express a message with which he disagreed and would violate his right to the free exercise of religion" (Vile, 2023). The ADF was also successful in their appeal to the Supreme Court in *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017), where the Court held that Missouri's denial of the church's public grant application to purchase rubber playground surface material was a denial of their free exercise rights under the First Amendment because the playground was a public benefit, and the church was rejected because of its religious status. Furthermore, organizations such as the ADF were also at the forefront of *Dobbs v. Jackson Women's Health Organization* (2022), which overturned a women's constitutional right to an abortion under *Roe v. Wade* (1973).

There are several keys to CCLOs legal successes. One is that organizations, such as the ADF, create model legislation and pitch it to conservative state legislators to present as bills to pass into law. For example, the ADF created a "model" bill protecting life at fifteen weeks and coordinated with the Mississippi's legislature to get it to passed into state law. As a result, this abortion ban became the focal point of the *Dobbs* case (Alliance Defending Freedom, 2023). Two, CCLOs also work among each other to coordinate responses within the Christian legal movement, particularly with the filing of amicus curiae briefs, which attempt to influence the court's decision. For instance, the American Center for Law and Justice, as well as the Liberty Counsel each filed amicus briefs in their support of the ADF's appeal in the *Trinity Lutheran Church* case. Third, CCLOs will also coordinate with other organizations in the brief writing process (Dallas, 2017).

According to Ministry Watch, an organization that works to restore credibility to evangelical ministry work by increased transparency of these groups' activities, there are forty-two Christian legal advocacy organizations with IRS non-profit status (Ministry Watch, 2023). The Alliance Defending Freedom (ADF), which is focused on in this book due to its involvement in the legislation at the center of the *Dobbs* decision and its support of the Alliance for Hippocratic Medicine in its legal fight to end the Food and Drug Administration's regulatory

authority over emergency contraception, is the third largest revenue grossing CLO in the country. According to Ministry Watch and these groups' IRS tax filings per ProPublica's Nonprofit Explorer, Table 1 below list information about the top ten Christian legal advocacy groups in the country (Ministry Watch, 2023; Suozzo, Schwencke, Tigas, Glassford, and Roberts, 2023).

(Insert Table 1)

As the table above illustrates, CLOs are multi-issue organizations that are committed to the values of Christian conservatives, promoted primarily through legal strategies, including filing lawsuits, drafting model legislation, and public education campaigns (Dallas, 2017; Bennett, 2017; Alliance Defending Freedom, 2023). CLOs are part of the Christian Right and a facet of the Christian Legal Movement. While the Christian Right's activism focuses on political engagement, lobbying, and the election of like-minded candidates, CLOs provide a specialized legal mechanism that perpetuate the cultural wars, meaning the public divides over topics such as abortion, LGBTQ+ rights, traditional marriage, and religious freedom issues. CLOs help religious elites frame these issues within a legal context so that even though their positions may not align with most Americans (i.e., as noted above that over 60% of the country believe abortion should be legal in all or most cases) they command political discourse, keeping them at the forefront of policy debates, creating and influencing high stakes court cases, and capitalizing on division among the public and those in power (Bennett, 2017).

In looking at why social movements, such as the Christian Right and Christian Legal Movement go to court and organize via various CLOs, it is important to examine some of the sociolegal scholarship surrounding this question. Some argue that the answer is simple, activist look to the courts coercive power to either uphold legislation or public policy they favor or strike down measures supported or instituted by their opponents. Moreover, legal concepts, can be used to frame a movement's grievance and unite activists (Briker, 2023). This framing can be done with legal concepts, such as "right to life" or "religious liberty." Others argue that legal rights can be viewed as "political rights," that are resources used to alter public policy indirectly through increasing movement mobilization, bargaining power, and a sense of collective identity (Scheingold, 1974). On the other hand, some scholars argue legal movements should be wary of a false sense of hope in securing legal victories, as it can foster backlash by counter movements and activists (Tushnet, 1993; Vanhala, 2010). Furthermore, researchers also argue that court victories are "contingent" resources because securing them may spur possible media coverage and further coordination between legal professionals and activists (Briker, 2023). And, even if a group loses a legal battle, it can be beneficial in terms of elevating public consciousness on the issue (McCann, 1994; Bennett, 2017).

It is also important to discuss the American Catholic Church's conservative legal movement alongside the above noted groups who are largely evangelical Protestants. As previously mentioned, the pro-life movement, which tends to be dominated by Christian conservatives (Ballard, 2022), was largely made up of Catholics when it first started in the 1960s. In the aftermath of *Roe*, this movement diversified with evangelical and fundamentalist groups joining the ranks (Sabella, 2023). However, the Catholic Church pronounces that from the first century they have been against "the moral evil of every procured abortion" (Catechism

of the Catholic Church, 2016). And, in the twentieth century, the Second Vatican Council, in its 1965 *Gaudium Et Spes*, the pastoral constitution on the Church in the modern world, once again affirmed the Church's opposition to abortion. Since the decision in *Roe v. Wade*, the American Catholic Bishops have released dozens of teaching documents on the Church's position against abortion (USCCB, 2023a). Like many religious organizations in the United States, the United States Conference of Catholic Bishops (USCCB), the governing body for the Catholic Church in America, is tax exempt (USCCB, 2023b; USCCB, 2023c); however, this does not prohibit them from educating the laity or lobbying the government on public policy issues relevant to the faith. The American Catholic Church has long lobbied against abortion and contraception through their Office of Government Relations, which represents the USCCB before Congress (USCCB, 2023d). The USCCB is also active in supporting court cases on public policy issues of concern to the bishops. For example, the USCCB strongly opposed the Department of Health and Human Services' insurance contraception mandate under the Affordable Care Act in 2012 and filed amicus curiae briefs in support of several Catholic University and religious organizations, such as The Little Sisters of the Poor's lawsuits against the Obama Administrations' enforcement of this policy (USCCB, 2023e; USCCB, 2023f; USCCB, 2023g). The USCCB has also supported individuals, religious groups, and even corporations that are not Catholic based, but share the Church's position on these topics. For example, in 2014, the USCCB filed an amicus curiae brief at the Supreme Court of the United States in the support of Hobby Lobby, a closely held company, whose founder, David Greene, an evangelical Christian, successfully argued that the Health and Human Services' contraception mandate on employers violated the 1993 Religious Freedom Restoration Act (SCOTUSblog.com, 2014; USCCB, 2023g). In addition to the USCCB, other Catholic groups, such as the Thomas More Society, a not for profit public interest law firm supporting pro-life issues, traditional family, and religious freedom, as well as the Catholic Bar Association, have been active in their legal advocacy of these issues in both state and federal courts (Thomas More Society, 2023; Catholic Bar Association, 2023).

## **Dobbs**

Over one hundred and forty amicus curiae briefs were filed in the landmark Supreme Court case, *Dobbs v. Jackson Women's Health Organization* (2022), with ninety-one supporting the petitioner, the Mississippi State Department of Health and fifty-three favoring the respondent, the state's then only abortion clinic (Erskine, 2021). Arguments in these briefs covered a range of issues, such as viability standards established in *Roe* and *Casey*, the principle of stare decisis, legislative authority, constitutional philosophy and interpretation, gender equality, medical ethics, fetal personhood, maternal health, reproductive health, the impact on marginalized groups, domestic violence, and the meaning of substantive due process, just to name a few (*Ibid*). However, out of all the issues argued, Justice Alito's decision in *Dobbs* focuses on the majority's view that there is no substantive due process liberty securing a woman's constitutional right to an abortion. And, in the words of Associate Justice Clarence Thomas, the concept is "demonstrably erroneous" (p. 2301).

To understand the *Dobbs* decision and how the Court reached its holding, it is important to briefly unpack the controversial concept, substantive due process, along with the *Roe* and *Casey* decisions. The modern concept of substantive due process deals with the interruption

and application of the Fourteenth Amendment. The incorporation clause of this amendment, "...nor shall any state deprive a person of life, liberty, or property, without due process of law...." would start the selective incorporation process by which the Bill of Rights became applicable to the states (Hawley, 2014; Cornell Law School, 2023). In the twentieth century, during the "Lochner Era," this clause was used to strike down state laws that were interfering with economic liberty and freedom to contract, both considered fundamental liberties under the Fourteenth Amendment (see *Lochner v. New York* 1905; Waimber, 2015). The Lochner era ended with the ruling in *West Coast Hotel Co. v. Parrish* (1937), which favored state regulation of minimum wage. However, the concept that certain unenumerated liberties exist and were protected by the Constitution continued and were revisited in landmark cases, such as *Griswold v. Connecticut* (1965) paving the way for *Roe* and *Casey*. In *Griswold*, the Court held that penumbras of privacy exist within the Ninth Amendment, prohibiting states from preventing married couples from using contraception. Some argue that substantive due process was revitalized in this ruling, since the implied right to privacy was held as a fundamental right within the context of the Bill of Rights (Waimber, 2015). Eight years later, *Roe* would accept a similar rationale to strike down a Texas criminal abortion law which prohibited procuring or attempting an abortion except to save the life of the mother. In *Roe*, the majority agreed with the appellant's argument, that the Texas statute criminalizing abortion, improperly invaded individual liberty and privacy, "embodied in the Fourteenth Amendment's due process clause" and is "protected by the Bill of Rights or its penumbras," as held in *Griswold* (p. 715). In addition to announcing a woman's constitutional right to an abortion, *Roe* set up a trimester framework establishing up to a point of viability when an individual could terminate their pregnancy with varying levels of state interest. In the case, the Court gave this right a heightened standard of scrutiny from government regulation, but noted that it was not absolute, because at some point (see *Roe* for trimester framework) the state has a sufficiently compelling interest to "sustain regulation" (p. 154). Nineteen years later, *Casey* (1992), a case dealing with restrictive amendments to Pennsylvania's abortion statute affirmed the essential holding of *Roe*, upholding the substantive "liberty" for a woman to terminate her pregnancy but rejected the trimester framework, replacing it with the undue burden test. The undue burden test essentially held that a woman may elect to end her pregnancy before viability without undue interference from the state. In its plurality opinion, the Court upheld several of Pennsylvania's amendments, but stated that spousal notification requirement was unconstitutional.

So, what happened to the view of the Court's abortion rulings were "precedent on precedent" (Sneed, 2021)? Well, what happened was a long game strategy employed by the Christian Right and CLO, as evidenced by the legal advocacy of the Alliance Defending Freedom. In 2018, Becky Currie, a registered nurse and Republican Representative for Mississippi's House of Representatives, introduced the Gestational Age Act, based on a model bill crafted by the ADF in 2017. This bill protected life at fifteen weeks of pregnancy to satisfy three compelling state interests: protecting the life of the unborn, advancing women's health, and upholding the integrity of medical professionals in Mississippi (Alliance Defending Freedom, 2023). The bill prohibited abortions in the state except in times of medical emergency or severe fetal abnormality (*Dobbs v. Jackson Women's Health Organization*, 2023). The bill argued that at fifteen weeks of pregnancy fetuses have heartbeats, engage in physical

movement such as kicking, opening and closing fingers, hiccupping, and can likely feel pain. The law also noted possible medical risk posed to mothers after this gestational period. On March 19, 2018, Governor Phil Bryant signed the legislation into law and shortly thereafter, Mississippi's only abortion clinic, Jackson Women's Health Organization sued the state (Alliance Defending Freedom, 2023). The United States District Court for the Southern District of Mississippi granted the plaintiffs' summary judgement motion and enjoined the legislation in all applications. The United States Court of Appeals for the Fifth Circuit affirmed (*Dobbs v. Jackson Women's Health Organization*, 2023). Subsequently, the state petitioned the Supreme Court to hear the case. With the Court's conservative majority, due to Trump's three appointments: Neil Gorsuch, Brett Kavanaugh, and Amey Coney Barnett, the state felt confident in its position (Liptak, 2021). During this time, the ADF's appellate division worked with Mississippi's legal team to prepare their argument before the Court and on June 24, 2022, *Roe v. Wade* was overturned. Essentially, the Supreme Court held that the Constitution does not provide a right to abortion and that the authority to regulate such an activity is up to each state and their elective representatives (Alliance Defending Freedom, 2023; *Dobbs v. Jackson Women's Health Organization*, 2023).

### **The New Legal Battles in a Post-*Dobbs* America**

The *Dobbs* decision will undoubtedly impact constitutional interpretation for decades to come, as the current Court calls into question protections for unenumerated rights in the Constitution. This landmark decision was not only celebrated among Christian Conservatives and their affiliated legal movements but provided these groups additional momentum to take up other legal battles against abortion. These groups are keenly aware that though *Dobbs* returned the decision on abortion to the states, it did not prohibit them from electing to keep the right to terminate a pregnancy on the table. Therefore, CCLOs, such as the Alliance Defending Freedom and other groups, like the Alliance for Hippocratic Medicine have taken up a new charge in their effort to eliminate abortion in America, the fight over emergency contraception.

The purpose of this book is to evaluate where the American legal and political system is in the aftermath of the *Dobbs* decision. With the overturning of *Roe*, both conservative and liberal states have doubled down on their efforts to either restrict or expand access to reproductive services. In the absence of constitutional protections, abortions policies are decided at the state level, creating a hodgepodge framework and fueling legal and political battles ahead of and even after the 2024 General Election. The subsequent chapters navigate this fluid dynamic and its impact on the country by focusing on regulatory efforts to restrict the use of medicated abortion and the measures conservative and liberal states are taking to either curtail or expand reproductive rights in their respective jurisdictions.

Specifically, Chapter Two continues to look at the role of Christian Conservative Legal Organizations (CCLOs) and their desire to eliminate nearly all types of abortion in the United States. This is done by examining the case of the *Alliance for Hippocratic Medicine (AHM) et al. v. U.S. Food and Drug Administration* (2023). The AHM, with the help of the Alliance Defending Freedom and other groups, like the Christian Legal Society, filed a lawsuit over the FDA's two decade old approval of mifepristone, which, when used with misoprostol, works to formulate an abortion pill, one of the most common methods of terminating a pregnancy in the United

States. The AHM and ADF argue that the FDA abused its authority when it approved mifepristone in 2000 through an accelerated process. This chapter evaluates the legal arguments of the AHM and Biden Administration via the FDA, and examines how Christian-based interest groups, such as the ADF, continues its legal strategy to push and ramp up its pro-life agenda.

In a post-*Dobbs* America, the divide between “Red” (conservative/Republican) and “Blue” (liberal/Democratic) states has become more prominent, and the stakes surrounding reproductive rights have grown higher. With the aid of theories of how the dynamics of activism can influence policy outcomes, Chapter Three evaluates the current differences between “Red” and “Blue” states on abortion rights in this era (Yamane and Oldmixon, 2006; Layman and Weaver, 2016; Gonzalez, 2023). This chapter employs a qualitative analysis, examining which states protect access to abortion via state law, ballot initiatives, state constitution, executive orders, or a State Supreme Court precedent versus states that have utilize the legislature or courts to limit or completely deny access (Gonzalez, 2023). This analysis will also uncover the political and religious influences behind these state policies and how they further create a sense of tension on the abortion issue across the country’s federal system of government (Reingold, Kreitzer, and Swers, 2021; Calfano and Ponder, 2023).

Chapter Four gives an overview of where the United States is on abortion and its impact in upcoming elections. The chapter discusses how religious as well as progressive groups continue to influence the political process to get public policies on abortion implemented according to their views. This section concludes the book with a discussion on the Supreme Court’s ruling on the FDA’s authorization of mifepristone and what implications this decision has on the future of abortion access across the country. Overall, this chapter highlights how the issue of abortion underscores the point that elections matter and have long term consequences.

Finally, Chapter Five discusses the abortion issue factored into the 2024 Presidential Election. This chapter analyzes how the American people both voted overwhelmingly for Donald Trump but also supported key state initiatives that protected abortion access. This chapter also evaluates key cabinet positions in the new Trump Administration and how it will impact the status of abortion over the next four years. Overall, this chapter highlights how the issue of abortion underscores the point that elections matter and have long term consequences.

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