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Reversing Roe

A Case Study of Institutional Change of Abortion Rights in the
United States

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Abstract

Building on historical institutionalism, this paper explores gradual institutional change. As previous research on institutional change has focused on shifts towards gender equality, there is less known about gender-inequitable changes. The reversal of abortion rights in the United States by overturning *Roe v. Wade* (1973) demonstrates the need to study gender-inequitable changes. By being attentive to the characteristics of the U.S. government and legislative system when looking at this historical process, this paper seeks to contribute to our knowledge of how this reform of abortion rights has come about. This theoretical perspective facilitates the exploration of the institutional context by analyzing what kinds of strategies and behaviors by actors have been successful and what have failed. The actors seeking to challenge existing rules have been forced to adjust their strategies in the different phases of this process to achieve their long-term goal of reversing abortion rights.

Keywords: abortion, *Roe v. Wade*, United States, historical institutionalism, gradual institutional change, gender-inequitable change

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1. Introduction

During the last decades, the rise of the anti-gender movement has caused major changes in gender equality, as governments have implemented rather hostile policies towards women by denying them rights to contraceptives, including abortion and family planning services.¹ These policy changes seek to delegitimize feminist claims over gender and sexuality to reassert control over women's rights.² This development of gender backlash is also noticeable in the U.S. where the conflict over abortion rights has escalated. Throughout the past five decades, the right to abortion has become increasingly threatened by different types of restrictions. As of 2022, over 1300 abortion restrictions have been enacted by states to limit access to abortions.³ The right to abortion was implemented nearly fifty years ago by the Supreme Court in *Roe v. Wade* (1973).⁴ The precedent has since then been guaranteeing women the right to abortion. Yet, as of June 2022, the Supreme Court decided in *Dobbs v. Jackson Women's Health Organization* to withdraw the protection of abortion rights, thereby stating that abortion rights no longer holds constitutional protection.⁵ Thereby leaving it up to each state to decide whether a woman is able to choose abortion or not. Currently, most states do not reserve women the right to make that choice.⁶

There is a great deal of research on abortion rights in the United States, depicting the legal history and the dynamics of abortion politics with the increased polarization between pro-choice and pro-life movements.⁷ However, there has been less focus on studies where the government system is put in focus in relation to the outcome of abortion rights. Considering that political institutions are central to understanding legislative reforms⁸, it is important to capture the context of how U.S. legislation has shifted from protecting abortion rights to

¹ Anne Sisson Runyan & Peterson, V. Spike Peterson *Global gender issues in the new millennium*, Fourth Edition, Westview Press, Boulder, CO, 2014 p.231

² Elizabeth, S., Corredor, "The Right-Wing Myth of 'Gender Ideology'" *Logos Journal* (2022-10-08), <http://logosjournal.com/2022/the-right-wing-myth-of-gender-ideology/> [accessed 2023-01-27], (2022) p.5

³ Guttmacher Institute, "US states have enacted 1,381 abortion restrictions since *Roe v. Wade* was decided in 1973" 2022-06-21 <https://www.guttmacher.org/infographic/2022/us-states-have-enacted-1381-abortion-restrictions-roe-v-wade-was-decided-1973> [accessed 2023-01-29] see Appendix A.

⁴ *Roe v. Wade*, 410 U.S. 113 (1973)

⁵ *Dobbs v. Jackson Women's Health Organization.*, 597, U.S. ___ (2022)

⁶ Center for Reproductive Rights, After *Roe* Fell: Abortion Laws by State, n.d., <https://reproductiverights.org/maps/abortion-laws-by-state/> [accessed 2023-01-30]

⁷ Ziegler, Mary, *Abortion and the Law in America: Roe v. Wade to the Present* [Electronic resource], Cambridge University Press, 2020

⁸ James Mahoney & Kathleen Ann Thelen, (red.), *Explaining institutional change* [Electronic resource] *ambiguity, agency, and power*, (Cambridge University Press, Cambridge, 2010) p.8

abandoning them. Previous research indicates that processes of gender backlashes or gender-inequitable changes are difficult to identify as they appear gradually.⁹ In addition, studies on historical changes have tended to downplay observed changes or simply see them as old recurrences.¹⁰ Previous research on gradual reform changes has focused on shifts towards gender equality, there is less known about shifts against gender equality. Therefore, to capture the institutional context in this historical process of overturning *Roe v. Wade* (1973), this paper uses a historical institutionalist perspective exploring gradual changes to understand how the government system and legislative rules have enabled this institutional reform.

1.1 Research Question and Aim

This study seeks to investigate the gradual institutional changes in abortion right in the United States between the years 1973-2022 in order to understand how it has been possible to overrule *Roe v. Wade*. Using a historical institutionalist perspective to understand how the design of the institutional context itself, the U.S. government system, has affected this process by facilitating certain strategies and behaviors by actors to enable this change. This paper will serve as an illustrative case to increase our knowledge of what strategies have enable this gender-inequitable change. By focusing on abortion rights in the U.S. and how it no longer holds constitutional protection, this study will ask *what strategies have been used and what actors have been a driving force in this matter?*

1.2 Disposition

The paper is structured by first presenting an overview of previous research to situate the reader. Thereafter, it follows theory and methodical sections, which include the analytical framework, declaring how the analysis will be conducted. Previous to the analysis will be a brief introduction to the American justice system. The analysis follows a chronological order, starting with events in 1973 until 2022. This paper concludes with a summary and discussion of the results.

⁹ Roggeband, Conny, & Krizsán, Andrea, “Discussion Paper. Democratic Backsliding and the Backlash Against Women's Rights: Understanding the Current Challenges for Feminist Politics”, *UN Women* 35, (2020), p.9

¹⁰ Mahoney & Thelen 2010 p.3

2. Previous Research

The following section will account for what is known about this type of change, a backlash of gender equality, what has been said about this case regarding the history of implementing abortion restrictions, and the debate over abortion rights, and the actors have been involved.

2.1 Anti-genderism

Various research has noted a regression of gender equality in western societies during the last decades. This process is referred to as *backsliding*, *anti-gender mobilization*, or *anti-genderism*. Runyan and Peterson notes a global regression in women rights, by denying them rights to contraceptives, including abortions and family planning services during at the start of the twenty-first century.¹¹ Berthet also sees that the concept of gender equality has become increasingly contested within Europe regarding the Istanbul Convention.¹² The convention was founded to combat violence against women and particularly domestic violence in 2011. Poland, Türkiye, and Bulgaria have recently distanced themselves from the convention. Roggeband and Krizsán have noted this type of regression of gender equality to coincide with the decrease in the quality of democracy in western societies since the economic and financial crisis of 2008.¹³ This so-called *backsliding* refers to "increasingly hostile policy processes, where anti-gender equality positions negatively influence how policies are perceived and implemented and thus pose a potential challenge to the rule of law"¹⁴. More precisely, it encompasses state authorities withdrawing from previous commitments and discrediting gender-equality objectives— involving a lack of inclusiveness towards women's interests where the political discourses have been redirected from supporting gender equality policies to openly challenging them. Roggeband and Krizsán credit this reform being driven by transnational networks of conservatives, religious and right-wing actors aiming to influence political processes. Consequently, as they have gradually risen to power, this has allowed them to start the regression gender equality. Roggeband and Krizsán explain that this change has been seen in cultures where processes of democratic backsliding have occurred.¹⁵ However, these processes are difficult to identify as they occur in a gradual manner which results in political systems

¹¹ Runyan & Peterson 2014 p.231

¹² Valentine Berthet, "Norm under fire: support for and opposition to to the European Union's ratification of the Istanbul Convention on the European Parliament" *International Feminist Journal of Politics*, 24(5), (2022) p.676

¹³ Roggeband & Krizsán 2020 p.1

¹⁴ *Ibid.*, 29

¹⁵ *Ibid.*, p.8

emanating a mixture of political systems.¹⁶ Regarding the actors involved, it is evident how new actors seek to mobilize with more established actors like churches, conservative and religious civil society organizations, and political parties.¹⁷ Their strategies includes a wide range of activities with everything from having a strong online presence to working directly in political parties.

Corredor notes a trend tracing back to the 1990s of political mobilization against "gender ideology" rhetoric in the U.S.¹⁸ This trend is part of a global phenomenon established as a direct response to the new understandings of the social and cultural construction of gender and sexuality as socially constructed, known as *anti-genderism* in academia. The first mobilization against gender and sexuality as a social construct happened in 1995 at the UN Fourth World Conference on Women in Beijing from the Vatican. Being a permanent Observer at the UN, the Vatican opposed the new definition and inclusion of sexual rights adhering to a social construct. Instead, they proposed that gender as a definition ought to be grounded in biological identity, in which the Vatican successfully eliminated the idea of gender as a social construct and any other mentions of sexual orientation or sexual rights. In the years following, conservative religious forces developed the term *gender ideology* to counter the evolving definitions of gender.¹⁹ They argued that gender ideology was responsible for obliterating differences between sexes, promoting homosexuality and inciting gender confusion, and ideological aggression against girls and women rooted in ideas of rejecting the family. Since then, this Vatican discourse on gender has served as a rhetorical mobilizer with global success, as a way of organizing resistance and as a discursive force.²⁰ Moreover, Corredor states that strategies of gender ideology correspond to more than gaining media attention as it ultimately aims to delegitimize feminist research and instead reinstate epistemological and ontological control over gender and sexuality where women's rights are subjected to exist in place of victimization and subordination.

¹⁶ *ibid.*, p.9

¹⁷ Roggeband & Krizsán 2020 pp.4–7

¹⁸ Corredor 2022

¹⁹ *Ibid.*, p.3

²⁰ *Ibid.*, p.5

2.1.1 Regression of Abortion Rights in the U.S.

The regression of abortion rights in the U.S. is an example of a change against gender equality. Previous research depicts clear opposition toward women's right to autonomy and privacy started after the *Roe* decision. They originate from conservative forces mobilizing on federal and state levels to legally restrict women's reproductive rights. Regarding political parties, abortion rights have polarized Democrats and Republicans. Democrats have historically aligned with abortion rights defenders and Republicans with more traditional values regarding gender and sexuality.²¹ *Roe v. Wade* has, since its implementation in 1973, faced more than 1300 abortion restrictions,²² which has gradually undermined the precedent set by *Roe v. Wade*. Bentele, Sager, and Aykanian notice in their study of state-level legislation regarding abortion that regulations have drastically increased since 2008, with nearly three hundred restrictive laws passing in thirty-three states.²³ They conclude that anti-abortion policies are more frequent among states with Republican governance, with fewer female democratic legislators and strong representation of Evangelical movements within state governments. They attribute the success of anti-abortion policy development as a product of long-term investment into GOP²⁴ institutions by conservative evangelical movements. Restrictive laws regarding abortion are often done to take back control over women's reproductive healthcare access, particularly abortions.²⁵ One common strategy has been targeting the conditions of obtaining abortions, so-called TRAP laws. Following the 2010 midterm elections, as Republicans achieved high levels of state control, the number of restrictive laws increased significantly.²⁶ According to Hong, this backlash to abortion rights has been a well-planned campaign that started back in the 1970s as a response to the liberal ideas of Warren Court's case law following *Roe v. Wade*.²⁷ The law stipulated that the Supreme Court has a right to strike down state laws that were imposing on an individual's rights to decide over marriage and contraception. This decision invalidated most of the conservatives' abortion bans.

²¹ Tina Fetner, *How the Religious Right Shaped Lesbian and Gay Activism [Electronic resource]*, 2008

²² Guttmacher Institute 2022

²³ Bentele, Sager and Aykanian 2018

²⁴ GOP stands for Grand Old Party referring to the Republican Party of the United States.

²⁵ Amanda D. Greubel, "Benevolent Sexism in the Targeted Regulation of Abortion Providers (TRAP): A Case Study of Texas Bill 2." *Sex Roles. A Journal of Research*. 85(2), (2021), p.651

²⁶ Guttmacher institute 2022

²⁷ Kari Hong, "The Supreme Court's Draft Abortion Decision Overturning *Roe v. Wade*: How Originalism's Rejection of Family Formation Rights Undermines the Courts's Legitimacy and Destabilizes a Functioning Federal Government." *Montana Law Review Online*, 83(5), (2022), p.1

In her book *Abortion and the Law in America: Roe v. Wade to the Present* from 2020, law professor Mary Ziegler gives a comprehensive overview of the legal history of abortions and abortion politics surrounding the clash between the pro-life and pro-choice movements.²⁸ She depicts how shifts in the social and cultural environment have influenced the debate over abortions rights. By often weighing the positive and negative aspects of abortions, speculating whether society is better off since *Roe*. In these debates, Ziegler explains how certain strategies have been successful, whereas others have not, depending on the current political climate. At times long-term goals of overruling *Roe* have had to step aside for short-term gains of implementing restrictions. Ziegler also notes the strategic alliances formed between actors, most notably how abortion foes from organizations like American United for Life (AUL) and the National Right to Life Committee (NRLC) have united with the Republican Party to influence the political agenda.

2.2 Research gap

As the previous sections have highlighted, there is a great deal of research on regression against gender equality, as well as the history of abortion rights in the United States, focusing on the legal aspects and abortion politics, as well as research on *Roe v. Wade* (1973) being overturned. However, none of these studies has put the development of abortion rights into the context of the government system evaluating how it has affected how change is possible by facilitating certain strategies over others. Compared to Ziegler, who accounts for the overall legal history of abortion rights and the debate between both sides and what arguments have been used, this study specifically looks at the strategies and actors that have contributed to changing the governing standard of abortion rights. This perspective involves taking a deeper look into the institutional context, the characteristics of the American judicial system, and abortion rights to analyze how this has affected what type of strategies has prevailed throughout this process. It does so by using a theoretical framework focusing on governmental design and how the legislation produced in those systems has certain characteristics. The theory which sheds light on different modes of change, which contains different kinds of strategies and actors operating within those strategies. Therefore, when I refer to strategies in my research question it is connected to this theoretical lens. By focusing on the rules of and context around abortions, I conduct an independent analysis of how the abortion laws have changed, as this paper aims to contribute to our knowledge of how this change has come about.

²⁸ Ziegler 2020

3. Theory

3.1 Historical Institutionalism

Theoretically, this paper is deployed from a historical institutionalist perspective which is interested in how institutions, such as governments, evolve over time.²⁹ It focuses on understanding how the institutional context affects actors' future decision-making as the design of an institution made by actors affects what types of changes an institution is prone to. Compared to other perspectives of institutionalism that do not consider long-term perspectives on a macro level. Institutions are understood "as rules, norms and procedures" structuring actors behavior and function as "relative features of political and social life"³⁰. It serves as a useful tool for this paper because of its interest in explaining historical processes, allowing this research to consider the historical context of abortion rights between 1973-2022 to understand better how the rules and regulations of abortion have changed. As most political institutions oversee the mobilization of resources, they are central to considering understanding why certain actors are given resources and others are not.³¹

From a historical institutionalist perspective, institutions are understood to have distributional elements that subjects them to reflecting and reproducing certain effects of power.³² Depending on what political arrangements institutions reflect particular interests, which often result in an inequality of power and resources between actors as the distributional consequences reflect the rules of the institution. Therefore, the actors operating within institutions ought to be strategic in obtaining their goals, sometimes even going as far as changing their goals to accommodate the institutional context. For this case of abortion rights, the distributional effects refer to women's access to abortions, and depending on the actors' interest, the resources meaning the access to abortions may vary. When analyzing political struggles from a historical institutionalist perspective, it is critical to see how institutions and actors operate to understand how institutions contour actors' behaviors.³³

²⁹ Lowndes, Vivien & Mark Roberts Lowndes, Vivien & Roberts, Mark, *Why institutions matter: the new institutionalism in political science*, Palgrave Macmillan, Basingstoke, Hampshire, 2013, p.31–38

³⁰ Mahoney & Thelen 2010 p.4

³¹ Ibid., p.8

³² Georgina Waylen, "What Can Historical Institutionalism Offer Feminist Institutionalists?" *Politics and Gender*, 5(2):, (2009) p.5

³³ Waylen 2009 p.5

3.2 Gradual Institutional Change

Previously historical institutionalists have frequently focused on critical junctures that open for change exogenously otherwise embedded in periods of stability of path-dependence.³⁴ From this viewpoint, agents are limited to implementing changes when the normal constraints are lifted. According to Mahoney and Thelen, this is problematic because change is intertwined with stability, meaning that institutional changes do not only occur at these times; rather change happens constantly, even in times of stability due to the dynamic component of institutions.³⁵ Thus, they argue that stability and change should be viewed as synonymous since it requires continuous efforts to keep institutions stable.³⁶ According to Mahoney & Thelen institutions are prone to gradual changes over time, and their changes have substantial political outcomes.³⁷ These incremental shifts can, over time, have just as much of an effect on institutional changes and, thus, people's behavior through its distributional effects. In some cases, the type of change has been closely related to the institutions character. If the institution has inherent ambiguities, the type of change will likely be related to that ambiguity, as it promotes certain behaviors.

The result of only considering change possible during critical junctures following previous scholarship on historical institutional change is that it assumes that abrupt shifts are more important than any other type of change because it obscures other possibilities of change. As it tends to downplay observed changes or see them as old recurrences. This concept of history being path-dependent can be problematic as it focuses more on stability than change, which restricts shifts in ideas by seeing institutions as more static concepts which risk being overly deterministic. Considering this gap in looking at gradual changes, Mahoney and Thelen felt they needed to develop equally sufficient theoretical tools to analyze endogenous changes.³⁸ As it is evident that political institutions, such as governments, are not only subjected to abrupt changes but relatively slow and subtle evolving shifts. This is even noted in research on anti-genderism, arguing that processes of regression on gender equality are difficult to identify due to their gradual development.³⁹ This trend demonstrates the importance of considering the inherent characteristics of the institution going through a change, particularly in cases of gender-inequitable change.

³⁴ Katznelson, 2003 in Mahoney & Thelen 2010 pp.3, 7

³⁵ Mahoney & Thelen 2010 p.3

³⁶ Ibid., p.9

³⁷ Ibid., p.3

³⁸ Ibid., p.2

³⁹ Roggeband & Krizsán 2020 p.9

3.2.1 Modes of Change

Mahoney and Thelen have developed a framework to explain gradual changes.⁴⁰ This theory highlights how the institution's specific and political contexts are crucial to understanding as they permit particular kinds of change. Before going into detail about each type of change, it is important to consider two permanent features of change, ambiguity, and compliance.⁴¹ Institutions hold various properties that, in turn, determine various potential types of change. Firstly, it is never possible to rule out ambiguity in rules, seeing as they can never be precise enough, they can give actors leeway to find new ways of implementing of old rules. These gaps open up for different subordinated movements to interpret ambiguous rules differently depending on their agenda. Even when rules are formalized, as in the case of U.S. abortion rights, they can still be subjected to competing interpretations. Considering that abortion is never mentioned in the Constitution, different beliefs about abortion has developed. Abortion rights defenders believe abortion rights should be protected under the *individual right to privacy*, and those opposed to abortion consider the *right to life* to be extended to a fetus, some even going as far as to believe that life begins at conception. Secondly, as rules can never be without enough ambiguity to cover all potential real-world situations, it results in issues with compliance. As institutions face new realities and must accommodate unforeseen circumstances, their rules have to adjust. Due to the cognitive limits of actors, it is impossible for them to anticipate future situations. For instance, the founding fathers of America did not foresee issues with abortion rights when writing the Constitution or how their ideas in the Fourteenth Amendment regarding rights would be subject to such ambiguous interpretations regarding abortions.

Depending on what type of change is successful it is possible to locate different change strategies and actors operating within them, as they promote different kinds of gradual change.⁴² The four modes of institutional change, *displacement*, *layering*, *conversion*, and *drift*, all entail various degrees of gradual changes. Displacement refers to the act of removing existing rules and adding new rules. This type of change can occur more or less abruptly, often involving a radical shift. For instance, when institutions break down and are replaced with new ones. Whereas layering acts only involve adding new rules to existing ones and do not require displacing the old institution. This act can happen through amendments or revisions. In contrast,

⁴⁰ Mahoney & Thelen 2010 pp.15–32

⁴¹ Ibid., pp.10–11

⁴² Ibid., p.4

drift strategies do not seek to reform formal rules, as the strategy instead wants to change the impact of current rules due to shifts in the environment. Similarly, acts of conversion do not seek to reform formal rules, as it entails reinterpreting old rules in new ways by taking advantage of any ambiguity in the rule which enables different enforcements.

There are three questions to consider to determine what mode of change has occurred and what kinds of actors have been involved. First, we have the question regarding power. When it comes to power and institutions, depending on what type of change actors aim to achieve, power can be crucial for that change to succeed. For instance, displacement strategies require those opposed to change not to sustain veto power to block changes. Similarly, acts of conversion are unlikely to happen when the status quo possesses strong veto possibilities, as they could intervene with rule enforcement in modes of conversion. Veto possibilities are high when actors are able to resist changes.⁴³ In contrast, for instances of layering and drift to be successful, the actors defending old rules can still have strong veto possibilities. This is possibly because neither of these strategies directly impose on old rules. In other words, actors working at a disadvantage trying to implement changes can still be successful. So, in cases where actors lack the capacity to change the original rules through displacement, it is common for layering to occur.

The second question asks “what level of openness there is for competing interpretations?” and this is key to consider as it can enable contending interpretations and variations of rule enforcement within the institution.⁴⁴ Depending on the institutional context, rules have different levels of ambiguity between interpretation and enforcement. Acts of drift and conversion are change modes that rely on these soft spots, in order for them to succeed there needs to be a higher level of openness in the rules. For instance, researchers have identified acts of conversion regarding the American Constitution.⁴⁵ Due to the vagueness of the commerce clause, it allowed actors to use different interpretations to enforce the clause differently. The actors managed to implement significant changes in civil rights during the 1960s without making any formal changes to the commerce clause itself. In contrast, acts of displacement and layering are not as

⁴³ Mahoney & Thelen 2010 p.19

⁴⁴ Ibid., p.20

⁴⁵ Ibid., p.21

reliant on the openness in the rules themselves to implement change, as they do have to rely on ambiguity to be successful.⁴⁶

The third question considers if the actors working within these strategies are with or against the current institutional rules.⁴⁷ Identifying what kinds of change agents are in place and are successful helps explain what type of change strategy has occurred. Considering how institutions produce distributional effects, change agents are seen as defenders or opposers of the existing rules and regulations. Actors opposing change usually belong to the status quo side, understood as the “winners” of the existing rules, and actors who initiate change are understood as “losers” by not benefitting from the existing rules. However, it is not as simple as viewing them as losers or winners, as it is important to distinguish between actors’ short-term behavior versus their long-term strategies. A short-term behavior defending an institution can disclose a long-term strategy of opposing the current institution. Change agents working within acts of displacement and layering oppose existing rules. However, they operate differently as layering strategies cannot involve any directly challenge the old system. Contrarily, actors working within displacement strategies can avoid adhering to the rules of the old institution as they seek to eliminate it. When it comes to actors working within drift strategies, they rely on the current institution, making them defend rather than oppose it. Lastly, actors operating within conversion strategies can be defendants or opponents of existing rules. It depends on what suits their motives and the opportunities within the institution.

3.2.2 Gender and Institutional Change

Previous literature on feminist institutional change has focused on changes that reduce gender inequalities and factors that inhibit or enable them.⁴⁸ Before mentioning what strategies are frequent in gender-equitable changes, it is important to understand how gender relates to institutions. When it comes to gender and institutions, Josefsson explains that many political institutions reflect a culture of masculinity due to the historical male dominance in politics.⁴⁹ Meaning that the same rules tend to benefit men and disadvantage women, which subsequently

⁴⁶ Ibid., pp.21–22

⁴⁷ Mahoney & Thelen 2010 pp.22–27

⁴⁸ Waylen, Georgina, “Informal Institutions, Institutional Change, and Gender Equality”, *Political Research Quarterly*, 67(1), (2014), pp.212–223

⁴⁹ Josefsson, Cecilia (forthcoming) "Chapter 2: The Resistance Stage Model" in *Defending the Status Quo: on Adaptive Resistance to Gender Equality Policy*, p.5

affects their distributional resources. Consequently, when institutions with a gendered logic tend to be biased towards sitting political elites and resist changes to protect the status quo, they prevent gender equitable changes. This bias affects how actors behave and their strategies to reach their goals. In cases of a formal rule change in favor of gender equality, it is often brought on by so-called *gender equity entrepreneurs* who do not possess veto power.⁵⁰

Considering the gendered logic of institutions regarding gender-equitable institutional changes, layering and conversion strategies are most likely as neither of them seek to displace the old rules.⁵¹ Layering has been quite common for gender-equitable change as it has the potential to transform institutions gradually and can still succeed when the opposition has veto power. However, it is essential to note that its effectiveness varies as these changes are unlikely to reconfigure the inherent gendered logic of institutions. Conversion is also a likely strategy for gender-equitable change, as it involves new interpretation by taking advantage of possible ambiguities within the institution.⁵² Nevertheless, it could be considered a risky strategy as it relies on continuous efforts to make the new interpretation stick as it holds no formal ground. In contrast, displacement is an unlikely strategy to implement gender-equitable change as gender equity actors tend to lack enough power to replace old rules.⁵³ However, there are instances where new institutions with gender dimensions have risen. For example, as part of post-conflict constitutions where most of the old status-quo rules and actors are gone, giving room to new actors to act and implement new rules. Drift is also unlikely as a strategy for achieving gender-equitable changes because it is not time efficient. However, during certain circumstances, it can function as a strategy for gender equality on an informal level, for example, by turning a blind eye to bans or rules that affect women.

⁵⁰ Josefsson (forthcoming) pp.1–2

⁵¹ Waylen 2014 p.219

⁵² Ibid., p.220

⁵³ Ibid., pp.218–219

3.4 Analytical framework

| “Modes of gradual institutional change” | Definition (type of change) | Do the defenders of old rules have strong or weak veto possibilities? | What level of openness for contending interpretations is there? | Are the actors involved a defender or opponent of current rules? |
|---|---|---|---|--|
| Displacement | Existing rules are replaced by new ones | Weak veto possibilities | Low level of openness | Opponent |
| Layering | When new rules are attached to old ones | Strong veto possibilities | Low level of openness | Opponent |
| Drift | When formal rules remain the same but their impact changes due to external conditions | Strong veto possibilities | High level of openness | Defender |
| Conversion | Same formal rules but new interpretation | Weak veto possibilities | High level of openness | Defender or Opponent |

Table 1: “Modes of Gradual Institutional Change”

3.4.1 Operationalization

By using a modified version, of the theoretical framework from the *Theory of Gradual Institutional Change*, this paper will analyze the institutional context of abortion rights in the U.S. between the years of 1973 to 2022 to understand how this reform change has been able to take place.⁵⁴ The first step to operationalize this theory will be to identify what kind of mode of gradual institutional change that has taken place. In order do to so, the theory has been broken down into three different questions, to determine which of the four modes of change have taken place. Each mode represents different strategies and actors operating within those strategies. By asking each of the questions in the table, it will function as an analytical tool to process the empirical material. Through this assessment, I can answer the research questions by identifying what type of change strategy has occurred and what actors have been involved transparently. Highlighting the historical process with the empirical material and making sense of it through this analytical framework. Regarding the scope of this paper, I have chosen not to elaborate further on the kinds of change agents, as I still will be able retain vital information of change actors and add important context to the strategies.

⁵⁴ Mahoney & Thelen 2020 pp.15–32

4. Methodology

4.1 Interpretive Process Tracing

This paper focuses on a single case, and in line with the case study design, it aims to get a deep understanding of a particular phenomenon by detailed and intensive analysis.⁵⁵ Meaning that it is concerned with the nature of the case in question. Therefore, this paper deploys a process-tracing method as it allows for exploring a historical process by describing a sequence of events.⁵⁶ This study aims to understand how strategies deployed by abortion foes have sought to gradually restrict abortion rights from 1973 until 2022 in the United States. Hence, to grasp the context of actors' behaviors in this case, it calls for a qualitative approach with an interpretative viewpoint.⁵⁷ Given that an interpretative perspective can offer an in-depth understanding of a social phenomenon.⁵⁸ More specifically, this form of process tracing is focused on explaining outcomes, relying on an abductive logic to explain the outcome of a historical case.⁵⁹ The objective for explaining outcomes is more case-centric than theory-oriented requiring more of an eclectic approach, relying on a combination of different mechanisms, such as non-systematic, to account for or “make sense” of the process. This method goes well with some key claims of historical institutionalist analysis believing that political processes are best captured if studied over time.⁶⁰ The analytical framework developed will act as a bridge to connect theory and method to study the historical process through the empirical material. Additionally, as this study emphasizes the context for this case, generalizability is not in focus. However, this does not mean there is no value to the conclusions found in this case, as they aim to provide new insight into processes of gender-inequitable change. As pointed out by Beach & Pedersen, outcome-centric cases can still provide lessons that can be applied to other comparable cases in the future.⁶¹

⁵⁵ Alan Bryman, *Social research methods*, 4. ed., Oxford University Press, Oxford, 2012, p.66-68

⁵⁶ Andrew Bennett, Andrew & Jeffrey T. Checkel, (red.) *Process tracing: from metaphor to analytic tool*, Cambridge University Press, Cambridge, 2015 p.8

⁵⁷ Marsh, David, Marsh., Selen A. Ercan & Paul Furlong, “A Skin not a Sweater: Ontology and Epistemology in Political Science” in *Theory and Methods in Political Science*, red. Vivian Lowndes, eds. (London Palgrave, 2018) pp.181–182

⁵⁸ *Ibid.*, p.190

⁵⁹ Derek Beach & Rasmus Brun Pedersen, *Process-tracing methods: foundations and guidelines*, University of Michigan Press, Ann Arbor, 2013 p.3

⁶⁰ Vivien Lowndes, & Mark Roberts, *Why institutions matter [Electronic resource] the new institutionalism in political science*, Palgrave Macmillan, Basingstoke, Hampshire, 2013 p.37

⁶¹ Beach & Pedersen 2013 p.156

4.2 Methods for Data Generation

The empirical analysis consists of various types of documentation from 1973, when *Roe v. Wade* (1973) was implemented, until 2022, when the decision was overturned. By relying on an interpretive perspective for gathering material or data, the data in this study is understood as co-generated.⁶² Meaning that the data is created in the process by the researcher and from the research question(s) and that it is not an objective measure of this phenomenon. Regarding the scope of material for process tracing methods, Bennett & Checkel recommends relying on a chronological approach, where one is attentive to theoretically relevant actors.⁶³ It is also important to be open to inductive insights as it will benefit from gathering more evidence that can further explain the outcome.⁶⁴ Therefore, to gather material this study has mapped for exposure. Seeking exposure to a variety of meanings, as there are various perspectives within the research setting to get acquainted with. By mapping out the most relevant court cases, important actors Republican Party, AUL, and NRLC and important settings Supreme Court and Congress to understand how the rules have changed by identifying the actors involved in initiating this change, and the strategies they used. Additionally, to sample empirical material, I have used keyword searches in Google Scholar (Roe. Wade, Planned Parenthood v. Casey, Dobbs v. Jackson Women's Health Organization, U.S. abortion rights, pro-choice strategies) to get exposure to relevant material.

In addition, I have relied on a purposive selection strategy, meaning the intentional selection of documents and literature thought to have something to contribute to the context, where the process stops when saturation is achieved.⁶⁵ This includes both primary and secondary sources; legislative records, such as transcripts and oral arguments from Supreme Court rulings, Congress decisions and historical records of party divisions of the House of Representatives; new articles containing actors' statements; and literature documenting the context surrounding abortion law and politics in the United States. It is important to note the tradeoff with this selection strategy, as it allows the researcher to be attentive to new insights regarding theoretically relevant actors and happenings. At the same time, it does not offer a transparent way of sampling material as other methods of sampling. Similar to how ethnographers are

⁶² Dvora Yanow & Peregrine Schwartz-Shea, (red.), *Interpretation and method: empirical research methods and the interpretive turn*, 2. ed., M.E. Sharp, Inc., Armonk, N.Y., 2013, p.80

⁶³ Bennett & Checkel 2015 p.171

⁶⁴ Ibid., p.172

⁶⁵ Yanow & Schwartz-Shea 2013 p.87

forced to gather information from whatever sources are available to them⁶⁶, this study has been limited to secondary sources when it comes to grasping the context from initiatives of certain actors in the pro-life movement by using literature and new articles. This choice can be criticized as it is always to prefer using primary sources to ensure validity and credibility. However, the only means available for this study have been these secondary sources which still can provide value to the study by working as a compliment by adding context to the primary sources of court rulings.

⁶⁶ Bryman 2012 p.424

5. U.S. Legislation

This section aims to give further insight into the American judicial system. In accordance with the judicial system in the U.S., the Constitution functions as governing standard for different institutions, such as abortions. The Supreme Court rulings sets federal judicial precedents that works as laws (*stare decisis*).⁶⁷ To understand why certain practices have or have not been authorized in states, one has to look at the Supreme Court cases and their judicial argumentation. Depending on the Supreme Court's governing standard State Governments can pose different challenges to the precedents. Regarding the seats in Supreme Court, the Senate approves judicial appointments to the U.S. Supreme Court.⁶⁸ Meaning that justices are nominated by the president, and for them to be appointed, they need support from the Senate. In total, there are nine justices in the Supreme Court, including a chief justice and eight associate justices. The justices typically hold office for life, and they are not supposed to be reflective of public opinion, something they themselves note in the *Dobbs* decision.⁶⁹ However, it is evident that justices appointed to the Supreme Court have party affiliations. Hence, they are in no way selected independent from their politics, which is evident when looking at appointments made.⁷⁰

To change legislation, i.e. for displacement to transpire in the U.S. legislation, it requires that three key institutional veto players are in unison.⁷¹ The three key actors are the state legislature, consisting of the senate and the house, and the governor. What determines if these actors are in congruence are political parties is if the same party control them, chances increase for them to implement a new legislature. Political parties are a great gateway for societal actors to access the political arena to influence legislation and nominations to the Supreme Court. Therefore, politicians are prone to be key allies for change actors as well as defenders of the status quo. Bringing mobilization capacity and other resources to improve electoral prospects enables societal actors to pursue their own agenda within the party and thus affect the agenda. Therefore, interest groups like churches and organizations have been able to elect party officials to champion their issues through their contributions of money and campaign workers.

⁶⁷ American Bar Association, *Understanding Stare Decisis*, 2022, https://www.americanbar.org/groups/public_education/publications/preview_home/understand-stare-decisis/ [accessed 2023-02-22]

⁶⁸ United States Courts, Supreme Court Procedures, n.d., <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> [accessed 2023-02-22]

⁶⁹ *Dobbs* 597 (2022),

⁷⁰ Hong 2020 p.5

⁷¹ Giulia Mariani, "Failed and successful attempts at institutional change: the battle for marriage equality in the United States" *European Political Science Review*, 12 (2020), p.258

6. Analysis

The following process tracing analysis consists of a theoretical framework from Mahoney and Thelen (2010). The analysis is structured accordingly by first presenting a sequence of events using the empirical material, which is then accompanied by analysis using the analytical framework. The framework consists of three questions that will be applied in order to determine what type of gradual change has transpired. With the help of the questions, it will be possible to identify the types of strategies and actors involved and thus answer the research questions. The analysis has been divided into three phases, following a chronological order from *Roe v. Wade* (1973) being implemented until its displacement in 2022. Each phase revolves around one of three Supreme Court Cases, *Roe v. Wade* (1973), *Planned Parenthood v. Casey* (1992), and *Dobbs v. Jackson Women's Health Organization* (2022), considering their influence on the governing standard of abortion rights.

6.1 Phase 1 – *Roe v. Wade*

The first period depicts the context of the implementation of *Roe v. Wade* (1973) and the opposition that has risen from anti-abortion movements after its implementation. Including both successful acts of layering and failed strategies of displacement.

6.1.1 Early Resistance Against Abortion Rights

In 1973 the Supreme Court ruled on a case called *Roe v. Wade*. The case stipulated the right to abortion until the fetus can survive outside the womb.⁷² This decision rested on ideas pertaining to the individual right to privacy. By formulating a trimester framework, the court was able to determine when in a woman's pregnancy her health became a compelling state of interest. It was decided after the first trimester of pregnancy, when the fetus was considered viable. This decision permitted the states to ban abortion after viability due to their interest in potential life. Considering how this decision carried with it an expansion of rights, it managed to abolish many state laws on abortion.⁷³ This decision was rooted in ideas of an individual's right to privacy. In the years previously, during the 1960s and 1970s leading up to *Roe v. Wade* (1973), the Supreme Court formulated protections under the Fourteenth Amendment to protect one's

⁷² 410 U.S. 113 (1973)

⁷³ Ziegler 2020 p.20

right to choose one's family.⁷⁴ This court, led by Chief Justice Earl Warren, also known as the Warren Court, famously acknowledged these rights. Essentially this enabled the Supreme Court to interfere with state policy whenever they considered state laws to marginalize or deny certain groups their democratic rights.⁷⁵

Following the *Roe* decision, pro-choice and pro-life movements clashed over rights-based claims. The abortion foes advocated for an amendment to the Constitution to ban abortions.⁷⁶ When this failed, pro-life organizations such as American United for Life (AUL) and National Right to Life Committee (NRLC) instead decided to focus on temporary solutions by targeting legal access to abortion. The NRLC even started investing in legal resources to help in Courts.⁷⁷ Here, it is noticeable how the strategy to change abortion rights gradually starts. Legislators on the pro-choice side started by targeting low-income and young women by severely restricting federal funds to cover the costs of abortions through Medicaid funding. These restrictions were passed in Congress in 1976 in the Hyde Amendment, that banned the use of federal funds to finance abortion.⁷⁸ The same year another type of state restriction was authorized, in *Planned Parenthood of Central Missouri v. Danforth* (1976) but this restriction targeted informed consent.⁷⁹ This Missouri law required women seeking to obtain an abortion were required to sign a consent form. Although the Supreme Court, in their decision, deemed the majority of restrictions in this case imposed on the constitutional rights of abortion, some restrictions like informed consent passed. During the following year, the anti-abortion movement had more success with implementing more regulations that limited state funding for abortions. In *Maher v. Roe* (1977), the Supreme Court decided that laws restricting abortion funding do not violate the Equal Protection Clause of the Fourteenth Amendment as it does not constitute an obstacle for women to obtain abortions nor “impinge upon the fundamental right recognized in *Roe*”⁸⁰.

⁷⁴ Hong 2022 p.12

⁷⁵ Geoffrey, R. Stone, David, A. Strauss, “The legacy of the Warren Court”, *American Heritage*, 64(1), 2020 <http://www.Americanheritage.com/legacy-warren-court> [accessed 2023-01-23]

⁷⁶ Ziegler 2020 p.3

⁷⁷ *Ibid.*, p.44

⁷⁸ Congress.gov. “H.R.14232 – 94th Congress (1975-1976): An Act making appropriations for the Department of Labor, and Health, Education, and Welfare, and related agencies, for the fiscal year ending September 30, 1977, and for other purposes.” September 30, 1976. <https://www.congress.gov/bill/94th-congress/house-bill/14232/summary/48> [accessed 2023-01-31]

⁷⁹ *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976)

⁸⁰ *Maher v. Roe*, 432 U.S. 464 (1977) see syllabus under b)

In 1980, as the Republicans won the presidential election in, it gave abortion opponents more hope of achieving Constitutional change.⁸¹ Around that same time, an alliance was created between anti-abortion groups and the Republican Party, as pro-lifers started to realize that if they could control the membership of the Supreme Court through political ties, this would give increase their chances at overturning *Roe* as it had become evident of how much power the justices hold in terms of abortion legislation. With Chief Justice Warren Burger's retirement in 1986, President Regan was able to appoint new Justice associate William Rehnquist as Chief Justice and nominate Antonin Scalia to replace Rehnquist.⁸² Not only did Reagan succeed in appointing a known abortion critique as head of Supreme Court and nominate a new conservative justice, but he subsequently also managed to remove an old *Roe* spokesperson. Congress then later confirmed Scalia in a unanimous decision. Justice Lewis Powell decided to retire a year later, and Anthony Kennedy replaced him in 1988. Ziegler explains that justices Scalia and Kennedy were seen as key by NRLC leaders to overrule *Roe* when the time had come.

It is also worth mentioning that there were some divisions within the anti-abortion movement as they were unable to unify on strategies, which the Hatch Amendment made evident.⁸³ Pragmatics within the anti-abortion movement had promoted additional restrictions to abortions for almost a decade since *Roe* was implemented. However, now they started getting criticism from absolutists that wanted to implement more drastic laws. In general, pragmatics preferred the Hatch Amendment which proposed to change the Constitution to remove *Roe* and instead let states decide over abortion rights. Absolutists preferred a more drastic law known as the Human Life Bill (1981), which wanted courts to recognize "unborn children as legal persons from the moment of conception".⁸⁴ In contrast, evangelical protestants in the anti-abortion movement were primarily interested in pursuing strategies outside of the court, blocking access to abortion clinics.⁸⁵ In addition there was a fear within the Republican Party that a reversal of *Roe* would decrease public support for the party, as polls consistently had reported that the majority of American were in support for abortions to remain legal.⁸⁶ In a response anti-abortion lobbyists started to focus the cost of abortions with concerning ideas of the family to win over

⁸¹ Ziegler 2020 p.3

⁸² Ibid., p.85

⁸³ Ziegler 2020 pp.64–66

⁸⁴ Ibid., p.65

⁸⁵ Ibid., p.59

⁸⁶ Ibid., p.91

the public. By claiming that legal abortions were a threat to husbands and fathers as the authority of the family as they excluded men and exploited teenagers. Anti-abortion lawyers began pushing for an agenda of parental involvement laws to defend the idea of the traditional family to gain public support for abortions to be restricted.⁸⁷ The family involvement laws required women to consult with their parents or spouse, and this would ensure that men still could be the head of household. The idea of the traditional family also glued the anti-abortion movement together with evangelical pro-life organizations.

During the 1980s, the anti-abortion movement continued to challenge Roe's precedent on different fronts. In *Harris v. McRae* (1980), the Supreme Court maintained that it was not unconstitutional to withhold financial resources to abortion procedures.⁸⁸ In *Thornburg v. American College of Obstetricians & Gynecologists* case of 1986 the anti-abortion side lost with a 5-4 vote.⁸⁹ The Court retained that the requirements from the Pennsylvania law were inflicting with the right to privacy and stated that "States are not free, under the guise of protecting maternal health or potential intimidate women into continuing pregnancies."⁹⁰ Ziegler explains that although it was another loss for the abortion foes in Supreme Court, it was still considered by some as a win because the majority of justices supporting *Roe* had gone down to five votes.⁹¹ In 1989, the Supreme Court ruled in favor of abortion critics in *Webster v. Reproductive Health Services* from the state of Missouri.⁹² This case addressed the constitutionality abortions rights and subsequently challenged the precedent set by *Roe*. One of the things the Missouri statute required were for women to get a viability test after twenty weeks to see if the fetus could survive outside the womb. This test is problematic because it imposes on *Roe's* viability framework as the fetus is considered non-viable during the first trimester, which authorizes a woman to obtain an abortion without state interference. The Missouri law also held that life begins at conception. By authorizing this, the Court subsequently criticized *Roe's* trimester framework by not deeming any of the provisions in the law to infringe upon the right to privacy. With the decision landing 5-4 in the anti-abortion side's favor, Ziegler explains that it was a clear indication to pro-lifers that they potentially had five justices on their side.⁹³

⁸⁷ *Ibid.*, p.92

⁸⁸ *Harris v. McRae*, 448 U.S. 297 (1980)

⁸⁹ *Thornburg v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), Ziegler 2020:84

⁹⁰ 476 U.S. 747 (1986) p.758-771

⁹¹ Ziegler 2020:84

⁹² *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989)

⁹³ Ziegler 2020 p.105

During the following year, the Court continued to lean in favor of the abortion foes by allowing state courts to require parental consent laws in cases of minors seeking abortions, see *Hodgson v. Minnesota* and *Ohio v. Akron Center* (Akron II).⁹⁴

6.1.2. Acts of layering strategies

During these two decades after *Roe v. Wade* (1973), quite a few restrictions were implemented to challenge the precedent set by *Roe*. The key actors involved were the Republican Party and organizations like the AUL and NRLC, who eventually joined forces to challenge abortion rights legally by implementing incremental restrictions. Considering the first question for determining the mode of gradual change, power, we know that when veto power is high, it affords the status quo to block change from within the institution. In this power struggle over abortion rights, it is notable that the challenging side, the Republicans, lack enough power on the federal level to overrule or remove *Roe*. However, this does not stop them from implementing new laws to regulate abortions. They successfully implement different forms of restrictions, most notably with the limitation of federal funds and the requirements of consent laws. As long as the restrictions do not directly challenge the unconstitutionality of abortions, they are able to pass. This feature is typical for acts of layering, as such processes tend to occur when those seeking change lack the capacity to change the original rules.⁹⁵ It is also notable how anti-abortion challengers have gradually increased their power relative to the abortion rights side by controlling the nominations to Supreme Court during the 1980s. Their increased power is evident by looking at the subsequently bolder types of cases that pose more of a challenge to *Roe* than before.

Regarding the second question, level of openness, for layering to occur, it is not necessary to rely on the ambiguities within the institutional rules to be successful.⁹⁶ They do not have to interpret existing rules in new ways, rather they seek to add an addition giving the original rule a new meaning. For example, abortion is still authorized in Missouri but there is a need for a woman to sign a consent form.⁹⁷ Here, in this case, the actors trying to change abortion policies from the Republican side are very open about each additional restriction they want to implement. They are also not seeking to interpret *Roe* in a new way; instead, they are adding

⁹⁴ *Hodgson v. Minnesota*, 497 U.S. 417 (1990), *Ohio v. Akron Center*, 497 U.S. 502 (1990)

⁹⁵ Mahoney & Thelen 2010 p.17

⁹⁶ *Ibid.*, p.21–22

⁹⁷ 428 U.S. 52 (1976)

new regulations and, thus, changing the idea of what it entails to obtain an abortion. The actors working within the system were opposed to preserving *Roe*, but they were still forced to follow the rules and regulations stipulated in the 1973 decision. This strategy is also evident for the actors involved. Considering the third question, whether the change actors involved oppose or defend current rules, it is evident that the type of actor involved is opposed to existing rules by impose regulations to abortions, but they do not challenge *Roe* on a constitutional level. With layering comes actors who are characterized as being opposed to preserving current rules but still have to adhere to them.⁹⁸ Their aim is often to displace the existing rules but do so by working within the system by adding new rules while removing existing ones.⁹⁹ That is why we see attempts to implement restrictions that imposes on *Roe*, however they fail due to lack of power. In other words, we see how Republican actors are opposed to the Constitutional protection of abortion rights and are therefore aiming to oppose it by implementing restrictions. As displacement strategies of removing *Roe* fail, the actors have to settle for implementing restrictions.

During the years after abortion rights were implemented to hold constitutional protection, it is evident that actors aim to remove *Roe* but continue to fail and therefore have to settle with strategies that do not directly threaten the constitutional holding of abortion rights. This strategy showcases how those actors seeking to defend abortion rights and preserve *Roe* have enough power to do so but lack enough veto power to prevent the implementation of new restrictions. Mahoney and Thelen explain that although layering strategies are unable to remove the old rules, it still has the potential to produce a substantial change given that new amendments reshape the logic of the institution.¹⁰⁰ Although each new element only results in minor changes, such as informed consent, together with all the other small changes, over time, they have the potential to accumulate into more considerable shifts. In this case, it is particularly important to consider that each restriction on state-level pertains to a particular state, meaning that if a restriction passes in Missouri, it only applies to women in that state. However, there are instances where the laws are implemented on a federal level, as in *Harris v. McRae* (1980), where the laws passed in Congress. In addition, it is worth mentioning that even in instances where laws are only passed in a particular state, it does signal to other states that seek to implement restrictions that it is okay to implement a certain restriction, for instance, to push for

⁹⁸ Mahoney & Thelen 2010 p.23

⁹⁹ Ibid., p.25

¹⁰⁰ Mahoney and Thelen 2010 p.17

consent forms. Together on a national level, all state restrictions accumulate to change the logic of abortion as an institution.

6.1.3 The Akron Case

Before we proceed with the analysis, a failed attempt at displacement during this period is worth mentioning. In 1983, abortion foes sought to implement restrictions in *City of Akron v. Akron Centre for Reproductive Health* (1983).¹⁰¹ It sought to implement seventeen different abortion regulations nationwide, including informed consent laws for unmarried minors and a twenty-four-hour waiting period. Ziegler explains that with these new regulations being up for debate, abortion foes were hoping to get support while patiently waiting for a constitutional amendment.¹⁰² As lawyers working within these ranks always were looking for cases that could pose an infraction on *Roe*. In the Akron case, the legal arguments came from organizations like the NRLC. They wanted to convince the court that abortion was harmful and therefore these restrictions were justified.¹⁰³ For instance, anti-abortion attorneys thought that graphic descriptions of the abortion procedure could convince judges of what they perceived to “be the physical and psychological costs of the abortion procedure”.¹⁰⁴

The Supreme Court shut down the case with a 6-3 vote and reaffirmed its commitment to abortion holding constitutional protection.¹⁰⁵ The Court deemed that the Akron laws violated the Constitution as they were undoubtedly aimed to make women not choose to abort, rather than out of medical necessities.¹⁰⁶ In addition, abortion foes lost in a Senate vote in 1983 the Hatch Eagleton Amendment, which would have withdrawn the Constitution from recognizing abortion rights.¹⁰⁷ These verdicts indicated to the anti-abortion side that they were not in the position to change the Constitution rather they would have to aim long-term to remove *Roe* by chipping away at the decision. Therefore, pro-life groups such as the AUL and NRLC aligned with Republicans behind ideas that would impose incremental restrictions rather than seeking

¹⁰¹ *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983)

¹⁰² Ziegler 2020 p.61

¹⁰³ *Ibid.*, p.69

¹⁰⁴ *Ibid.*, p.61

¹⁰⁵ 462 U.S. 416 (1983)

¹⁰⁶ 462 U.S. 416 (1983) pp.433–434

¹⁰⁷ Congress.gov. “S.J.Res.3 – 98th Congress (1983-1984): A joint resolution to amend the Constitution to establish legislative authority in Congress and the States with respect to abortion.” June 28, 1983. <https://www.congress.gov/bill/98th-congress/senate-joint-resolution/3> [accessed 2023-01-24]

to remove the constitutional holding of abortion rights as they knew that those attempts had no chance of succeeding.¹⁰⁸

6.1.4 Failed Acts of Displacement Strategies

Although this instance depicts a failed attempt to implement change, comparing it to the previous success of layering strategies is interesting. Although this instance depicts a failed attempt to implement change, it is interesting to compare it to the previous success of layering strategies. Initially, the Akron case appears to be another case of layering as it seeks to add more restrictions to abortion procedures. However, as the case makes its way through court, it becomes apparent that it challenges the constitutional protection of abortions. To be able to replace existing institutional arrangements requires more capacity from the change actors. For acts of layering to succeed, the change actors in question can still face a strong veto power and manage to implement changes, whereas displacement requires a weak status quo.¹⁰⁹ Although both change strategies are opponents to existing rules, the advantage of layering is that it works within the system and can still succeed even when faced by a strong status-quo power. In addition, for acts of displacement to be successful, actors need sustained mobilization over time.¹¹⁰ Despite the recent successes for Republican Party, winning the presidential election and nominating a conservative Supreme Court justice, they had not sustained enough power to overrule *Roe*.

6.2 Phase 2 – The Undue Burden

The second period focuses on how abortion rights have evolved after the case *Planned Parenthood v. Casey* (1992), as the case managed to impose a major change in the governing standard of abortion rights. It expanded the anti-abortion side possibilities to pursue new strategies, now exploiting the ambiguities of the standard to implement more restrictions.

6.2.1 Undue Burden and Partial Birth Abortions

In the spring of 1992, another opportunity to challenge *Roe* appeared as the Supreme Court took on the case of *Planned Parenthood v. Casey* (1992). The Court had to decide on whether the Pennsylvania state could impose five provisions without violating the constitutional holding

¹⁰⁸ Ziegler 2020 p.199

¹⁰⁹ Mahoney & Thelen 2010 p.19

¹¹⁰ Mariani 2020 p.258

of *Roe*.¹¹¹ Among the five provisions, women were required to wait 24 hours if married to inform their husbands or if they were minors to inform their parents. The Court did something new to evaluate whether these restrictions were unconstitutional by imposing a new standard called the *undue burden*.¹¹² Therefore, in matters of implementing state regulation of abortions, state are not authorized to implement restrictions that constitute an undue burden on “a woman seeking an abortion of a nonviable fetus”.¹¹³ However, states are not prohibited from showing interest in protecting fetal viability throughout the entire pregnancy.¹¹⁴ In the *Casey* decision, the Court reaffirmed the central holding of *Roe* by maintaining the right to obtain an abortion. However, they decided to uproot the trimester framework that protected women from having the state interfere with their pregnancy during the first trimester. Instead, the Court authorized state regulations when the fetus is viable.

According to Paulk, the introduction of the undue burden seems to have created a soft spot for states to push the boundaries even more.¹¹⁵ Considering that the Supreme Court decided that instead of giving a definition of what constitutes as an undue burden, to merely explain it as “a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus”¹¹⁶. Paulk explains that left lower courts with little guidance.¹¹⁷ By creating this vague new standard, the Court left the state and federal courts to their own devices to interpret the constitutionality of abortion regulations. This confusion about this new standard resulted in many states modeling their abortion laws according to the Pennsylvania statute from *Casey*.¹¹⁸ Later on, this shift afforded states the opportunity to regulate abortion in manners previously considered unconstitutional by authorizing increasingly more restrictive laws. Although this is a win for abortion foes, as in getting one step closer to overturning *Roe*, Ziegler explains that it was still considered a failure because they did not do it.¹¹⁹

¹¹¹ Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)

¹¹² 505 U.S. p.837

¹¹³ 505 U.S. p.877

¹¹⁴ 505 U.S. p.872

¹¹⁵ Lauren, Paulk, "What is an 'Undue Burden?' The Casey Standard as Applied to Informed Consent Provisions." *UCLA Women's Law Journal*, 20(1), (2013), p.76

¹¹⁶ Casey, 505 U.S. p.877

¹¹⁷ Paulk 2013 p.77

¹¹⁸ Ibid., p.77

¹¹⁹ Ziegler 2020 p.117

Following the implementation of the undue burden, the anti-abortion side pursued new ideas to undermine abortion rights.¹²⁰ Considering the vagueness of the standard, it enabled different interpretations of what exactly constitutes an undue burden to occur. A few years after the *Casey* decision, the NRLC championed the idea of a partial-birth abortion ban. This new ban sought to outlaw surgical abortions by framing the procedure as a partial birth to convince the public that it was closer to infanticide. By using explicit descriptions of the procedure, it would stress the harmfulness of abortions and suppress the validity of surgical abortions.¹²¹ Surgical abortions were known at the time as one of the safest abortion procedures among physicians. This narrative of distrusting medical authorities had also been used to claim that certain drugs for abortions correlated with breast cancer. As pro-life leaders did not trust medical professionals, they preferred to focus on women's moral compass to steer the procedure's availability.

Considering the political situation, with a pro-choice president governing, the leader of the NRLC thought that launching a debate on partial-birth abortion bans would alienate President Clinton from public opinion.¹²² When the discussion of a ban was brought up in Congress, the strategy to emphasize the graphicness of the procedure was used. A former abortion clinic nurse asked those who were voting to look at sketches of a partial birth abortion "I think every member [of Congress] should be marched into an operating room and actually made to watch an actual abortion, and then you make your own decisions"¹²³. In December of 1995, the partial-birth abortion ban was passed by Congress.¹²⁴ But then, in April next year, President Clinton vetoed the bill as it lacked a health exception.¹²⁵ The NRLC responded by accusing Clinton for falsely stating that surgical abortions are safe to override the veto. They argued that any exception would generate in surgical abortions being too available. Ziegler explains that despite the ban failing in Congress and Bill Clinton getting re-elected as President in 1996, public support for banning Partial-birth abortion remained strong.¹²⁶

¹²⁰ *Ibid.*, p.152–157

¹²¹ *Ibid.*, p.208

¹²² *Ibid.*, p.153

¹²³ For Schafer's statement: Partial-Birth Abortion Act: Testimony before the Senate Judiciary Committee, 104th Congress 1st Session (1995), 69 (Statement of Brenda Pratt Schafer) from Ziegler 2020:153

¹²⁴ Congress.gov. "H.R.1833 – 104th Congress (1995-1996): Partial-Birth Abortion Ban Act of 1995.", 1997-01-06 <https://www.congress.gov/bill/104th-congress/house-bill/1833> [accessed 2023-01-26]

¹²⁵ Ann Devroy, "Late-term Abortion Ban Vetoed", Washington Post, 1996-04-11, <https://www.washingtonpost.com/archive/politics/1996/04/11/late-term-abortion-ban-vetoed/857678df-deea-40b8-9abe-d1d5ee4f0a1c/> [accessed 2023-01-26]

¹²⁶ Ziegler 2020 p.155

In the years following, the debate revolved around the question of where to draw the line between politics and science.¹²⁷ The anti-abortion movement enjoyed more success, not only did bans on surgical abortions receive public support, but the American College of Obstetricians and Gynecologists also came out in support of the Daschle proposal, prohibiting all abortions post-viability, except for instances concerning women's health.¹²⁸ It was not exactly a victory for abortion foes, but it showcased a more compromised stance from the medical community. In addition, the American Medical Association showed public support for the partial-birth ban (surgical abortions), stating the procedure had no medical necessity.¹²⁹ Clinton were then forced to veto the Partial-Birth Abortion Ban Act in October 1997 for the second time.

Regarding the Supreme Court cases during the next decade, as the anti-abortion side continues to implement restrictions on abortions, the contending interpretations of what constitutes an undue burden continue to keep the Court busy. The anti-abortion side was successful in *Mazurek v. Armstrong* (1997), where they were able to convince the Court that requiring physicians to be present for abortion procedures does not constitute an undue burden.¹³⁰ This was an important step for abortion foes, as it limits possibilities for medical abortions which leaves the option of surgical abortions that is already under scrutiny. However, three years later, in *Stenberg v. Carhart* (2000), the Court decided in favor of the abortion rights defenders by striking down a Nebraska law that banned partial-birth abortion.¹³¹ Despite the setback, the abortion foes continued to pursue bans for partial-birth abortions. In 2003 Congress passed a federal ban on a type of surgical abortion known as the Partial-Birth Abortion Act.¹³² In 2007, in *Gonzales v. Carhart*, the Supreme Court decided to uphold the Partial-Birth Abortion Ban Act with a five to four vote.¹³³ Stating that Congress's ban on this specific type of surgical abortion did not impose an undue burden nor that it was unconstitutionally vague.¹³⁴ The Court's decision to now uphold a type of partial-birth abortion did not come to as much of surprise considering the two significant replacements that had taken place among the justices.¹³⁵ As President Bush had the opportunity to nominate justices with more sympathetic records

¹²⁷ Ibid., p.9

¹²⁸ Ibid., p.155–161

¹²⁹ Ibid., p.161

¹³⁰ *Mazurek v. Armstrong*, 520 U.S. 968 (1997)

¹³¹ *Stenberg v. Carhart*, 530 U.S. 914 (2000) pp.922–946

¹³² Congress.gov. "H.Rept. 108-58 – PARTIAL BIRTH ABORTION BAN ACT OF 2003."

<https://www.congress.gov/congressional-report/108th-congress/house-report/58/1> [accessed 2023-01-27]

¹³³ *Gonzales v. Carhart*, 550 U.S. 124 (2007)

¹³⁴ 550 U.S. 124 (2007)

¹³⁵ Ziegler 2020 p.177

towards the anti-abortion movement. He nominated John Roberts instead of O'Connor, who then preceded to become Chief Justice following Rehnquist's passing in September. Bush then nominated Samuel Alito as a likely ally to the anti-abortion side to take O'Connor place.

6.2.2 Acts of Conversion Strategies

With *Casey*, we get to witness something new where the Court imposed a new standard to assess abortion restrictions' constitutionality. The introduction of the new standard has created a soft spot for states to push the boundaries even more. Following the implementation of the undue burden, we now see how contending interpretations of what abortion rights entail in the type of restrictions being authorized. Despite retaining the central holding of *Roe*, this new standard to assess rules and regulations around abortion rights has opened up more room for contending interpretations. For instance, it was now possible to question physicians' medical expertise regarding abortions. By questioning the authority of physicians and the medical necessity and safety of surgical abortions. These strategies are highly characteristic of processes where conversion occurs where old rules are interpreted in new ways.¹³⁶

Although the implementation of the undue burden was considered a failure by some in the anti-abortion movement, we can see how the change agents working for an institutional change are taking the opportunity of every situation. For instance, with the Daschle proposal, pro-choice leaders authorized a health exception where abortion procedures are not prohibited. This compromise does not correspond to abortion foes' long-term goal of restricting all abortions, but for the short-term, this aligns them with the medical community which helps them with implementing more restrictions. Compared to the other modes of change, the types of actors associated with conversion can pose as either defenders or opponents of the existing rules.¹³⁷ This is because they exploit any available opportunities within the institution to reach their goals.

For the question concerning power, in order for it to be classified as a successful act of conversion, it is necessary for those defending the status quo to have weak veto possibilities.¹³⁸ In this case, we notice at first how the status quo, pro-choice defenders, are unable to stop the

¹³⁶ Mahoney & Thelen 2010 pp.19–20

¹³⁷ *Ibid.*, p.23

¹³⁸ *Ibid.*, p.19

partial-birth abortion ban being passed in Congress. However, they manage to veto the act twice, thanks to President Clinton being pro-choice. Despite the veto, the abortion-right side does not have enough power to stop this idea of partial-birth from getting established. This is why years later, in the *Gonzales* case, after the additions of Conservative justices to the Supreme Court leaning in the anti-abortion side's favor, they are successful. Whereas, in instances where new laws have failed, like with *Stenberg* in 2000, we notice how the veto power of the opposition was strong.

Although the acts of layering and conversion are similar in that the formal rules still apply, there is a clear difference in how they succeed.¹³⁹ In the case of abortion rights, we can identify their difference by comparing the changes before and after *Casey* in 1992. Although we still see restrictions being implemented like before, there is a clear difference. By implementing the new evaluating standard to restrictions using the *undue burden*, this standard created a gap or ambiguity between how its interpreted and enforced. Therefore, the restrictions after *Casey* have relied on this vagueness. For instance, with *Gonzales*, there is room for contradictory testimonies of women's regret of having abortions to be acknowledged as experts instead of relying on physicians to be the experts on the safety or necessity of surgical abortions. These arguments convinced the Court that the health and safety benefits of surgical abortions were unclear. They concluded that matters regarding medical evidence were up to elected officials to decide rather than judges or doctors to be the authoritarian voice. By stressing the uncertainties of fetal pain, viability, and the safety of surgical abortions, the procedure remained unsettled. In addition, the case gave legislators more leeway to decide when something was to be classified as scientifically uncertain.

6.2.3 War on Women

In 2008, Barack Obama was elected president it was the first time since Clinton that there was a pro-choice president. His initiative to reform national health care brought abortion politics to become even more polarized as it got entangled with religious beliefs.¹⁴⁰ Those opposing abortion perceived Obama's reform to violate their religious liberty despite Obama stating that this bill was neutral to abortions. Claims about the cost and benefit of abortions remained at the

¹³⁹ Mahoney & Thelen 2010 pp.15–32

¹⁴⁰ Ziegler 2020 pp.182–193

center of the legal conflict.¹⁴¹ By 2010, Obama’s reform Affordable Care Act had lost support, and in addition the Republican Party secured a victory in the midterm election. This success enabled Conservatives to pass a great number of abortion regulations.¹⁴² For instance, Nebraska were first to ban abortion at twenty weeks by passing a law on fetal pain.¹⁴³ By going after fetal pain as a medically contested justification pro-life supporters were able to institute bans on abortions earlier in pregnancy Ziegler explains.¹⁴⁴ A key part of the anti-abortion movement had evolved not to trust the opinions of established medical community and instead seek alternative sources to rely on when it came to ideas of abortion and contraception. During the following years, many restrictions regarding abortions were enacted on state level.

As pro-life and pro-choice groups continued to clash surrounding the upcoming election in 2012, pro-life groups were met with strong resistance. According to Ziegler, Republicans were heavily criticized by pro-choice groups for waging a so-called “war on women” by robbing them of health care and, subsequently, an education or career.¹⁴⁵ Planned Parenthood also saw an upswing of support online after Republican senate candidates had issued controversial statements regarding rape and pregnancy. For instance, Todd Akin, a Missouri Senate candidate, said it is rare for women to get pregnant by legitimate rape because “the female body has ways to try and shut that whole thing down”¹⁴⁶. With the help of pro-choice groups, Planned Parenthood and NARAL, abortion rights became a central issue for the 2012 election. The Affordable Care Act received religious objections regarding ideas of human life because it included different kinds of contraception. Religious-liberty arguments became more and more frequent among larger anti-abortion groups.¹⁴⁷ Both the AUL and NRLC argued that allowing for contraceptives would set a dangerous precedent for what would classify as a preventative service, even including surgical abortions.¹⁴⁸ By exploiting this uncertainty groups like the

¹⁴¹ Ibid.,

¹⁴² Ibid., p.5

¹⁴³ Tom Venzor, “See You in Court: An Analysis of Nebraska’s Newest Abortion Legislation”, *Nebraska Law Review*, 2011-03-15, Nebraska Law Review, <https://lawreview.unl.edu/see-you-court-analysis-nebraska%E2%80%99s-newest-abortion-legislation-lb-1103-%E2%80%93-pain-capable-unborn-child> [accessed 2023-01-29]

¹⁴⁴ Ziegler 2020 p.189

¹⁴⁵ Ibid., p.191

¹⁴⁶ David Cohen, “Earlier: Akin: ‘Legitimate rape’ rarely leads to pregnancy”, *Politico*, 2012-08-19, <https://www.politico.com/story/2012/08/akin-legitimate-rape-victims-dont-get-pregnant-079864> [accessed 2023-01-27]

¹⁴⁷ Ziegler 2020 p.193

¹⁴⁸ Ibid., pp.191–193, 37

AUL and NRLC hoped it would create room for legislators sympathetic to the pro-life movement to impose more regulations.

One of the Supreme Court's most conservative and longest-serving justices, Antonin Scalia, unexpectedly died at the beginning of 2016 leaving the Court with four appointed justices by the Republicans and four by the Democrats.¹⁴⁹ Meaning that the next appointment would have a major impact for future decisions. President Obama nominated Merrick Garland, and although Garland was viewed as moderate, he did not pass the Senate vote due to the Republicans' control.¹⁵⁰ This decision left the Court shorthanded as they tried on an abortion regulation case in *Whole Woman's Health v. Hellerstedt* (2016).¹⁵¹ The case revolved around a law passed by the state of Texas in 2013 called House Bill 2 (H.B 2) which put provisions on abortion clinics and physicians. Together these restrictions limited the majority of abortion facilities in Texas with access to abortions.¹⁵² The abortion petitioners against these restrictions claimed that they denied equal protection, among other things. The Court ruled in favor of the petitioners, stopping the Texas law, stating that the restriction in H.B 2 constituted an *undue burden* to women seeking abortions.¹⁵³

By late 2016 Donald Trump was elected president, and part of his appeal to the anti-abortion movement was his skepticism of authorities.¹⁵⁴ This skepticism paired well with the mistrust of medical authorities among abortion critics. It is also important to note that the Supreme Court was the most important factor for voters in the presidential election.¹⁵⁵ Since a Republican President would ensure another conservative addition of justices on the Supreme Court. In April 2017, Neil Gorsuch got nominated to replace Antonin Scalia.¹⁵⁶ It was expected from pro-lifers that Gorsuch would help the Court overturn *Roe*.¹⁵⁷ A year later, in June of 2018, Trump got the opportunity once again to nominate a new justice to the Supreme Court as Anthony Kennedy

¹⁴⁹ Terri Langford & Jordan Rudner, "Supreme Court Justice Antonin Scalia Found Dead in West Texas", *The Texas Tribune* 2016-02-13, <https://www.texastribune.org/2016/02/13/us-supreme-court-justice-antonin-scalia-found-dead/> [accessed 2023-01-30]

¹⁵⁰ Ziegler 2020 p.199

¹⁵¹ *Whole Woman's Health v. Hellerstedt*, 579 U.S.__(2016)

¹⁵² <https://supreme.justia.com/cases/federal/us/579/15-274/#tab-opinion-3590955>

¹⁵³ 579 U.S.__(2016)

¹⁵⁴ *Ibid.*, p.202

¹⁵⁵ Jeanne Mancini, "Neil Gorsuch Will Strengthen the Fight Against Abortion Rights", *Time*. 2017-03-20. <https://time.com/4705897/neil-gorsuch-anti-abortion/> (accessed 2023-01-23)

¹⁵⁶ Ziegler 2020 p.202

¹⁵⁷ Mancini *Time* 20/3 2017.

announced his retirement.¹⁵⁸ Seeing as Kennedy had a swing vote in abortion cases, replacing him with a conservative justice would end the so-called the deadlock regarding abortion rights.¹⁵⁹ Trump nominated Brett Kavanaugh as his replacement, a conservative who previously publicly had criticized *Roe v. Wade*.¹⁶⁰ Despite some Me-Too controversy, Kavanaugh eventually joined the Court and secured a majority to undo *Roe v. Wade*.¹⁶¹

The Court started to withdraw from protecting abortion rights, which was evident in the number of heartbeat bans passed by states the next year.¹⁶² These laws forbid abortions after six weeks of pregnancy and often lacked an exception for rape and incest. This action was considered problematic because, at such an early stage of pregnancy, many women have yet to discover their pregnancy. In addition, a heartbeat bill is somewhat misleading since a fetus at six weeks does not have a fully formed heart.¹⁶³ What is also notable about the heartbeat bans is that they signal from the anti-abortion side a more aggressive approach to getting closer to undoing the constitutional protection of abortions. The anti-abortion side is no longer interested in settling for middle-ground solutions. Georgia becomes the first state to recognize fetal personhood, meaning that an embryo is classified as a person after six weeks of pregnancy.¹⁶⁴ Alabama passes a ban making it a felony to perform an abortion in the state, including for victims of rape or incest. In 2019 it made headlines when a pregnant woman got arrested after being shot and having a miscarriage.¹⁶⁵ With this development, the reversal of *Roe* was more anticipated than ever. Some pro-choice states even decided to liberalize their laws on abortion in anticipation of a reversal.¹⁶⁶

¹⁵⁸ Ziegler 2020 p.181

¹⁵⁹ Pat Ralph, "6 times Justice Kennedy was the tipping point on the Supreme Court shows how consequential his retirement is", *Insider*. 2018-07-01 <https://www.businessinsider.com/when-justice-anthony-kennedy-sided-with-liberals-on-supreme-court-2018-6?r=US&IR=T> [accessed 2023-01-23]

¹⁶⁰ Li Zhou, "A 2017 speech speaks to Brett Kavanaugh's views on *Roe v. Wade*", *Vox*. 2018-07-12. <https://www.vox.com/policy-and-politics/2018/7/12/17564048/brett-kavanaugh-roe-wade-views> [accessed 2023-01-23]

¹⁶¹ Gay Stolberg, "Kavanaugh Is Sworn In After Close Confirmation Vote in Senate", *New York Times*. 2018-10-06 <https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html>, [accessed 2023-01-23], Ziegler 2020 p.203

¹⁶² Ziegler 2020 p.205

¹⁶³ *Ibid.*, p.204

¹⁶⁴ *Ibid.*, p.xiii

¹⁶⁵ Alanna Vagianos, "Georgia Says A Fetus Is A Person. The Implications Are Terrifying." *Huffpost*, 2022-10-20, <https://www.huffpost.com/entry/georgia-says-a-fetus-is-a-person-the-implications-are-terrifyingn634f09afe4b03e8038d8fbae> [accessed 2023-01-29]

¹⁶⁶ Ziegler 2020 p.205

6.2.4 More Acts of Conversion Strategies

It is evident how abortion politics has evolved into two divergent coalitions, the abortion rights side defending the idea of individual rights and those opposed to abortion believing life begins at conception. These divergent understandings became particularly evident after *Casey* implemented the *undue burden* in 1992. As abortion foes view abortions as harmful, they have taken advantage of what constitutes an undue burden, now implementing heartbeat bans. In line with acts of conversion, this strategy would not have been able to succeed the undue burden standard mobilizing different interpretations of what kinds of abortion restrictions are allowed.¹⁶⁷ In addition, with veto power, abortion foes have strengthened their grip on the Supreme Court, with Trump nominating no less than three conservative and outspoken abortion foes as justices. This increase in power has enabled more restrictions to pass, as acts of conversion requires veto power. Actors on the anti-abortion side are no longer interested in pursuing any middle-ground solutions, rather seeking to eradicate abortions as an option. As the power has turned in their favor, they can afford to pursue more aggressive ideas of restricting abortions. For instance, Georgia state laws maintain that a fetus has personhood, and Alabama criminalizes abortions. Although the Supreme Court voted against certain restrictions, more restrictions than ever have been authorized since 2011 on state level led by conservative governing.¹⁶⁸ Indicating that the pro-choice side is subsequently losing their grip on abortion rights. Considering how actors operating within acts of conversion can defend or oppose the existing rules as they exploit all opportunities to achieve their goal. Compared to the previous acts of conversion, these actors are seeking to oppose the existing rules of abortion rights rather than adhere to them.

6.3 Phase 3 - A Successful Attempt of Reversing Roe

This third and final phase depicts the Supreme Court case *Dobbs v. Jackson Women's Health Organization* (2022), which made it possible to overturn abortion rights' constitutional protection.

¹⁶⁷ Mahoney & Thelen 2010 pp.19–20

¹⁶⁸ Guttmacher Institute 2022

6.3.1 Constitutional Neutrality

In spring 2021, the Supreme Court agreed to assess a Mississippi law from 2018 called the “Gestational Age Act” that challenged abortion rights in *Dobbs v. Jackson Women’s Health Organization* (2022).¹⁶⁹ This law banned abortion at fifteen weeks as state lawmakers believed that was the point in pregnancy where fetus began to feel pain. This law challenged the precedent set by *Roe* that the protected right to choose abortion. Meaning that if the Court decided to uphold the Mississippi law, it would require them to either undo the viability limit or reverse *Roe* completely.¹⁷⁰ It is worth noting that during the year prior, right before the presidential election, President Trump was able to make his third nomination of a justice to the Supreme Court. This time he nominated Amy Coney Barret to replace Justice Ruth Bader Ginsburg.¹⁷¹ Coney Barret known for her conservative views and opposition to what she called “the barbaric legacy of *Roe v. Wade*”¹⁷² was a stark contrast to the progressive Bader Ginsburg.¹⁷³ In June of 2022 the Court held that “The Constitution does not confer a right to abortion; *Roe* and *Casey* are overruled; and the authority to regulate abortion is returned to the people and their elected representatives.”¹⁷⁴. Stating that the Court is neither pro-choice nor pro-life leaves it up to each state to decide. Following the decision, thirteen states had previously set trigger bans that would automatically ban abortion as soon as *Roe* was overturned.¹⁷⁵ Currently, abortion only holds protection by in only twenty-one states and the District of Columbia.¹⁷⁶

The Court discussed different factors to determine whether the Constitution confers a right to obtain abortions. Firstly, they asked if the Fourteenth Amendment's liberty protects a particular right.¹⁷⁷ They noted that the Constitution does not mention the right to obtain an abortion. Secondly, the Court questioned if the right to obtain an abortion has any deep historical and traditional roots and if it is a key component of "ordered liberty".¹⁷⁸ Concluding that it does not.

¹⁶⁹ 597, U.S. __ (2022)

¹⁷⁰ Ziegler 2022 p.383

¹⁷¹ Ziegler, Mary., *Dollars for Life: The Anti-Abortion Movement and the Fall of the Republican Establishment* [Electronic resource], Yale University Press, 2022.

¹⁷² Margaret Talbot, “Amy Coney Barret’s Long Game”, *The New Yorker*. 2022-02-07.

<https://www.newyorker.com/magazine/2022/02/14/amy-coney-barretts-long-game> accessed 2023-01-23

¹⁷³ Ziegler 2022 p.382

¹⁷⁴ 597 U.S.__(2022)

¹⁷⁵ Sara Mccammon, “Two months after the Dobbs ruling, new abortion ban are taking hold”, *NPR*, 2022-08-23 <https://www.npr.org/2022/08/23/1118846811/two-months-after-the-dobbs-ruling-new-abortion-bans-are-taking-hold> [accessed 2023-01-30]

¹⁷⁶ Center for Reproductive Rights, *After Roe Fell: Abortion Laws by State*, n.d., <https://reproductiverights.org/maps/abortion-laws-by-state/> [accessed 2023-01-30]

¹⁷⁷ 597 U.S. (2022) p.2

¹⁷⁸ *Ibid.*, p.2

Finally, the Courts asked if abortion rights are part of a wider anchored right supported by other precedents.¹⁷⁹ Here, they concluded that the right to abortion is not justified as part of a broader right. According to Hong, the Court relied on ideas pertaining of originalism and textualism in the *Dobbs* decision.¹⁸⁰ Originalism refers to "the belief that the Founders intent is discoverable and determines the meaning of legal disputes" ¹⁸¹. Textualism refers to locating the Founders' intent by scrutinizing the Constitution's words closely. Hence as the founders make no mention of abortion, it is not for the Supreme Court to make decisions about abortions. This philosophy displays a different stance than the one used to implement *Roe*, as the Court instead was able to shut down state laws imposing on an individual's right to privacy.¹⁸² Now, the Court has decided to withdraw itself from interfering with state policies.

6.3.2 Acts of Displacement Strategies

With *Dobbs*, we witness something new with a state law passing in the Supreme Court, subsequently revoking the constitutional protection of abortions. This formal rule change required weak veto possibilities from those defending the *Roe* precedent, and thanks to the recent Supreme Court nominations, the power is in favor of the Republicans. This feature is necessary for acts of displacement to succeed, as it requires a context of weak veto possibilities to remove existing rules.¹⁸³ Compared to previous attempts to displace abortion rights that failed due to lack of power, it is now evident that abortion foes have sustained enough power over time to have the capacity to replace this existing institutional arrangement. In contrast to layering, for acts of displacement to be successful, actors need sustained mobilization over time.¹⁸⁴ As Hong explains, it has been a long-term strategy for abortion foes to control the Supreme Court nominations for the Republican Party and now we finally see the how this strategy is paying off.¹⁸⁵ With this formal change of abortion rights as an institution, it was not as necessary for the challengers to exploit the ambiguity of the undue burden as before with acts of conversion to prevail. Here instead, displacement can still occur without relying on that ambiguity.¹⁸⁶

¹⁷⁹ *Ibid.*, p.4

¹⁸⁰ Hong 2022 p.7

¹⁸¹ *Ibid.*, p.7

¹⁸² Stone & Strauss, *American Heritage*. 64(1), 2020

¹⁸³ Mahoney & Thelen 2010 p.19

¹⁸⁴ Mariani 2020 p.258

¹⁸⁵ Hong 2022 p.5

¹⁸⁶ Mahoney & Thelen 2020 pp.21–22

Acts of displacement can occur rapidly as well as more gradually depending on how successful the actors are operating to eliminate the existing rules.¹⁸⁷ These actors aim to remove old rules by outright mobilization against the institutional status quo. In instances when they are not successful as quickly is when displacement occurs gradually. In this case, the actors working against abortion rights have been trying to displace *Roe* since its implementation. However, it has not occurred as quickly as they wanted it to. Therefore, it could be understood that the displacement strategy has taken place gradually, not just surrounding the *Dobbs* decision. At the same time we must consider that actors operating within layering strategies often aim for displacement but must settle for short-term solutions.¹⁸⁸ Mahoney & Thelen explain that change actors often need cooperate in reality. Therefore, it is reasonable to assume that layering and displacement actors have been operating together, forming a type of coalition. Considering the context of actors in this process it was noticed early on how anti-abortion actors aligned, with pro-life organizations like the AUL, and NRLC, joining forces with the Republican Party. In addition, there has been divisions within pro-life movement some preferring more aggressive actions and others the incremental restrictions. This supports the idea of different change actors working together.

Although acts of displacement do not rely on exploiting the soft spots of rules, it should still be noted that ambiguity is a permanent feature within institutions, as rules can never pinpoint all the possible new ways actors can interpret rules.¹⁸⁹ This is the case with abortion rights in the United States as there is no direct mention of abortions in the Constitution. Instead, the right to abortion rested on ideas of the individual right to privacy in the Due Process Clause of the Fourteenth Amendment. The reasoning behind the Supreme Court's decision in *Dobbs* reflects a different philosophy from that in 1973. Instead of reasoning that the right to abortion rested on ideas of the individual right to privacy, the current Supreme Court reasoned that it is not for the Court to take a stance on whether abortions ought to be protected by the Constitution. As the founders do not mention abortions, it is not for the Supreme Court to make decisions about abortions. In their decision, they write, “The Court’s decision today properly returns the Court to a decision of neutrality and restores the people’s authority to address the issue of abortion

¹⁸⁷ Ibid., p.24

¹⁸⁸ Ibid., p.27

¹⁸⁹ Mahoney & Thelen, 2010 pp.10–11

through the processes of democratic self-government established by the Constitution.”¹⁹⁰. Now, the Court instead has decided to withdraw itself from interfering with state policies. Reasoning that it is more democratic to let states decide for themselves. This logic follows the principle of subsidiarity, a keystone in democracy by locating the decision-making closer to the people.¹⁹¹

In terms of distributional effects, this relocation of power has made access to abortion less available, with the majority of states lacking protection for abortion rights. This institutional context and this final decision, in particular, reflect a gendered logic by relying on ideas that put women at a disadvantage when it comes to making decisions over their bodies.¹⁹² This was also evident in the arguments made in *Dobbs*, by asking about the historical and traditional roots of abortion as these historical roots reflect a masculine dominance when it comes to abortion rights. Therefore, it could be argued that by moving the decision-making closer to the people it has resulted in a democratic backlash in terms of women’s rights. Although the context of the American legislation is unique the trend of relocating the subsidiarity boundary by promoting ideas of sovereignty in the context of withdrawing from commitments to gender equality has also been noticed in the EU. Considering how the European Parliament has been known to champion gender-equality¹⁹³ it is interesting to see how countries have chosen to withdraw from their commitments concerning the ratification of the Istanbul Convention.¹⁹⁴ In their rejection countries have used the subsidiarity principle to argue against it, thereby choosing their sovereignty over ideas promoting human rights. Thus, these examples of abortion rights in the U.S. and with the Istanbul Convention in the EU indicate that relocating power closer to the people can work as a strategy to oppose gender equality. It does so by contributing to delegitimizing gender equality through the transfer of power to hostile actors who lets women’s rights exist in a subordinated place of victimhood.

¹⁹⁰ *Dobbs* 597 (2022), p.3

¹⁹¹ Sylvia Walby, "Gender in the crisis and remaking of Europe: regendering subsidiarity" *European Journal of Politics and Gender*, 1(3) (2018) p.308

¹⁹² Josefsson (forthcoming) p.1

¹⁹³ Berthet 2022, p.682

¹⁹⁴ *Ibid.*, p.693

7. Conclusion

7.1 Results

This study has sought to investigate the gradual institutional changes in abortion rights in the United States between the years 1973-2022 in order to understand how it has been possible to overrule *Roe v. Wade*. Throughout these years, a great deal of changes has taken place. The main actors involved in driving this reform have been pro-life organizations like the AUL and NRLC, evangelical movements and the Republican Party. Joining forces with the Republican Party was necessary for the pro-life organizations to gain more ground on the legal side as this gave them access to influence nominations to the Supreme Court. Although this reform of abortion rights, at first glance, can appear as an isolated act following the few years with an unsympathetic Republican government, it was just the tip of the iceberg. Right from the start, after *Roe v. Wade* was implemented, the restrictions against abortions have followed one after the other through strategies of layering and conversion. In addition, we saw early challenges on a constitutional level that failed, as the conservatives had not yet sustained enough power to displace the existing rules.

A significant shift came after *Casey*, in 1992, by introducing the undue burden, the Republican actors changed their strategy and started to exploit the soft spot of the new standard. The vagueness of the standard allowed for more invasive types of restrictions than previously by relying on acts of conversion. Most notably by questioning the authority of medical professionals and banning surgical abortions. However, seeing as their interpretation of the standard did not hold any formal guarantees, for it to succeed, it was necessary for the Republicans to pursue it continuously. Which they did, and it helped the anti-abortion side to continue to sustain mobilization over time to eventually displace the old rule. Although the restrictions implemented never were the end goal for the anti-abortion side, as they always wanted a reform that would remove the *Roe v. Wade* precedent, it shows the importance of pursuing short-term goals while biding time for the end goal. Together, these restrictions have contributed to gradually changing reforming abortion rights. From the strategies deployed, it is evident that the final act of displacement would not have succeeded without all the previous restrictions through layering and conversion.

7.2 Discussion of Results and Further Research

Compared to previous research on gender-equitable changes, there are several similarities. In this case, layering and conversion strategies are the most frequent to succeed, similar to gender-equitable changes. Seeing as neither of them requires as much power as a formal rule change to the old rules as they appear in a more gradual manner.¹⁹⁵ Displacement acts, on the other hand, are rare for gender-equitable changes, as it is a rare occurrence for gender equity actors to achieve enough power to remove existing rules. This phenomenon has also been true in this case. Although displacement was attempted several times, it did not manage to succeed until the abortion foes had sustained enough power. What is also interesting about this change is how the legacy of old institutions formed this change, as they wanted the Constitution to be restored to a neutral place, not dictating abortion rights. For displacement acts within gender-equitable changes, it is often, despite significant contributions to establishing new formal institutions, that old rules still manage to shape these new institutions.¹⁹⁶ This indicates how influential old legacies are in shaping new institutions, whether it is intentional or not.

When considering the effectiveness of the strategies implemented in gender-equitable changes, depending on the context, this varies significantly. This inconsistency is related to the gendered logic of institutions, considering that neither of these strategies has the ability to fundamentally reconfigure institutions with inherent masculine characteristics.¹⁹⁷ In this case, the institution of abortion rests on a gendered logic as it instead works in favor of abortion foes, with the institution reforming back to constitutional neutrality it has resulted in gendered effects. The decision to surrender the decisions pertaining to abortion rights to states has resulted in a loss of abortion rights in the majority of states, some even criminalizing abortions.¹⁹⁸ Therefore, it is easier for layering and conversion strategies to be effective in this case because they do not have to reconfigure the institutional gendered logic as it already works in their favor.

This case demonstrates the importance of considering gradual institutional changes regarding gender-inequitable changes as the transformation has unfolded gradually. As we have learned, there are similarities in the strategies involved in gender-equitable changes. However, more research needs to be conducted to facilitate more understanding of gender-inequitable changes,

¹⁹⁵ Waylen 2014 pp.218–219

¹⁹⁶ Ibid., p.219

¹⁹⁷ Ibid., p.219

¹⁹⁸ Center for Reproductive Rights, *After Roe Fell: Abortion Laws by State*, n.d., <https://reproductiverights.org/maps/abortion-laws-by-state/> [accessed 2023-01-30]

especially when we consider the regression of gender equality happening within western societies, with governments withdrawing from previous commitments like the Istanbul Convention. Particularly as this kind of change takes place not only in the U.S. but also in other states with different types of governmental and legislative systems. Therefore, to establish more knowledge of gender-inequitable changes in other types of governmental systems and better understand how the institutional context affects the strategies, there needs to be more research done in this area.

Regarding further research, this study has areas with room for improvement. For instance, with regard to the empirical material, it would have been beneficial to include failed strategies of the pro-choice side to put it in context with the successful strategies of the pro-life actors. As it would have allowed the analysis to include more of the dynamics between pro-choice and pro-life sides to give a better insight into the historical process and thus give us a better understanding of how this change occurred so gradually. For instance, to capture the complexity of the *Casey* decision in 1992, although it brought on an important shift for abortion foes, it was deemed by some Republicans as a failure. It would have been interesting to see what strategies occurred on the other side, to preserve abortion rights. However, this was excluded in order to properly facilitate the action from the actors who were instigating this change, meaning the pro-life actors with regard to the scope of this paper.

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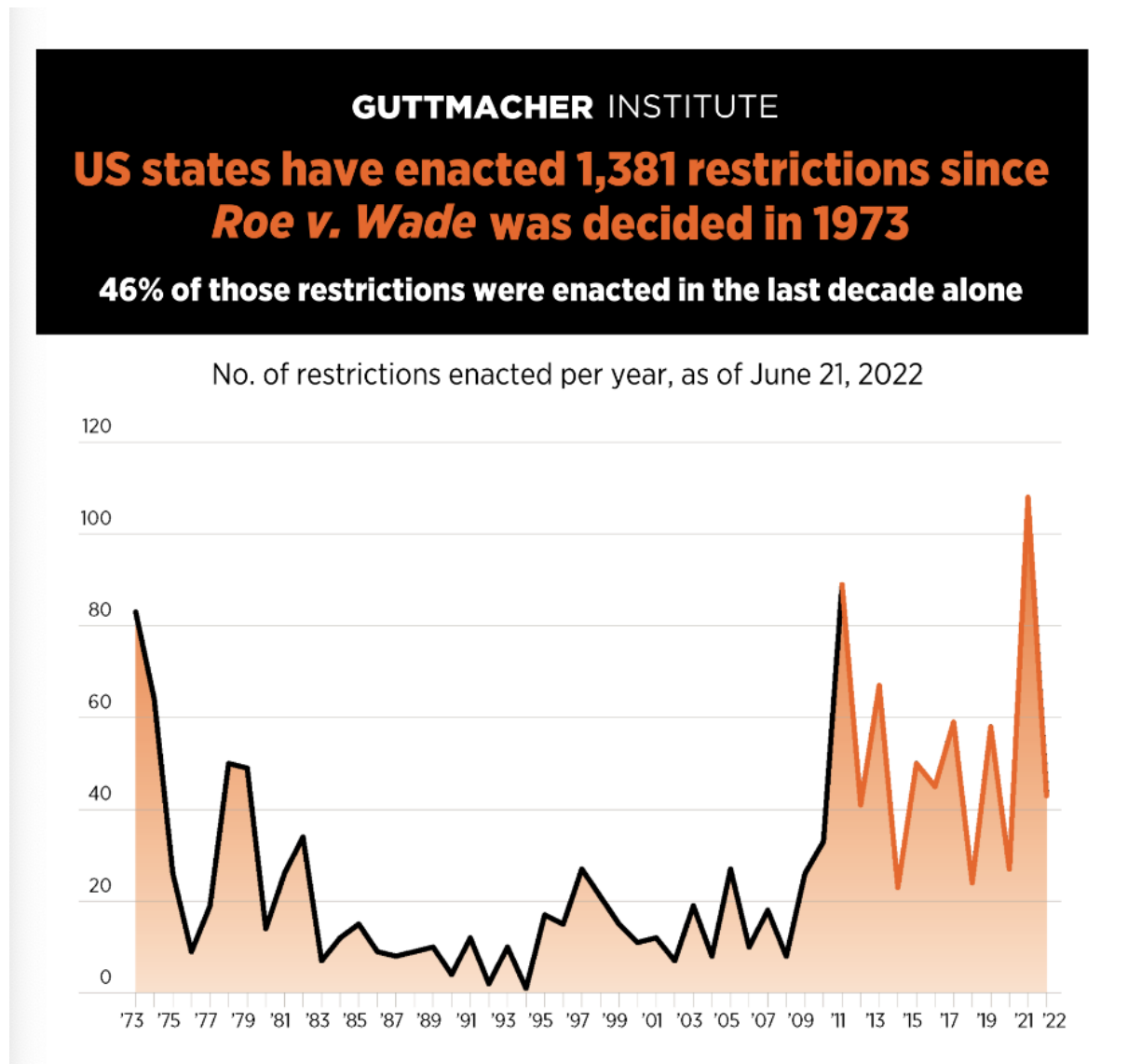
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Appendix

Appendix A: Graph of abortion restrictions between 1973-2022 by the Guttmacher Institute



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