Evaluating the Roles of Gender and Religion in Defining Reproductive Health Case Law

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Abstract

This thesis argues that expressions of religious ideology, both implicit and explicit, create and enforce stereotypes of women as they relate to motherhood under the law. In particular, I apply this framework in analyzing the oral arguments of *Dobbs v. Jackson Women's Health Organization* (argued in December 2021 and to be decided in June 2022). In doing so, I look to historical and landmark case law, alongside legal and feminist theory, to contextualize the arguments made in *Dobbs* and to understand the implications of how the Court may rule. I conclude that, if the Court overturns *Roe v. Wade*, in part or in its entirety, it will represent an increase in state power over reproductive health, which will significantly limit the substantive due process protections women are afforded under the law. This will have significant and lasting repercussions for women and other marginalized communities in all states.

"We end this opinion where we began. Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives. The judgment of the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion." (Alito, Majority Opinion first draft *Dobbs v. Jackson Women's Health* 2022, 67)

Introduction

"According to Jewish tradition, a person who dies on Rosh Hashanah, is a tzaddik, a person of great righteousness" (Ruth Franklin 2020). When Ruth Bader Ginsburg passed away on September 18th, 2020, the Jewish New Year, my heart sank. I was with my family celebrating Rosh Hashanah, when I first heard the news, and was overcome with emotions. I had admired Ruth Bader Ginsburg, her snappy dissents, and tireless determination as she fought for gender equality and women's rights. She was not only the second woman to be granted a seat, but the first Jewish woman to serve on the Supreme Court. At 5'1" Ginsburg showed me that a small, but strong-willed, woman like myself can have a prominent place in the legal field.

Ginsburg's death came at a tumultuous time for the American judiciary, and her open seat led to the nomination and installation of Justice Amy Coney Barrett as her successor on the Supreme Court. Barrett's confirmation to the Court was controversial, not only because of her conservative political and religious ideology, but also because the confirmation happened on October 27, 2020, just days before Democratic candidate Joe Biden was elected President of the United States. Her confirmation thus came in the waning days of Donald Trump's presidency, an era that had also seen the successful confirmations of both Neil Gorsuch and Brett Kavanaugh, despite the still-pending nomination of Judge Merrick Garland (who had been nominated in the final year of President Barack Obama's presidency, following the death of Justice Antonin Scalia). Yet the controversial character of Barrett's nomination did not dampen the enormous support she had from many conservative and religious organizations; with this support, and the Republican majority in the Senate, Barrett was confirmed to the Court with a 52-48 vote (Oyez 2022).

Indeed, throughout her confirmation hearings, much was made of Barrett's legal, political, and religious beliefs. Her conservative perspectives, her focus on motherhood, and her

devotion to her religion all served to situate her as an idealized representation of "womanhood" for many conservative and Catholic political organizations, as well as for the conservative-leaning and religiously-devoted members of the Senate itself (Oyez 2022). While political and religious affiliations are not meant to explicitly influence the decisions authored by the Justices, Barrett's ideological commitments nonetheless served as a lens through which her potential interpretations of the Constitution were assessed, such that she was described as the "female Justice Scalia" - a nickname substantiated not only by her time spent clerking for the late Justice, but also by her originalist approach to the Constitution (Oyez 2022).

Barrett's ultimate appointment to the Supreme Court solidified the body's conservative ideology, such that states and other political institutions looking to contest the expansion of rights - particularly in the domain of sex and gender protections - began to bring challenges to the Court. More specifically, in the 18 months since Barrett took her seat, state-based legislative challenges to reproductive health rights have risen to the top of the Court's docket. These challenges, if successful, will alter the scope of reproductive health services provided to individuals across the United States. The nomination and confirmation of Barrett provided the motivation for legislative challenges to be fully realized and fully considered by the Court, in other words, what now needs to be considered is how the confluence of Barrett's religious beliefs and her status as a mother set the stage for challenges to abortion access to find legal purchase. This thesis uses this curiosity to analyze the oral arguments of one such legal challenge - *Dobbs v. Jackson Women's Health Organization* (2022) - in order to understand how both religion and gender can shape the notion of womanhood in reproductive health cases. I aim to answer three guiding questions: How does religion shape the law's understanding of what a "woman" ought to be? How might contemporary challenges - like that of *Dobbs* - draw from not only religion, but also historical understandings of legal womanhood, in order to shape their possible resolutions?

And finally, if *Dobbs* does incorporate religious ideology and past adjudications of "appropriate" womanhood in its decision, such that abortion access is curtailed, what does that mean for the future of equal protection and substantive due process for women? In answering these questions, I argue that expressions of religious ideology at the Supreme Court construct an idealized vision of "motherhood," such that the federal government and the states are empowered to circumscribe access to reproductive healthcare and abortion rights for women. I further argue that *Dobbs v. Jackson Women's Health Organization* - when it overturns *Roe v. Wade* - will undo the substantive due process rights fought for and achieved by women, thereby returning the United States to a time before equal protection was realized for all persons under the law.

To make this argument, I proceed in five distinct, yet interrelated, sections. I begin by detailing the methods I use to assess the language deployed in the arguments before the Court as well as its history with respect to both religion and sex- and gender-based protections. In doing so, I also provide definitions of critical terms that are central to the remainder of the thesis, like the separation of church and state, religion, and religiously-inflected womanhood. I next engage with prominent literature in the fields of law and gender, law and religion, and religion and gender. Combined, these three fields - particularly when combined with the history of the Court's landmark jurisprudence in relation to sex and gender - demonstrate that little substantive attention has been paid to how the law can generate a vision of "womanhood" that is discursively grounded in religious ideology. After engaging with the gaps in currently existing literature, I then engage directly with the intricacies of the oral argument in *Dobbs v. Jackson Women's Health Organization*. I analyze the oral arguments of both parties before the Court by looking at the specific language deployed to address claims to religious exemptions, to challenge direct expressions of political ideology, and to participate in discussions over the appropriate exercise of a woman's reproductive agency. By approaching the oral arguments with an eye to these

themes, I evaluate the power they possess to alternatively challenge and construct an image of "woman" before the law through appeals to religion and historical understandings of the role of women in society. I thus conclude that should the state of Mississippi succeed in *Dobbs*, it will return the reproductive health jurisprudence in the United States to a time when women were unable to be full and equal participants in society - and it will do so on the basis on a heteronormative Christian identity.

Methodology

In this thesis, I use the lens of discourse to illuminate how *Dobbs v. Jackson Women's Health* represents the power possessed by religiously-inflected legal arguments to construct idealized notions of womanhood. Moreover, I demonstrate that this language has power precisely because it has historical roots in the denial of women's substantive due process rights and the fight for access to reproductive health in the late nineteenth and twentieth centuries. This approach serves not only to answer the questions posed in the introduction, but also to illustrate what the lived experience of access to abortion would be like in a post-*Roe* world. But what does it mean to deploy a lens of discourse to a jurisprudential history of struggles over rights, religion, and reproductive health? To answer this question, it is helpful to both provide a working definition of discourse and to understand what work this definition may do for this thesis. Broadly construed, discourse focuses "on the structure of naturally occurring spoken language, as found in such 'discourses' as conversations, interviews, commentaries, and speeches" (Crystal 1987, 116). Within these settings, discourse presumes "a transaction between a speaker and hearer, an interpersonal activity whose form is determined by its social purpose" (Leech and Short, as cited in Hawthorn 1992, 189). Thus, what distinguishes discourse from language is a required context that gives productive power to the words themselves in the course

of a given interaction; this context is, more often than not, defined by history and given weight by ideology (Fowler as cited in Hawthorn 1992, 48).

The works of Michel Foucault further illustrate this discursive power. For instance, he argues "discourse is not as a group of signs or a stretch of text, but as practices that systematically form the objects of which they speak" (Foucault 1972, 49). A French sociologist, Foucault deployed what he called a methodology of "genealogy" to investigate institutions that governed our collective lives through discourse. For Foucault, in other words, institutions like the law, healthcare systems, and religions all operated within an historical context that conditioned the possibilities of individual action and individual identity (Foucault 1978). As Sara Mills interprets Foucault:

> A discourse is something which produces something else (an utterance, a concept, an effect), rather than something which exists in and of itself and which can be analyzed in isolation. A discursive structure can be detected because of the systematicity of the ideas, opinions, concepts, ways of thinking and behaving which are formed within a particular context, and because of the effects of those ways of thinking and believing. Thus, we can assume that there is a set of discourses of femininity and masculinity, because women and men behave within a certain range of parameters when defining themselves as gendered subjects. These discursive frameworks demarcate the boundaries within which we can negotiate what it means to be gendered (Mills 1997, 15-16).

In this instance, Foucault argues that our contemporary understanding of what it means to be female or male, woman, or man, is conditioned by the history of these very same identities. The "acceptable" parameters of these identities, moreover, are defined through the normative ideologies of institutions like the law. For example, in *The History of Sexuality*, he notes that "civil and religious jurisdictions alike" created sex-defined roles, such that anything falling outside those parameters were treated as "general unlawfulness [...] that were contrary to nature" (Foucault 1978, 38). The echoes of this history, Foucault concludes, discursively conditions what we believe to be possible or permissible in our contemporary moment; this means, then, that when representatives of the law speak about sex and gender roles today, they are drawing

forth a productive history of the past. The productive history is one that creates separate identities for men and women on the basis of gender and religion.

In the context of this thesis, I engage with the literature on gender, religion, and reproductive health, and landmark Supreme Court cases in three significant eras, including the contemporary moment, all of which illustrate that *Dobbs* is not necessarily a legal aberration, but rather a challenge generated by historical moments. I embrace Foucault's call for a civil and religious genealogy in order to demonstrate how historical jurisprudence on matters of sex and gender condition what is possible in our current moment, such that the very language used by the Court today finds purchase precisely because of these histories. I also build on this observation by incorporating an attention to how religion and religious ideals circulate between the parties and the bench by engaging the history of the law's relationship to religion in the United States. In drawing from history to illuminate the language of the present, discourse analysis thus provides insight into how the very rights women believe that they can have access to are contingent, conditioned by what our collective ideological commitments and histories allow. Equal protection and substantive due process for all, on this understanding, are not guarantees.

Church and State in American Law

In order to assess how the current discourse deployed by the Court reproduces historical notions of womanhood through appeals to religious ideology, it is first necessary to provide a brief overview of the law's relationship to religion in the United States; this move is necessary because, as will be seen in the literature review below, there is very little explicit reference to religion in the context of sex- and gender-based American jurisprudence. When sex, gender, and religion do meet, it is often in the confines of specifically First Amendment jurisprudence, like *Abercrombie & Fitch v. EEOC* (2015) and *Masterpiece Cakeshop v. Colorado Civil Rights*

Commission (2018). These cases, however, do not directly engage with what it means to inhabit or exercise a particular gender identity; instead, they focus on the religious identity as means for accommodations on those grounds. This creates an assumption that religion does not influence the law outside of the First Amendment; however, this assumption is dangerous - and, as will be seen in *Dobbs*, hides the discursive work that religion does in constraining access to reproductive health rights.

In his "Letter to the Danbury Baptists," Thomas Jefferson famously argued that a "wall of separation between church and state" existed in the United States (Jefferson 1802, 1). For Jefferson, in order to secure the rights and liberties of those considered to be persons under the Constitution, the operations of the state must be secured from the influence of religious belief. The belief articulated in this Letter is often used as a lens to interpret the First Amendment, which states: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances (United States Constitution First Amendment, 1789). Yet the use of this letter assessing the rights and liberties of all persons hides how religious ideology often operates in the courtroom, such that the law's protections are often conditioned by legal actors' latent religious beliefs.

To demonstrate how religion and law are not fundamentally separate, we can look at the works of John Locke and Winnifred Fallers Sullivan. Through an engagement with these texts, I argue that the American system of governance endorses a heteronormative society founded on Christian principles. *In A Letter Concerning Toleration*, Locke argues that it is "necessary to distinguish exactly the Business of Civil Government from that of Religion, and to settle the just Bounds that lie between the one and the other" (Locke 1689, 26). Although this argument could be said to directly influence Jefferson's letter to the Danbury Baptists, Locke also did something

slightly different: he justified the circumscription of religion from the state on the basis of Christian ideologies. He writes, with respect to the practice of secularism: "the toleration of those that differ from others in Matters of Religion is so agreeable to the Gospel of Jesus Christ, and the genuine reason of Mankind, that it seems monstrous for Men to be so blind, as not to perceive the Necessity and Advantage of it, in so clear a light." For Locke, the separation of church from state was not "the wall" idealized by Jefferson, but it was rather the idea that a *Christian state* ought to be tolerant of other religions within its borders; the circumscription of overtly Christian ideology would preserve the peace of the state, but it could be appealed to in critical moments - like in determining whether a calf ought to be slaughtered for a non-Christian religious rite - in concerns regarding "the public weal" (Locke 1689, 25). Indeed, Locke's vision of Christianity in western liberal democracies demonstrates that secular values are difficult, if not impossible, to achieve.

In *The Impossibility of Religious Freedom*, Winnifred Fallers Sullivan extends Locke's argument into the 21st century with respect to the religious beliefs of legal actors and the operations of the law. More specifically, she draws from discursive methodology to analyze *Warner v. Boca Raton* (2004), a Florida case in which she served as an expert witness and concerns the ability of a multi-denominational cemetery to have vertical headstones, rather than horizontal headstones. In doing so, she interrogates the language used by the judge and the plaintiffs, such that personal and lived religious practices become a site of legal interpretation. As the case proceeds, Sullivan observes how the presiding judge draws from his own experiences of Christian texts to interpret what forms of religious expression ought to be protected under the law; Fallers Sullivan, furthermore, shows how - in contrast to the judge's understanding of Christianity - the lived religion of the plaintiffs is easily dismissed, as it does not accord with what the judge accepts a "proper" form of faith. Fallers Sullivan concludes that

religious pluralism is therefore not easily protected under the law, as it will always be challenged by the religious ideology of institutional actors (Fallers Sullivan, 2005). Sullivan recounts the words of the judge:

> In listening to the testimony [of the plaintiffs], the views expressed weren't necessarily my views, but I recognize them all as valid religious beliefs that are entitled to protection under the law. I'm sure that if I express my religious views some people would say that's very weird and that's very strange, you know, I can't argue with that. That's unorthodox. And that's what makes up religion, is that we all have a right in this country to have whatever religious views we choose to have. (Fallers Sullivan 2005, 92)

Here, as we see Judge Ryskamp struggling, we can also see elements of the Lockean argument treated above. Judges, for Fallers Sullivan, struggle to separate religion from the law as they seek to use their "genuine reason of Mankind" to guide their interpretation of constitutional principles. Thus, Fallers Sullivan provides an important example of how the analysis of discourse tells us something critical about the interconnectedness of church and state as it operates before the law. While the American Constitution in writing attempts to disentangle itself from religion, below I argue that it is nearly impossible to do so, and in practice, these concepts are neatly intertwined. Even when a case does not make an explicit claim to religion, notions of what is religious by text and by lived practices determine what can be protected. This separation between what is in writing and what is executed on behalf of religious accommodations in practice further articulates the myth of separation of church and state.

Religion

In my treatment of Locke and Fallers Sullivan above, I made general references to "Christianity." And, during the formative years of the United States, Protestant Christianity was the predominant religious ideology. However, as can be seen from the confirmation of Justice Amy Coney Barrett and the current composition of the Supreme Court, there has been a recent shift towards Catholic ideology being presented before the law, especially in reproductive health

cases like *Dobbs v. Jackson Women's Health Organization*, which seeks to restrict access to reproductive health services. While I must acknowledge that the Catholic religion itself is not the only motivator for the legal reasoning practiced by many of today's Supreme Court justices, I argue that these unexpressed forms of religion do play a role in cultivating gendered stereotypes, and, in turn, limiting reproductive health services. Throughout the remainder of this thesis, I refer to dominant religious teachings as Christian and/or Catholic in certain circumstances. While important distinctions operate between these two terms, the combination in specific places is intentional, as the umbrella of Christian ideology influences the collapse between "church" and "state" in matters of law, even as particular Catholic teachings on when life begins are reproduced (and affirmed) before the Court. Taken together, these concepts create a dominant legal ideology and influence what - and who - should be protected under the law.

Yet even as I reference specific religions, I also recognize Fallers Sullivan's argument that "religion," as a discrete concept, is nearly impossible to define due to lived experiences and individual relationships to practices, texts, and traditions. As she notes, there is no one widely used definition of religion, as it is a deeply individual process focused on a single human's needs and desires (Fallers Sullivan 2005). As a person evolves, often their own understanding of religion evolves too, and the role that religion plays in their life may begin to change. For this thesis, I thus acknowledge that religion, while impossible to provide an all-encompassing definition, can be described as a "human seeking after response to what is considered to be holy" (Schmidt, 1988). This definition, in conjunction with Fallers Sullivan, proves useful because it acknowledges the individualistic role in creation of religious practices as it applies to all religions, not just heteronormative practices. The quote furthermore illustrates an encouragement for an individual to seek something holy on their own. Because of the individualistic nature of religion, it can be used as a way to understand themselves "in the world," such that the law

becomes a tool in which individuals seek to "find something holy" or larger than themselves, reflected in the legal and political views of their state. I use this definition of religion as the basis for analyzing the connection of Church and state as it is situated before the Supreme Court. In particular, I examine hegemonic religious teachings as they relate to abortion and other reproductive health rights. In the context of the Supreme Court, all but two currently seated Justices fall under a Christian dominant religious practice. Six of these Justices identify as Catholic and one as Protestant.

The teachings of the Catholic church often encourage women to find meaning and fulfillment in the home, even as they encourage men to earn a living in the public sphere (Vatican Doctrinal Principles Last Accessed 2022). These notions separate men and women into two different working worlds, the public and the private, with different rules for how individuals' bodies and natures ought to be used in each. For instance, in the Vatican Doctrinal Principles, abortion, contraception, divorce, incest, and polygamy are prohibited, even as marital rape is not understood as an act of rape (Vatican Doctrinal Principles Last Accessed 2022); women are also prohibited from being a member of the priesthood (Haskins 2003). Combined, these principles severely limit the personhood rights available to women and deny them leadership opportunities to change potentially harmful religious principles (Haskins 2003). If we apply the language of Schmidt above on the nature of seeking one's religion in one's world, then it is *also* possible to see how these religious principles may influence the development and enforcement of the law. For instance, the Church's opinion on abortion as demonstrated creates the notion of when life begins:

> The specific Christian teaching on abortion developed in a theological context in which the commands of the Old Testament to love God with all your heart (Deuteronomy 6.5).and to love your neighbor as yourself (Leviticus 19.18) were singled out as the two great commandments on which depended "the whole law and the prophets" (Matthew 22.40). The standard for fulfillment of these commandments was set in terms of the

> sacrifice of one man's life for another (John 15.13) and embodied in the self-sacrifice of Jesus. Jesus told the disciples, "This is my commandment, that you love one another as I have loved you" (John 15.32). In terms of his example, the commandment was "a new commandment" (John 13.34). The Christian valuation of life was made in view of this commandment of love. (Noonan 1967, 89)

These values coupled with the Catholic teaching "you shall not kill" have created a vested interest in the potential life of a child from the moment of conception (Noonan 1967, 93). This ideology expressed in these religious sentiments illustrate the connection of religious practices to the understanding of abortive perspectives for Catholic specific religious individuals. These religious claims to the right of life have been used by the States to pass reproductive health restrictions. While states, following the argument of Jefferson's letter to the Danbury Baptists, have argued that their legislative efforts are distinct from their representatives' religious ideals, many have used the religiously-created notion that life begins at conception to bring arguments for reproductive restrictions before the Court. Hence, this religious understanding of fetal life, which is grounded in gendered stereotypes and sex-specific ideals, has been tailored into an argument for increased state regulation on the processes of obtaining an abortion.

Gender and…the Law, Religion, and Reproductive Health

The literature examined above offers definitions that are central to my analysis of the discourse in *Dobbs v. Jackson Women's Health*. They also begin to create a connection between the operations of religious ideology and matters of the state and its laws. This next section uses this literature and its definitions to examine relevant scholarship in three areas: first, gender-based approaches to law; second, sex-based approaches to religion; and third, contemporary reproductive health jurisprudence. Taken together, these three areas of scholarship provide a framework for understanding how sex and religion impact legal cases and statutes for reproductive health, even as they point towards a tangible gap: because of the Lockean myth of

the separation of church and state, little research has been done on how all three ideas - religion, law, and sex - combine to construct the institutions that govern our lives. As will be seen below, although there is some literature that draws from Islamic-specific contexts to demonstrate the confluence of these ideas, they focus primarily on religious dress and public accommodation, rather than reproductive healthcare. As such, I argue that currently-existing literature does not sufficiently illuminate what happens when the law itself becomes dependent on a dominant religious identity and what effects this dependence will have on American understanding of substantive due process rights.

Gender and the Law

This section analyzes, in turn, three different approaches to gender and the law: difference feminism, dominance feminism, and equality feminism. These three approaches, which respectively examine the roles of biology, oppression, and gender stereotypes in the law, all seek to identify the rights that women can claim in western liberal democratic states. Yet even as I acknowledge how these approaches attend to the need for positive sex- and gender-based protections, they do not consider how these very same protections may founder due to religious ideology - particularly if such religions mandate the separation of male and female gender identities. Moreover, if the law is fundamentally connected to a Christian ideology, it limits the protections granted to gendered claims on the basis of other religious identities.

Difference feminism argues that, like the name suggests, that there are innate biological differences between men and women. For instance, Robin West in *Jurisprudence and Gender* (West, 1988) argues that to deny these innate differences would be to deny sex-specific protections to women on the basis of their biological functions. In making this argument, she advances two central theories: the separation thesis and the connection thesis. With respect to the separation thesis, West writes: “According to liberal legalism, each of us is physically

separate from every other, and because of that separation, we value our autonomy from the other and fear our annihilation by him" (West 1988, 12). The separation theory thus posits that the law, as it can only guarantee negative rights to individuals under the Constitution , focuses on separating lived human experiences from one other (West 1988, 12). Such a system denies the connection thesis, which in contrast to the separation thesis, determines that women "long to establish some sort of human connection with the other in order to overcome the pain of isolation and alienation which our separateness engenders" (West 1988, 12). West argues that, for women, operating as individuals before the law - and asking for rights on the basis of that individuality - denies the biological experiences shared among women that create long-lasting and sustained connections: experiences like menstruation, breastfeeding, and pregnancy that ought to be cherished by society. If these shared biological commonalities could be used as the basis for granting group-based rights, West further determines, women could access laws that provide for maternity leave, healthcare access, and more. Yet there is a danger in West's theory: in order for women to best benefit under the law she needs to understand her biological needs and wants and articulate them through *only* the language of biology to the law. Her argument thus mandates that the law *ought not* to guarantee the equal treatment of all persons before the law but should rather endeavor to separate "man" from "woman" and apportion rights accordingly. Under such a system, a person who experiences pregnancy or menstruation would be forced to articulate the need for protection on the basis of a shared female connection, creating two separate spheres in society with different attendant rights. In other words, West's theory constructs what is known as the "separate spheres ideology," in which individuals must desire sex-specific connections and conform to gender normative behavior. While her theory does represent an important step in securing rights under the law, it does not make space for

non-traditional gender roles to be protected under the law because of the ways in which it separates men and from women on the basis of biological differences.

West's theories, as I indicated above, were not without controversy. In particular, the second body of literature I examine challenges the idea that innate biological differences ought to be the guarantor of legal rights. For instance, in *Difference and Dominance: On Sex Discrimination* (1984), Catharine MacKinnon argues that separate spheres ideologies are inherently oppressive, as they reproduce the idea that one's gender must absolutely follow from one's sex. Moreover, MacKinnon stresses that the difference feminism approach means that rights are "measured according to our lack of correspondence with him, our womanhood judged by our distance to his measure" (MacKinnon 1984, 34). The difference between men and women, in other words, thus becomes a way to deny that women ought to be understood as deserving of the same rights of men; biology becomes an oppressive tool of measurement that always leaves women wanting. In contrast to West, she advances what is known as dominance feminism, which argues that any theory of rights must account for the idea that a woman's life is shaped around their inferior status to men, which is then substantiated through social and legal processes. MacKinnon believes that the law, if left unchecked, can become a tool of oppression, as it will explicitly limit the roles that women may have and force gendered stereotypes to become the "ideal" before the law (MacKinnon 1984, 38).

To remedy the inequalities of the social and legal world for women, MacKinnon advocates for litigation and for legislation to be enacted that proactively acknowledges and remedies the legal, social, and political disadvantages faced by women and gender non-conforming individuals (MacKinnon 1984, 41). For MacKinnon, the law itself has a dual identity, in that it could be used as a tool of oppression that actively limits the life prospects of women, but so too it could be used as a tool of liberation that radically reconstitutes the power

possessed by women in private and public spheres - perhaps surpassing the power historically possessed by men. Indeed, for MacKinnon, ideals of gender neutrality and equal treatment before the law are not enough; she writes:

> I say, give women equal power in social life. Let what we say matter, then we will discourse on questions of morality. Take your foot off our necks, then we will hear in what tongue women speak. So long as sex equality is limited by sex difference, whether you like it or don't like it, whether you value it or seek to negate it, whether you stake it out as a ground for feminism or occupy it as the terrain of misogyny, women will be born, degraded, and die. We would settle for equal protection of the laws under which one would be born, live, and die, in a country where protection is not a dirty word and equality is not a special privilege. (MacKinnon 1984, 45)

MacKinnon's radical feminist ideology directly contests the notions discussed by West by creating a narrative that challenges how languages of equality cannot address the social subordination and legal oppression created by separate spheres ideology. Yet, even as MacKinnon at once compels and challenges the law to address the differential and harmful treatment of individuals under the law on sex-specific bases, she does not fully address *how* such remedies can occur - and how the possibilities of a life lived under the law could be expanded beyond those defined by sex stereotypes and normative gender expectations.

The last body of literature I treat - that of equality feminism - looks to the law as a means for upsetting stereotypes, something that neither West nor MacKinnon fully embraced. More specifically, Cary Franklin's *The Anti-Stereotyping Principle* and David Cole's *Strategies of Difference* harness the gendered differences that are present in society, the law, and scholarship as a means for eliciting meaningful legal changes. Both Cole and Franklin look to late Justice Ruth Bader Ginsberg, her life experiences, and her unique approach to gender equality before the Court as the ideal method by which to unsettle stereotypes. Before Ginsburg took a seat on the highest Court, she faced gender discrimination, barring her from job opportunities across New York City, until she landed a position as the director of the Women's Rights Project of the

American Civil Liberties Union (ACLU) (Halberstam 1997, 1446-1447). During this time, she used her personal experiences of gender discrimination as fuel to argue six gender equality cases, all having a critical role in expanding women's - and men's - rights before the law (Halberstam 1997, 1447-1449).

In his assessment of Ginsburg's jurisprudential method, Cole examines Ginsburg's use of male plaintiffs to advocate for sex and gender equality. He argues that this move persuaded the all-male Court to sympathize with the plaintiffs and, in turn, to decide in favor of expanding the rights that could be claimed by men (Cole 1984, 54). Yet, crucially, this move was not one that either rested on innate biological differences nor on the subordination of women to allocate more socio-political power to men. Instead, for Ginsburg, male plaintiffs served as a means to highlight gender-based disparities under the law, which unsettled the sex- and gender-based stereotypes to which women were expected to conform (Cole 1984, 56). In support of his argument, Cole points to the case of *Frontiero v. Richardson* (1973), in which Ginsburg argued before the Supreme Court. In this case, the male plaintiff sought dependency status on his wife as she was an active military member, and he, at the time, was a student (Cole 1984, 59). The facts of this case illustrate the implicit gender biases present in the law, as there is an understanding that women would not be United States service members, and instead the woman would be at home seeking the military spousal pensions. The multiple levels of authority that the wife of the plaintiff needed to prove her military service as legitimate called attention to a standard for women working in the public sphere not necessary for men. Ginsburg's ability to play to the court's "prejudices" was a brilliant tactic that allowed her to garner greater representation for women under the law, while also expanding for men the possibilities of what roles they could assume in life (Cole 1984, 59). Gender, according to Cole and demonstrated by Ginsburg, could thus be used as a tactic to raise awareness of inequities of protection under the

law. By using the law as a tool for unsettling stereotypes, it leaves room for nontraditional understandings of womanhood and femininity to have a place in legal proceedings.

Cary Franklin further examines Ginsburg's strategy as a means for eliciting changes in constitutional protections for all sexes and genders. She builds on Cole's findings and echoes his methodology by examining Ginsburg's litigation but concretizes his argument to a greater degree. Franklin argues that Ginsburg practiced an "anti-stereotyping principle," as it "dictated that the state could not act in ways that reflected or reinforced traditional conceptions of men's and women's roles. It was not simply anti-classifications: it permitted the state to classify on the basis of sex in instances were doing so served to dissipate sex-role stereotypes. Nor was it strictly anti-subordinationist" (Franklin 2010, 88). Franklin views Ginsburg's challenges with male plaintiffs as pushing anti-stereotyping principles, but in a way that is far more radical than that acknowledged by Cole: instead, on this reading, Ginsburg is able to unsettle the insidious sex- and gender-based stereotypes that permeate separate spheres ideology as idealized by West, even as she seeks to upset the normal order of the law as desired by MacKinnon. Challenging stereotypes, in other words, allowed Ginsburg to expand the protective possibilities of the law, such that new forms of positive rights could be identified and substantiated.

The approaches of gender and the law examined above tell us important information on the roles of femininity and womanhood in creating an argument before the Court. However, these works do not examine the entanglement of gender jurisprudence with the ideological stereotypes of men and women seen in Christian and Catholic doctrine. In three unique ways: the discussion of biological claims of difference, sex as it relates directly to gender, and the law's implicitly gendered language, are reinforce Christian/ Catholic teachings. Indeed, even as Justice Ginsburg troubled the connection between gender stereotypes and the law as a means for creating a more just system, unsettling the law could not address the latent religious ideals that

operate amongst legal actors. In the literature below, we can see how the scholarship on gender and religion, and religion and law, do not fully account for the fluidity of the law's discursive construction, as argued by Fallers Sullivan above. It is this gap that my thesis seeks to fill in its treatment of *Dobbs v. Jackson Women's Health Organization*.

Gender and Religion

Much of the literature that examines the relationship between gender and religion under the law focuses on religions that have been marginalized in the United States such as Islamic specific religious dress practices. Below, I engage with the scholarship on such marginalized groups, specifically scholarship that discusses Sharia Muslim law. As shall be seen, this scholarship focuses primarily on how the law can regulate (or not) the religious dress worn by devout Islamic women in the United States, Canada, Africa, and more. What is illustrative about these works, however, is that they do not reflect on the possibility - as seen with Locke and Fallers Sullivan above - that the language of accommodations for conservative religious dress presumes a Christian ideology in the law's operations. In other words, to talk about accommodations - an exemption from the law's normal operations - is to talk about what the law understands to be its baseline; for much of the legal scholarship on gender and religion to focus on Islamic women's appeals for exemptions demonstrates, in relief, a latent Christian ideology.

The works discuss the legal relationship to Muslim dress code, *the hijab,* and its role in shaping cases across countries for which religious practices are legally protected (Dabbous-Sensenig 2006, 60-61). Dabbous-Sensenig argues that through media representation of the commonly streamed Muslim media network, *Al-Jazeera,* argues that dominant perspectives of religion are viewed as righteous and in turn are more likely to be protected by the law especially when gendered dress is involved (Dabbous-Sensenig 2006, 62). Television and other mass media outlets help to create a stereotypical representation of gender and religious interactions,

and when they view cases that deal with the wearing of the hijab, it continues to percolate negative ideas of the practice and the need for legal accommodations for religious women (Dabbous-Sensenig 2006, Barlas 2002). Moreover, the conversation of the refusal to remove hijabs in accordance with State orders, international courts in France attempt to justify their behaviors with calls to the lack of scripture stating the mandatory dress of hijabs in public for Muslim women (Dabbous-Sensenig 2006, Barlas 2002).

While American domestic jurisprudence may attempt to categorize Islamic specific accommodations as an international issue, Letti Volpp argues that these claims are also ingrained in the practice of American jurisprudence which tells us critical information into the relationship of church and state. Volpp's argument is based in the Western internalization of minority religious practices. By examining how minority religions- in particular religious women- must seek protections on the basis of their beliefs to make it synonymous with American culture, Volpp articulates the relationship of American culture and law to Christian religious ideals (Volpp 2001). Therefore, when a religious group attempts to disrupt hegemonic practices, it is often viewed as the "backwards" culture and met with controversy (Volpp 2001). Gender specific religious freedom claims on cases such as wearing Islamic headdress or protecting cultural marital practices must need differential legal protections (Volpp 2001). This further illustrates the claims of cultural hegemony around certain religious identities in America and refocuses the issues of gender and religion back to those faced in the States.

The paragraphs above demonstrate that many appeals to courts on the basis of sex or gender *and* religion are often framed in terms of exemptions or accommodations and, moreover, they emerge from marginalized religious communities internationally, but also domestically. This is not to say that such requests ought to be denied, but rather that they demonstrate that American jurisprudence - and American society - operates on the presumption of Christian, and

Catholic, dominance. When this understanding is taken together with my treatment of Locke and Fallers Sullivan in the previous sections, it is possible to see that the ability of a gender-specific religious accommodation request to succeed before the law is its capacity to preserve the dominant, yet latent, framework of Christian ideology. More recently, however, the Court has seen an increase in sex- and gender-related religious accommodation requests being made on the basis of Christianity, more generally, and Catholicism, more specifically. Like with the religious dress examples above, these requests are also asking for exemptions from generally applicable laws, but they do so in a way that seeks to *restrict* access to reproductive rights rather than *expand* the ability to move throughout the world. These cases, like *Burwell v. Hobby Lobby*, which will be examined below, however, to understand their full impact, it is first necessary to understand how current literature understands access to and challenges made against reproductive health law on the basis of gender.

Gender and Reproductive Health Jurisprudence

To best examine the current scholarship on reproductive health jurisprudence, I look to Reva Siegal and Beth Burkstrand-Reid, as they examine what kinds of arguments are compelling for abortion regulation cases before the Supreme Court. Their works consider social contexts and the consequences of viewing womanhood as a valid means for enacting reproductive health restrictions as they begin to trouble the connection between womanhood as an idealized identity, and the role that this has in the adjudication of highly contested abortion cases. In the end deciding that abortion is used to further political agendas and often does not favor the woman's choices or body autonomy. Moreover, when reproductive health law is adjudicated, it is done so with the intention of invoking state power, enforcing stereotypical ideas of gender and also of religion by deciding when state's interests become more compelling that interests of women as actors other than mothers.

In *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions,* Siegel argues that attempts to justify abortion regulations because of gender differences constricts protection for those seeking abortion under the equal protection of the law (Siegel 2006, 994). Siegal's work uses the framework of South Dakota's 2006 abortion ban to address the state's interest in controlling women's bodies and the stereotypes that this perpetuates (Siegal 2006, 996). Siegal focuses on the "woman-protective" antiabortion rhetoric as it relies on gendered stereotypes of the woman as the homemaker and matriarch to increase state control over a woman's body (Siegal 2006, 1009). The "woman-protective" antiabortion rhetoric mimics the language of Robin West and difference feminism as it forces separate legal protections onto men and women, because of the possibility of pregnancy for women. Siegal continues to argue that the Court takes up abortion cases not because there is a genuine and vested interest in the child from conception, but instead there is a vested interest in controlling the actions and limiting the State powers given to women (Siegal 2006, 1009-1010). Siegal's work connects conceptions of gender and the law to its role in adjudicating reproductive health cases and, in doing so, she examines the paradoxical nature of what it means to launch an argument for abortion "because of the health of the mother," as it serves to limit the woman's autonomy before the law; for Siegal, in other words, even legal arguments that seek to secure access to abortion can nonetheless recreate troubling gender-based stereotypes or limit a pregnant person's agency. This argument, as we will see below, has troubling repercussions for later reproductive health cases.

Following from the work of Siegal, Burkstrand-Reid's work *The Invisible Woman: Availability and Culpability in Reproductive Health Jurisprudence* focuses on two main considerations that Courts use to justify reproductive health regulation. Much like Siegal, Burkstrand-Reid's piece tells a story of double standards of the law for women for reproductive

health cases. When read together, their pieces create a narrative on how the court attempts to adjudicate reproductive health claims; with an emphasis on protecting the potential for motherhood regardless of the burdens that it may place on a woman.

In creating her argument, first, Burkstrand-Reid draws on the "significant consideration" of women's health as the means for enacting these restrictive laws (Burkstrand-Reid 2010, 97). This work examines the ways in which the Court speaks directly to the women seeking an abortion through two distinct tools: the availability tool and the culpability tool. With respect to the availability tool, Burkstrand-Reid argues that, in a number of reproductive health cases, the Court often refers to other available options for obtaining an abortion, such as self-managed medical abortions rather than physician-assisted abortions, instead of addressing the unconstitutionality of why a certain provider may refuse to provide reproductive health services (Burkstrand-Reid 2010, 108-109). This claim that service can be accessed through one's own resources, or found in a different location, has been used to justify Court decisions in many cases such as *Planned Parenthood v. Casey* and *June Medical Services v. Russo*; however, it does not consider the practical circumstances that may limit an individual's ability to seek other accommodations. When we see this claim being utilized by it is effective in limiting the protections granted to women seeking an abortion. While the cases are explained below in more detail, Burkstrand-Reid's claim of the presence of the availability tool has been used to justify the decisions and effectively return rights to the state over female individual liberty.

Burkstrand-Reid's second point draws on the "culpability tool," or the idea that judges look to blame the woman when the aforementioned alternative resources are not available (Burkstrand-Reid 2010, 137). In cases where the availability of accommodations may be limited, judges do not blame the legal system or state legislatures for the creation of abortion-access limits; instead, they find fault with the challenger. Burkstrand-Reid draws attention to the

Court's arguments in *Planned Parenthood v. Casey* amongst other cases to demonstrate that, if there is a lack of available abortive resources, it was "the result of a woman's own (bad) choice" (Burkstrand-Reid 2010, 137). This twofold argument creates a system that minimizes the role of the woman's health and her personal autonomy in reproductive health jurisprudence (Burkstrand-Reid 2010, 97). These strands of reproductive health jurisprudence tell us important information about the positionality of women's health before the law. When read in connection with Siegal and other feminist theorists such as West, it is clear the dominance of separate spheres ideologies to be used as a tool to limit the services a woman is entitled to. As illustrated, reproductive health jurisprudence does not exist in a vacuum, instead it connects concepts of gender stereotypes to the law through the restriction of autonomy based on the separate spheres ideology coined by West. Women are often penalized by legal proceedings for attempting to upset and challenge state imposed reproductive health restrictions.

The bodies of literature examined above (gender and the law, gender and religion, and gender and reproductive health jurisprudence) provide a framework for understanding both landmark Supreme Court decisions, but also the discourse of the oral arguments in *Dobbs*. When placed in conversation with each other, the literature tells critical information of gender specific claims onto three distinct categories. West in conversation with the works of Siegal and Burkstrand-Reid create a narrative that perpetuates separate-spheres ideology in the law and in practice. However, we also see the latter two authors connect to Franklin and Cole's idea that the law can be unsettled by creating challenges on the basis of equal protection. Yet in practice it only further ingrained separate spheres ideology and lessened the protections for women seeking reproductive health services. When all of the previously examined literature is viewed in conversation with each other, it is clear how hegemonic religious identities are used to reinforce a stereotypical understanding of womanhood and play a large part in the adjudication of

reproductive health law- most importantly by shifting the 'blame' of seeking an abortion off the state and onto the woman. This literature provides a necessary background to view eras of case law and examine what the Court finds convincing for extending or restricting reproductive health protections during different moments of history.

A History of Present Jurisprudence

In the section above, I demonstrated that contemporary scholarship on gender, religion, and law can tell us important things about how stereotypes are constructed and enforced, and how the law itself cannot see its own religious ideology when adjudicating accommodation cases. I also demonstrated that attempts to decide current case law illuminate the limits of the law in its ability to provide for equal protection in matters of reproductive health. But, in doing so, I also demonstrated that these bodies of scholarship do not directly address the confluence of gender, religion, and law in contemporary challenges to abortion access. In what follows below, I bring this scholarship into conversation with the previously adjudicated Supreme Court's jurisprudence with respect to sex and gender protections. First, as I argued at the outset of this thesis, I follow Foucault's methodology of discourse analysis which requires a "genealogy" of our lived experiences, a genealogy that can be reconstituted through attentiveness to historical developments. Second, if this historical analysis is brought to bear on the oral arguments in *Dobbs* with the preceding literature of stereotypes and reproductive autonomy in mind, it is possible to see that *Dobbs* may not just represent a minor reduction in the rights afforded to women, but rather a return to an American moment in which women's bodies were subordinated and subjected to the control of the law - a reality that Ginsburg challenged and MacKinnon feared.

To this end, I separate and examine the Supreme Court's sex- and gender-based jurisprudence into three eras: a time before substantive due process; the era of *Roe v. Wade*; and a post-*Roe* America. In doing so, I engage with cases within these eras to illustrate the emergence - and then the retreat - of rights afforded to individuals on the basis of sex and gender, such that we can discern what arguments were convincing to each Court at each moment in history. I begin my treatment of these cases in 1872, continuing to our contemporary moment. Throughout this section, I connect these cases back to the concepts detailed in my literature review. The culmination of these cases tell us critical information about how the court uses the idea of "womanhood" as a vehicle for the communication of implicit and explicit religious ideologies. By discussing these cases in conjunction with the moments in history that help situate the decisions, it is possible to "read" the discursive nuances at work in *Dobbs*, such that we can see how the law itself creates the conditions in which equal protection for women under the law can be challenged - and win.

A Time Before Substantive Due Process

In order to understand precisely what substantive due process is, and how substantive due process seeks to expand and protect the ability of all persons to be at liberty under the law, it is first necessary to understand what it is not. As will be seen below, substantive due process emerges from challenges to sex- and gender-based discriminations brought under the 14th Amendment, it finds its origins in two specific cases: *Bradwell v. The State of Illinois* (1872) and *Muller v. Oregon* (1908). Combined, these cases demonstrate how the ideal of "womanhood" was used as a means to not only deny women the ability to challenge the pervasiveness of separate spheres ideology, but also how it could be used to secure some sex-specific protections - but in a way that did not realize autonomy or agency, as understood by Siegal and Burkstrand-Reid.

In *Bradwell v. The State of Illinois*, Myra Bradwell brought a case before the Court, stating that she had the right to practice the law because of her status as a United States citizen (*Bradwell v. The State* 1872). Previously, the Illinois state Supreme Court had denied her bar application because of her gender identification as a woman. Bradwell appealed to the United States Supreme Court because she believed her right to obtain a legal license was guaranteed under the Fourteenth Amendment for all citizens (*Bradwell v. The State* 1872). Bradwell made a claim on the basis that she was a citizen of the United States, and therefore entitled to the protections of sharing the "privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" (American Constitution, 14th Amendment Section One). Yet, the Supreme Court found that the right to practice law does not have to be a privilege granted to all citizens, and instead should be circumscribed to men. In deciding this way, the Supreme Court determined that the proper place of women was the home, while the men's place was in the public sphere, but so too did it explicitly acknowledge that women possessed few constitutional rights and were not constitutionally protected with the due process of the law. For instance, Justice Bradley wrote:

> It certainly cannot be affirmed, as an historical fact, that [the practice of law] has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference **in the respective spheres and destinies of man and woman**. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, **which is founded in the divine ordinance,** as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. (*Bradwell v. The State of Illinois* 1872, 7; emphasis added)

As quoted by Justice Bradley, the Court determined that men and women must operate in separate spheres because of the 'divine ordinance' of a familial structure. Not only does Justice Bradley in this decision explicitly limit the public roles a woman could play, but more implicitly he allows his own religious beliefs to act as an adjudication tool, much like that of Judge Ryskamp during the case of *Warner v. City of Boca Raton* as told by Fallers-Sullivan. This once more illuminates the tacit relationship between hegemonic religious identities and the determination of women's rights for the Court. The separate spheres ideological decision for the Court is one that following cases use as a legal guide to deny the extension of equal protection to women under the 14th amendment.

In *Muller v. Oregon* (1908), the Court built on its determination in *Bradwell* that womanhood was something unique and in need of protection. This case concerned Curt Muller, an owner of a laundry business, who was convicted and fined for violating an Oregon statute that limited the number of hours a woman could work a day, while not also limiting the hours that could be worked by men(*Muller v. Oregon,* 1908). Muller appealed his conviction to the Supreme Court, arguing that it violated the 14th amendment. However, in a unanimous decision, the Court voted to uphold the Oregon law stating that there is something "fundamentally female" that deserves to be protected against the vagaries of labor in the workforce because of a "woman's physical structure and the performance of maternal functions" (*Muller v. Oregon* 1908, 4). The Court mentioned the child-bearing nature in conjunction with the social role of women which were strong state interests in limiting the number of hours that they were legally allowed to work (*Muller v. Oregon* 1908). When the decision of *Muller* is examined, there is once more a focus on separate spheres ideology on the claim to potential motherhood as deserving of a different set of protections. Hence this case explicitly designated that womanhood should operate in a separate sphere solely on the basis that women, because of the possibility of

pregnancy, require differential treatment. Once more illustrating the legal implications of West's anti-subordination theory and separate spheres ideology and helping to build an argument that substantive due process rights to protection under the law have not yet been realized.

In *Buck v. Bell,* Carrie Buck was committed to a Virginia state mental institution by her foster family, after their nephew raped and impregnated her (Lombardo 2008, 103). The institution and her family alike referred to Buck as a "feeble-minded woman," whose condition was believed to be untreatable and likely genetic (*Buck v. Bell* 1927); however, biographies of Buck's life demonstrate that she excelled at school and was well-liked amongst her peers and community (Lombardo 2008, 103). Historians suggest that Buck's institutionalization was to "take care of" the social problem of Buck's pregnancy for her foster family. At the time of Buck's institutionalization, Virginia statues authorized the sexual sterilization of women confined to their "colonies" due to the "health of the patient and the welfare of society" (*Buck v. Bell* 1927*,* 274). This movement to forcibly sterilize institutionalized women found its roots in the eugenics movement, which argued that there ought to be a "science of good breeding," in order to prevent "lunacy, feeble-mindedness, habitual criminality, and pauperism" among "the Unfit" (Lombardo 2008, 7-8). An historian of Carrie Buck, Paul Lombardo, notes:

> [The originator of the "science of good breeding"] was doing nothing more than echoing the well-received theory of "degeneracy" that had been used to explain social degradation since the seventeenth century. Degeneracy theory gave a human face to the biblical curse condemning children to inherit the sins of their fathers. The curse carried particular power when those sins were demonstrated in dissolute living leading to legal transgressions, disease, and pauperism, as poverty was typically known. (Lombardo 2008, 8)

Moreover, this quote illustrates a larger claim to motherhood by deciding who is capable of being a mother, and how that child should be raised. The ability for a state- or in *Buck's* case, a man- who is disconnected from the direct act of pregnancy to have power over the bodily decisions of a pregnant woman furthers my overall argument that the State prioritizes their power

over the autonomy of a woman to make her own choices. Even further, this quote and case law has an implicit religious agenda as it enforces traditional roles of male authority that are echoed in religious teachings. The opinion goes so far that it even uses the word "biblical" to describe his justification; further showing the collapse of church and state. When her sterilization was scheduled, Buck challenged the legality of the Virginia law under the Fourteenth Amendment. Yet, in the face of support from both the institution's founder and the Virginia state legislators, the Court took no issue with the statute's constitutionality, on the grounds that it was for societal benefit. The Court further argued that if there had been an issue in a sterilization being wrongly justified, there are enough court procedures in place to have the Court intervene and overturn the ruling before the actual medical procedure took place. (*Buck v. Bell* 1927). This case served as a landmark moment in the eugenics movement and illustrates the Court's willingness to intervene on a woman's bodily choices to carry a child on the basis of religiously-inflected notions of "good parenthood."

When these three cases are taken together, they illuminate how the Court viewed womanhood during the late 19th and early 20th centuries. In this era, the country was reeling from the Civil War and the immense losses faced across all states. During this moment, the Court sat in a deeply conservative position as they attempted to disentangle the connections of the war, build cohesive legislative decisions, and adjudicate what the latter portion of the 14th amendment meant in practice (Urofsky 2012). There was a focus on who exactly is included in protections of the 14th amendment, and it was founded that equal protection should be granted, but not on the basis of sex and gender and, in fact, that in some circumstances a fully separate set of rules should apply to women as compared to those that applied to men. "At the same time that reformers looked to end bondage based on skin color, many of them also sought to end the legal disabilities of women. Traditional common-law rules forbid women from voting, holding

property in their own name, and making contracts. If they wanted to sue, they had to do so in their husband's name, and by law, the legal control of a husband over his wife was near-absolute. After the Civil War the drive for women's suffrage and for the removal of other legal impediments picked up steam, but it would take many years before women would be able to cast a ballot, and even more before they achieved full equality before the law" (Urofsky 2012, 2). The second section of the 14th amendment brought forth claims to equal protection but made clear the use of gendered language to quantify that these protections only apply to men under the law. Hence, as discussed by Urofsky, even as movements for gender equality were beginning, they were not given a place under the law to be realized, because the laws in their language had no regard for female voices.

Challenges to the sex-specific language of the 14th amendment gave rise to what is known as "substantive due process" challenges, which can be traced, as seen above, to the lawsuit launched by Myra Bradwell against the state of Illinois. Substantive due process challenges are not necessarily, as the name implies, challenges to the procedures of the laws; instead, they are challenges that seek the positive protection of the laws through the creation of unenumerated rights. Bradwell's challenge was to have the Court *create* a right for women to be lawyers, such that she could then realize the equal protection of the 14th amendment to the Constitution. Yet in the denial of Bradwell's challenge, the Court - through Justice Bradley - determined that a woman's job was to be confined to the home, thereby reinforcing the "maleness" of the protections granted under the 14th amendment (Urofsky 2012). The landmark decision of the Court to render the differences in protection afforded to men and women as constitutional under the 14th amendment then influenced the outcomes in both *Muller* and *Buck*, such that women could only be granted positive rights related to their "fitness" of motherhood.

Beyond the scope of motherhood, the Court denied protections to women in other areas of their lives (Urofsky 2012).

The potential of motherhood, moreover, was often tied to religious ideology, which can be seen not only in the language deployed by the Court, but also in the history surrounding the cases themselves. When Justice Bradley relied upon the supposed divine differences between men and women in *Bradwell*, instead of the equal protection language of the 14th amendment, he not only denied Bradwell substantive due process rights, but he did so by reinforcing Christian beliefs on the roles of motherhood. This move by Bradley echoes the arguments seen earlier by West, such that the "connection" of pregnancy for women isolates them from participation in the men's public sphere; the Court capitalized on these very same biological differences in *Muller* and *Buck.* In these cases, womanhood is understood solely as it relates to reproductive processes and biologically female phenomena, such that it creates a legally-enforceable notion of an idealized and stereotypical woman. Yet, as we saw from the legal and historical language surrounding both *Muller* and *Buck*, this vision of idealized women relies on appeals to hegemonic religious beliefs that are deeply tied to pregnancy and motherhood. Thus, what is important about this legal history is that the denial of substantive due process rights is not based on a principled reading of the language of the Constitution or its amendments, but rather on appeals to social and religious ideals. This will have significant repercussions for my interpretation of *Dobbs* in the final sections of this thesis.

The Era of *Roe v. Wade*

The Civil Rights Movement did much to secure substantive due process rights for all persons under the law. Following a number of social, legal, and political challenges to "Jim

Crow Laws," which created "separate but equal" spheres of life on the basis of race, the Civil Rights Act of 1964 was enacted and prohibited discrimination targeted towards "race, color, religion, sex, or national origin" (US DOL Last Accessed 2022). In this Act, and by formally determining the idea that discrimination could occur not only on the basis of race, but also on the basis of sex, Congress broadened the definition of who could appeal to the Constitution as a guarantor of rights. This led to a slew of legal challenges on the basis of sex and gender, and for the first time, a right to protections of privacy.

At the time of the Civil Rights Movement, the Court was led by Chief Justice Earl Warren, author of the unanimous decision in *Brown v. Board of Education* (1954). Warren had recognized the contentiousness of ruling segregation unconstitutional and deployed his political skills and connections to work with his fellow justices to craft a decision that could be read by the "lay" person and published in a single newspaper page across the country (Urofsky 2006). Warren's efforts to reshape the protections afforded to individuals under the law inspired *Griswold v. Connecticut* (1965) and *Roe v. Wade* (1973), both of which revisited the struggle for substantive due process rights in the late 19th and early 20th centuries. This time, however, the challenges focused on crafting positive protections for bodily autonomy, particularly in the domain of contraception and abortion. This was a necessary shift to unsettle traditional gendered protections and expand the rights to privacy for all women. These cases served to distance the state from decisions regarding female health, by creating a veil of privacy for decisions to be made under. This change allowed what is protected as a female act to be decided when the woman wants, not on the basis of when she is pregnant. This shift allowed women to unsettle gendered stereotypes and the separate spheres ideology.

Griswold v. Connecticut concerns an 1879 Connecticut statute that banned contraceptive methods for women in all forms[1]. This law stood firm for many years, until it was challenged by Estelle Griswold and Lee Buxton, the Head of Planned Parenthood Organizations in Connecticut, and a registered Yale-trained gynecologist, respectively (*Griswold v. Connecticut* 1965). Together, they created a birth control clinic that sought to provide contraceptives and counseling to married couples (*Griswold v. Connecticut* 1965). However, they were arrested for their work in this practice, yet they challenged the Court on the grounds that there is a fundamental right to marital privacy, and the choice to consider contraceptives falls under that (*Griswold v. Connecticut* 1965). In 1965, nearly 100 years after the original law was passed, the Court created the fundamental right to privacy and awarded it to married couples to make decisions on contraception. Justice Douglas, on behalf of seven of the Justices, wrote that "The case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives, rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court." (*Griswold v. Connecticut* 1965 Majority Opinion). This guaranteed right to privacy began the moment where women were able to successfully mount substantive due process claims and gain equal protection. By substantiating the right to privacy in this decision, the Court shielded women (and their partners) from the need to conform to sex-specific stereotypes and challenged the subordination found in *Bradwell,*

[1] In March of 1873, Congress authorized the Comstock Act of 1873. This was a tactical move to ban the transportation of lustful and obscene (part of a fundamentally religious claim to what is considered pure) materials through the public mail. The decision of *Griswold* actually appealed those acts by purposefully invoking a veil of privacy. We also see the Court start to proactively separate jurisprudence from hegemonic religion by limiting state control. (Bailey 2010)

Muller, and *Buck*. Ultimately, this allowed women to become something more than an idealized mother.

Roe v. Wade built on the right to marital privacy carved out by Douglas in *Griswold and* extended the protection of this privacy to all who seek abortions, during certain parts of their pregnancy (*Roe v. Wade* 1973). Yet even as the Court argued that women have a fundamental right to choose whether to have an abortion without the interference of the state, they created what is now known as the "trimester system" for determining when an abortion can be legally accessed. Justice Blackmun wrote:

> In the first trimester of pregnancy, the state may not regulate the abortion decision; only the pregnant woman and her attending physician can make that decision. In the second trimester, the state may impose regulations on abortion that are reasonably related to maternal health. In the third trimester, once the fetus reaches the point of "viability," a state may regulate abortions or prohibit them entirely, so long as the laws contain exceptions for cases when abortion is necessary to save the life or health of the mother. (*Roe v. Wade* 1973)

Here, the Court decided that the first trimester takes place from week one through week twelve, the second trimester is from week thirteen until week twenty-six, and the third trimester is from week twenty-seven through the end of the pregnancy (*Roe v. Wade* 1973). This trimester system is unusual, in that it was not endorsed nor created by medical professionals. Moreover, the trimester system created a sliding scale by which a woman's autonomy in matters of pregnancy receded as the fetus aged; as Blackmun notes above, by the time the fetus reaches a point of "viability" (that is, when a fetus could feasibly survive outside of the uterus), the state would have a compelling interest in regulating access to abortion. While *Roe* is often viewed as a transformative moment in women's rights, it is important to note that it does not grant full autonomy to a woman during her time of pregnancy. Instead, the Court justifies waiting until a moment of viability before making claims to State intervention on the basis of motherhood and properly raising a child.

Griswold and *Roe* attempt to separate the interests of an individual's reproductive health from the state and, in doing so, they allow women to achieve somewhat equal legal footing with their male counterparts. These cases, moreover, set the stage for women to challenge the separate spheres ideology more robustly; both *Griswold* and *Roe* afforded women the ability to decide, for themselves, when, how, and whether to become pregnant - and, in doing so, secure their ability to labor, if they chose, outside of the home. In this vein, *Griswold* and *Roe* served to unsettle stereotypes of gender much like the work done by Ginsburg as interpreted by Cary Franklin and David Cole. Moreover, these cases expanded the rights and protections provided to women before the law. It was a crucial step as it gave women the ability to transition from the private to public spheres while deciding on the individual preferences of pursuing motherhood. The Justices made a deliberate move to protect women from state intervention in a woman's body based solely on childbearing capabilities, not childbearing desires.

While this era allowed women to take fundamental steps forward, the cases did not do all of the necessary work to instill multiple levels of protection for women. By granting a right to privacy that is not fully enumerated or explicitly stated in the Constitution, it leaves room for constitutional challenges to be made by states. This era also spurred a moment of politicization around Supreme Court decisions and abortion. *Roe* created a principle that is based in science and strove to separate state control from women's health before viability. This made religious organizations, particularly Catholic institutions that believed that life began at conception, angry with the Supreme Court's assertion of power. In the years following *Roe*, abortion became a contested debate, separating those, are "pro-life" from those who are "pro-choice", and creation political "camps" based on such beliefs (Staggenborg, 1995). Moreover, as these debates on the power of the Court to regulate the state's access to the potential life of the fetus populates state legislatures, many states have begun to bring challenges to the Court - this time, not to expand

the right of women to substantive due process rights, but to expand the ability of the state to regulate reproductive autonomy.

A Post-*Roe* America

The decisions in the *Roe* era that granted women substantive due process rights advanced women's reproductive health protections under the law immensely. Yet, as noted above, these decisions were met with backlash that led to an abundance of conservative appeals to the central holdings in *Griswold* and *Roe* as states attempted to reestablish control over a woman's right to decide whether or not to carry a pregnancy to term (Urofsky 2012). Moreover, even as *Griswold* and *Roe* sparked a political debate on a state level, it also compelled legal controversy over what it meant to interpret the Constitution, prompting arguments that a "living Constitution" - in which new rights could be discovered as society adapts - had gone too far, necessitating a return to originalist and textualist interpretations of the document[2]. Conservative agendas that aimed to overturn *Roe* and its central holdings sought to ground their reasoning in originalist and textualist readings of the Constitution, which make no mention of the right to privacy, despite Justice Douglas' assertion in *Griswold* that such rights could be found in the penumbras of certain amendments. These 'originalist' challenges have continued to govern the debate over reproductive health rights in 2022 and often provide opportunities for religious objections to abortion to be covertly argued under the notion of an originalist perspective (Urofsky 2012). By making an originalist argument that privacy is not in the Constitution, challenges to reproductive health law have been given an avenue to succeed. Which leads to the contemporary claims in the discourse of *Dobbs* that I examine more thoroughly in the final section of this paper.

[2] Originalism is a political term that designates that the Constitution should be interpreted as it was written in 1787. Coined and executed by Rehnquist and Scalia, this approach does not take into consideration any current moment or changing American values, instead it emphasizes the meaning of the words at the time it was written. (Scalia, 1989)

A post-*Roe* era is one that attempts to chip away at the rights awarded to women by the creation of substantive due process protections. The cases examined below challenge the protections afforded to women, arguing that reproductive health services cannot be protected by the right to privacy and that the state's compelling interest in the viability of the fetus must be recognized earlier than the framework established by *Roe*. These challenges also suggest, echoing the Siegal and Burkstrand-Reid's arguments above, that the state has a responsibility to protect the physical and emotional life of the mother as well as those around her. Thus, while each of these cases challenge a different aspect of *Roe*, all aim to limit the rights of women. This limitation, moreover, is often justified on the "traditional" visions of motherhood seen in *Bradwell*, *Muller*, and *Buck*.

Planned Parenthood of Southeastern Pennsylvania v. Casey concerned several changes to Pennsylvania's abortion law, which were: 1) informed consent for a woman seeking an abortion; 2) parental notification for minors seeking an abortion; 3) a 24-hour waiting period between intake paper and abortion procedure; and 4) spousal notification for a woman seeking an abortion, should she have a husband (*Planned Parenthood v. Casey* 1992). Several abortion clinics challenged Pennsylvania's revised statutes, claiming that they posed an undue burden for women seeking an abortion during prior to *Roe*'s established point of viability (*Planned Parenthood v. Casey* 1992). The Supreme Court came to a hotly contested 5-4 decision that ostensibly reaffirmed the central holding in *Roe v. Wade* on the basis of upholding legal traditions (known as *stare decisis*), while still finding that all the requirements established by Pennsylvania - with the exception of the spousal notification provision - were constitutional (*Planned Parenthood v. Casey,* 1992). The decision to uphold *Roe* was highly contested, but nonetheless valuable in addressing the Court's perspectives on womanhood. The Court decided that it was more important to preserve the Court's legitimacy, even as by affirming

Pennsylvania's limitations to abortion access, it called into question the "scientific" notion of the trimester system to recognize the state's compelling interest in the potential life of the fetus and the wellbeing of the pregnant person. For instance, during the oral arguments for this case, Kenneth Starr, The U.S. Solicitor General, on behalf of the state of Pennsylvania, argued the state had an interest in regulating the lives of its potential citizens beginning at conception (*Planned Parenthood v. Casey* 1992).

In the majority opinion by Justice O'Connor, argued on behalf of stereotypes that are meant to suggest that a woman would only seek an abortion if they have not fully understood what it is like to be a mother. This line of justification calls back claims made to "woman-protective" agendas that Siegal argued guide much of the reproductive health adjudication. This case overturned core protections on the basis of gender and further stereotyped women on the grounds of ability to participate in maternal acts. Thus, while the Court upheld *Roe* in some capacity, this case did work in reverting protections of womanhood back to traditional and biological roles, reinforcing the notion that men and women ought to operate in separate spheres.

Following *Planned Parenthood v. Casey,* the Supreme Court took up *Gonzales v. Carhart* after a partial-birth abortion ban was passed in Congress in 2003 (*Gonzales v. Carhart* 2007). A partial-birth abortion[3] as defined in *Gonzales* is "any abortion in which the death of the fetus occurs when "the entire fetal head [...] or [...] any part of the fetal trunk past the navel is outside the body of the mother" (*Gonzales v. Carhart* 2007, 2). Dr. Leroy Carhart and other physicians who perform late-term abortions sued to stop the Act from going into effect as a means of preserving this procedure for women who chose (or are medically required) to obtain

[3] It is important to note, that the term "partial-birth abortion" or "late term abortion" as used in *Gonzales v. Carhart* are terms used in the medical community, but conservative political terms. Instead, the medical community refers to them just simply as abortions. (Rovner, 2006)

an abortion in the later phase of their pregnancy (*Gonzales v. Carhart* 2007*,* 2). The Court questioned whether the Partial-Birth Abortion Ban Act of 2003 was unconstitutional because of the due process provisions of the 5th amendment[4] (*Gonzales v. Carhart* 2007). Again, in a hotly contested 5-4 decision, the Court found that "Congress's ban on partial-birth abortion was not unconstitutionally vague and did not impose an undue burden on the right to an abortion" (*Gonzales v. Carhart* 2007). This decision further inserted conservative nature of controlling of the abortion process, as illustrated through subsequent case law in *Planned Parenthood* and analyzed in its connection to religious tendencies in *Burwell v. Hobby Lobby* (2014) which is examined in greater detail below. *Carhart* decided that there is a compelling state interest in motherhood, so much so that this interest is greater than the right of a woman, as established by *Roe* and upheld in *Casey*, to be able to make a medical decision in consultation with her doctor. By upholding this decision, stereotypical and implicitly religious gender norms are given more weight than female interest before the Court, through the Court's decision to uphold restrictions on "partial-birth abortions.

The trajectory established in *Gonzales v. Carhart* finds even more legal weight in *Burwell v. Hobby Lobby Stores* (2014)*,* which concerns a 1st amendment challenge to the Affordable Care Act (ACA). The ACA required employers - through their insurance plans - to cover the cost of contraceptives. However, the Green Family, the sole owners, and operators of Hobby Lobby stores, sued the Secretary of the Department of Health and Human Services alleging that certain forms of contraceptives functioned as "abortifacients" (*Burwell v. Hobby Lobby Stores* 2014). In their challenge, they argued that they were a "closely held religious

[4] The 5th and 14th amendments share a lot of characteristics; however, the 5th amendment is meant to ensure rights to individuals on the federal level, while the 14th amendment aims to provide those protections to individuals in each state.

corporation," which allowed them to opt out the ACA's contraceptive mandate because their faith - Christianity - objected to the practice of abortion. The Court agreed, and found that, because they are a closely held corporation, they are entitled to deny health benefits on the basis of their religious objections to certain forms of contraceptives (*Burwell v. Hobby Lobby Stores* 2014). The Court cited the RFRA as legal means for protecting religious ideals over reproductive health services. This decision, in conjunction with the earlier established cases in this era, began to diminish the substantive due process rights that were granted under *Griswold* in favor of concerns of "motherhood" and of Christianity. Two concerns we see given great weight during the oral arguments of *Dobbs v. Jackson Women's Health.*

In addition to the retreat of the substantive due process rights established in *Griswold* and extended by *Roe*, a further interpretation can be made by allowing closely-held religious corporations to limit reproductive health services, the Court illustrates the Lockean collapse of church and state. In permitting Christian ideology to take precedence over women's health and labor, the Court, in justifying this decision, suggests that it is clear to the "genuine reason of Mankind" that religions must be tolerated over and above the wellbeing of women and the substantiation of their rights. Moreover, much like the argument made by Burkstrand-Reid, the Court argues that if women are unhappy that Hobby Lobby stores will no longer provide preventative contraception, women have the right to seek employment elsewhere. Once more, giving tremendous power to the state's interest in controlling identities of womanhood, over the actual woman involved in the pregnancy.

Furthermore, just months after *Hobby Lobby* was released to the public in 2014, Louisiana State legislatures passed Act 620, which required all doctors who provide abortions to have admitting privileges at a hospital within 30 miles of where the abortion takes place (*June Medical Services LLC v. Russo* 2020). Multiple abortion clinics in Louisiana challenged this law,

as it was almost identical to case law in Texas that was struck down through the case of *Whole Women's Health v. Hellerstedt* because of the undue burden it caused providers and those seeking abortion treatment (*June Medical Services LLC v. Russo* 2020). The Court tried to answer the question of "Does the decision by the U.S. Court of Appeals for the Fifth Circuit, below, upholding Louisiana's law requiring physicians who perform abortions to have admitting privileges at a local hospital conflict with the Court's binding precedent in *Whole Woman's Health v. Hellerstedt*?" (*June Medical Services LLC v. Russo* 2020). They concluded that the reversed decision in the Fifth Circuit ought to stand. Justice Breyer authored the opinion stating that there was no difference in the two to laws, and that both would enact the same burdens on women seeking abortions (*June Medical Services LLC v. Russo* 2020). This case was decided in a 5-4 fashion by the Court's liberal wing, including the support from Justice Roberts, a traditionally not liberal justice. This case helped to challenge the state's role in limiting reproductive health options and upset stereotypical practices of motherhood much like the work of Ginsburg as articulated by Cole and Franklin. However, the scope of this case is limited in comparison to other cases that have favored state intervention, as it created a hollow victory because it did not reaffirm any rights for women seeking an abortion, or reinstating the fundamental right to privacy, instead it just overturned the law on the basis of stare decisis.

The post-*Roe* era has withdrawn the full scope of protections granted to women's reproductive health choices by *Griswold, Roe,* and, to a certain extent, *Casey*. Each of the cases examined in this section above targeted reproductive health in a different way. The use of gender differences, religion, and restrictively-constructed roles for women in society have all chipped away at the robustness of the rights established in the wake of *Bradwell*, *Muller*, and *Buck*. Moreover, cases like *Gonzales* and *Burwell* combined biological approaches with religion to decide what can and cannot create a burden for women. In doing so, there is a move

backwards towards notions of difference feminist practices as coined by West, as was seen in the first era of sex- and gender-based jurisprudence above. The narratives established in the pre-*Roe* era reemerged into our contemporary, post-*Roe* moment, such that the Court could easily call upon historically- and religiously-articulated notions of biology and "womanhood" to justify abortion restrictions, without understanding fully what undue burdens it may cause for a woman. As illustrated in *Burwell,* even outward religious exemptions can be convincing to the Court if the religious ideologies are Christian. Once more illustrating the collapse of church and state as two separate entities. *Burwell* illustrates that often religious claims hold more weight than claims to female autonomy.

While these cases have had different outcomes, some leaning more conservative and others more liberal, they have all equally played a role in defining the post-*Roe* era. In total, this is an era that gives power to the state to challenge the privacy granted to women by *Griswold* and *Roe.* These challenges have politicized the public perception of reproductive health law in America and created a jurisprudential climate in which challenges to women's substantive due process rights, particularly in the domain of reproductive health protections, may be able to not only find purchase at the Court, but may also ultimately succeed. While all the cases examined above did not fully overturn the central holdings of *Roe,* they nonetheless established a discursive framework that sounds and feels apprehensible to the Court - a framework that can be appealed to and deployed in new and successive challenges. We see these even more restrictive claims hold weight in 2022, as the Supreme Court of the United States has taken up the case of *Dobbs v. Jackson Women's Health Organization.*

Theorizing the Current Supreme Court

In my treatment of the relevant case law above, I argued that, in some fashion, much of the Supreme Court's sex- and gender-based jurisprudence create idealized representations of womanhood. Moreover, I argued that many of these cases harness religiously-motivated ideologies as a means for evaluating State made claims of controlling specifically female acts and giving power to the states to control the reproductive life of its citizens. Claims to increased state power and interest in life beginning at as little as six weeks mimics religious teachings that conception is synonymous with viability. By arguing for this return to state power, states are building on Catholic religious identities of womanhood to decide what and who deserves to be protected under the law. As evaluated through case law above, the state or religious beliefs are viewed in higher regard than women's substantive due process rights and their rights to bodily autonomy. In 2021 and 2022, the Court appears open to further challenges to reproductive health laws. As I mentioned at the outset of this thesis, the Court, as it is currently seated, leans conservatively, and it has made clear that the current reproductive health case law, in its reliance on the privacy right established in *Griswold*, may not withstand an originalist interpretation of the Constitution. States, particularly conservative states like Texas and Mississippi, have capitalized on the Court's willingness to hear challenges to settled law.

Thus, the cases examined above provide a necessary genealogical framework to understand what has been persuasive to the Court in the past. It also helps to create a path for how the state of Mississippi may bring forth an argument in *Dobbs.* The case of *Dobbs v. Jackson Women's Health Organization (2022)* does not merely draw on the fact that claims to viability beginning at conception are religious in nature, but it is the beginning of religion being used as a tool for the Justices to interpret the facts brought before them. The presence of a religious lens as it is applied in this case, in conjunction with each justice's individual judicial ideology, will play a major role in deciding the Constitutionality of the Mississippi law explained

below. While it is important to note that not all Christian or Catholic justices on the Court may view their religious commitments equally, the mere presence of a pre-existing religious responsibilities is a crucial part in theorizing the obligations, discourse, and subsequent decision that the Court will announce near the end of the Court's term in June 2022[5].

Dobbs v. Jackson Women's Health Organization (2022)

Dobbs v. Jackson Women's Health Organization was argued in front of the Supreme Court of the United States on December 1st, 2021. The case was brought by Jackson Women's Health Organization, the only licensed abortion facility in Mississippi, and one of the practice's doctors following the passage of the "Gestational Age Act," which prohibits nearly all abortions after 15 weeks' gestational age. There are only few exceptions in which they would allow abortions to take place after this 15-week period and they were limited to "medical emergency or severe fetal abnormality" (Mississippi State Legislature Lines 135-136). While this law does begin state intervention at week 15, Mississippi passed subsequent legislation that would limit abortions at week six. If the Court finds the Gestational Age Act constitutional by overturning *Roe* and *Casey* in their entirety, there is a tacit understanding that this would mean they are not limiting at fifteen weeks, but six instead.

Under this Act, if a doctor knowingly performs an abortion after the fifteen-week gestational period without cause or concern for the health of the mother, the doctor is liable to both professional sanctions and legal penalties.[6] These penalties can range from suspension of

[5] While the case was meant to first be released in June of 2022, a first draft decision was leaked on May 2, 2022. I have addressed the findings in the epilogue of this thesis.

[6] "(a) A physician who intentionally or knowingly violates the prohibition in subsection (4) of this section commits an act of unprofessional conduct and his or her license to practice medicine in the State H. B. No. 1510 *HR31/R1655SG* ~ OFFICIAL ~ 18/HR31/R1655SG PAGE 9 of Mississippi shall be suspended or revoked pursuant to action by the Mississippi State Board of Medical Licensure. (b) A physician who knowingly or intentionally delivers to the department any report required by subsection (4)(c) of this section and known by him or

license to a fine, or even the threat of further punishment when it is felt necessary by the Attorney General (Mississippi State Legislature Lines 180-196). These penalties place of seeking an abortion penalize the doctor with legal sanctions while simultaneously penalizing the woman seeking this procedure. This law also creates a state interest in viability at a point well before the second trimester. Under the Gestational Age Act, Mississippi thus exceeds the abortion regulations established in *Casey* and *Gonzales*, thereby making it the most restrictive reproductive health law in the nation. It limits the role of women in creating decisions for their own health that deal specifically with bodily reproductive choices much like the early decision of *Buck v. Bell.*

Thus, while this case followed suit from a slew of other partial abortion bans, this was the first that directly challenged the 1973 landmark decision of *Roe v. Wade*. As detailed above in the "relevant case law" portion of this thesis, *Roe* created a trimester trajectory for the state's interest in the potential life of the fetus, which is the standard of abortion care and treatment for when the state can intervene. Since the second trimester does not end under *Roe* until week 26, the implementation of Mississippi's Gestational Age Act would overturn the legal parameters detailed in the 1973 decision. In many circumstances, the woman does not begin to show her pregnancy until well into the second trimester (weeks 16 to 20) and may not even know that they are pregnant before that point (Branum and Ahrens 2017). Yet, if the Act passes constitutional muster, women at sixteen weeks by law, and seven weeks in practice, would not be eligible to pursue abortive treatments.

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her to be false shall be subject to a civil penalty or fine up to Five Hundred Dollars ($500.00) per violation imposed by the department. (7) Additional enforcement. The Attorney General shall have authority to bring an action in law or equity to enforce the provisions of this section on behalf of the Director of the Mississippi State Department of Health or the Mississippi State Board of Medical Licensure. The Mississippi State Board of Medical Licensure shall also have authority to bring such action on its own behalf."

This restrictive Act has the potential to severely limit the rights guaranteed to women in the state of Mississippi. Because of the lasting impacts a decision on this case will have on the reproductive health rights of women, I have chosen to analyze the claims made by the petitioners of the Court to decipher the discourse of how these claims are created and what will be considered valid to the Court. In doing so, I evaluate the claims and their subsequent repercussions on the entitlement of women's rights. Both gender stereotypical identities and religious identities percolate throughout the oral arguments and tell us important information into how the Court is likely to decide - precisely because of their "rootedness" in the Court's jurisprudential history.

In the presentation of oral arguments and in the subsequent deliberation, the Court sought to answer the question: , "Is Mississippi's law banning nearly all abortions after 15 weeks' gestational age unconstitutional?" (Oyez Last Accessed 2022). The two and a half hour long oral arguments illustrate the high tensions surrounding reproductive health case law, particularly with respect to its power to construct identities and constrict access to long-established rights. In what follows below, I analyze the discourse that emerges within the context of these oral arguments between the Court and the parties before the bench. In this analysis, I demonstrate that the interconnectedness of the state and religion - which illuminates the lack of separation of church and state emerges in crucial moments to construct not only an idealized image of "womanhood" with respect to childbearing, but also as a reason to restrict access to reproductive health rights that had been previously understood as fundamentally constitutional.

The parties before the bench were Mississippi's Attorney General Scott G. Stewart, Julie Rikelman, who represented the interests of the abortion clinics and providers, and the Attorney General for the United States, Elizabeth Prelogar. To demonstrate how the discourse between these parties - in particular the opening arguments and the questioning of the Justices of the

parties before the Court - create an identity-producing power, I draw connections between the arguments offered by the appellant and State's claim to religious interests in life at conception, such that the language deployed recalls and reconstitutes notions of religiously-inflected womanhood. Stewart began his argument to the Court by focusing on the constitutionality of *Roe v. Wade*, noting that *Roe*'s reliance on a woman's conditional right to privacy is not explicitly enumerated in the Constitution, as it only was recognized by the Court in *Griswold*. Yet in challenging the fundamental right to privacy, Stewart sought to strengthen the argument that a state may have a vested interest in the potential life of the fetus much earlier than viability, as was affirmed in *Casey* and *Gonzales*. For instance, Stewart said in his opening remarks: "So, I think it just confirms, whichever one of those you look at, Your Honor, a right to abortion is -- is not grounded in the text, and it's grounded on abstract concepts that this Court has rejected in -- in other contexts as supplying a substantive right" (Oral Arguments *Dobbs v. Jackson Women's Health Organization* 00:02:46). Thus, for Stewart, because *Roe* relies on the unenumerated right to privacy, the Court is under no obligation to uphold it if it finds it to be in violation of the fetus's right to liberty, as protected under the 14th Amendment. His opening statement then suggests that the balance of power ought to shift from a woman's consultation with her doctor as provided by *Roe* to the state's interest in regulating abortion access; the rights of the pregnant person, for Stewart, should not supersede the rights of the fetus. But Stewart's argument does not stop at differentiating between the relative rights possessed by the pregnant woman and her fetus. Just moments before, Stewart argued that

> it didn't matter that the law applies -- that the law applies when an unborn child is undeniably human, when risks to women surge, and when the common abortion procedure is brutal. The lower courts held that because the law prohibits abortions before viability, it is unconstitutional no matter what. *Roe* and *Casey's* core holding, according to those courts, is that the people *can protect an unborn girl's life when she just barely can survive outside the womb but not any earlier when she needs a little more help*. (Oral Arguments, *Dobbs v. Jackson Women's Health Organization* 00:00:53; emphasis added)

From this quote, it is possible to see how Stewart relies upon gendered language to persuade the Court that the pregnant woman cannot be entrusted with the rights of reproductive health. By explicitly making the fetus a young girl, he suggests that, in seeking an abortion, the pregnant woman is a mother seeking to kill her daughter - a daughter who, in the future, could also be a potential mother. The discourse, as presented in this quote, is intentional, and serves to make the Justices and listeners of the arguments uncomfortable, and to side against the women's interest.

This quote, which illustrates the maternal role of women as the main responsibility for women in the US, also makes discursive claims that directly connect to West's connection thesis, which argues that the bodily relationships that women have that separate them from men and require different protections under the law. The focus on motherhood, pregnancy, and breastfeeding that West draws attention to in her piece is thus used as a tool to justify the law applying differently to men and women. Stewart makes similar claims in the quote above by tying the decision to not bring a pregnancy to term with the societal expectations that a woman's role in society should be based around her ability to bear children. Not only do the claims made in Stewart's initial arguments relate directly to the exclusionary gendered claims made by West, but they also express similar legal sentiments exhibited in the first era of case law. Moreover, in using gendered language, and in making the unborn child a female, Stewart establishes a specific connection to the fact that a woman cannot make the right choice to kill her child because that child should grow up to not only be a woman, but a mother too; what mother would kill her own daughter when that daughter has the potential to create life on her own? This line of questioning thus once more reinforces the gender specific identities of women as mothers as seen in *Bradwell*, *Muller*, and *Buck*.

Throughout his argument, he continues to make claims to womanhood that supplement his argument that the fetus is viable as early as week fifteen. Once more, reinforcing that Mississippi has a vested interest in keeping the fetus alive at all stages, even when scientifically proven that the fetus would not be able to sustain life outside of the uterus. This line of argumentation continued for nearly two hours, such that the Justices and Stewart evaluated the relative weight of the right to privacy and the right to liberty, all within the context of gendered ideals of motherhood.

But what does this have to do with religion? How, in other words, are Stewart's appeals to idealized visions of womanhood and the state's interest in the potential life of future mothers necessarily grounded in a vision of Christianity, and why did he think that the law would be the appropriate place to have such religious notions enforced? While Attorney General Stewart does not make a direct claim to religiously-motivated ideologies for fueling the Gestational Age Act, Sotomayor begins to question the connection between the written law and religious ideologies. Sotomayor, the most liberal leaning Justice currently on the Supreme Court bench (Axios, Last Accessed 2022), struggled to determine how his argument could be considered without the acknowledgement that religion played a part in creating a state interest. While it is important to note that Sotomayor identifies as Catholic, it is clear she is calling attention to the religiosity of these claims and circumstances, even if they outweigh her personal judicial ideologies. Sotomayor begins to question Stewart on the tenuous relationship between religious interpretations of the law and the non-gendered right to due process for all citizens. This strand of judicial questioning challenges where these claims originate, and the Court's likelihood for favoring messages of hegemonic religious identities. It also leaves room for one to analyze the effects on women if their substantive due process rights are challenged. Sotomayor made this claim by asking Stewart "how is your interest anything but a religious view? The issue of when

life begins has been hotly debated by philosophers since the beginning of time. It's still debated in religion. So, when you say this is the only right that takes away from the state the ability to protect a life, that's a religious view, isn't it -- because it assumes that a fetus's life at -- when? You're not drawing -- you're -- when do you suggest we begin that life?" (Oral Arguments *Dobbs v. Jackson Women's Health Organization* 00:26:36-00:27:08). This direct connection to the role of religiosity in adjudicating this case is only the beginning of claims to religion holdings being favored for the Court. Since the Court is willing to connect the religious connotations of the claim to the argument in favor of state control over the abortion process, it further illuminates just how connected the two ideologies are.

Justice Samuel A. Alito, Jr. speaks directly to this. He asks Stewart: "General, are there -- are there secular philosophers and bioethicists who take the position that the rights of personhood begin at conception or at some point other than viability? (Oral Arguments *Dobbs v. Jackson Women's Health Organization* 00:29:32). In asking this, Justice Alito is giving Stewart the opportunity to provide an alternative justification method for the need for state intervention at early stages of pregnancy. The very asking of this question further illuminates the collapse of distinction between church and state, as noted by Fallers Sullivan and demonstrated through previous case law (especially *Hobby Lobby*, which granted hegemonic religious protections over protections of reproductive health services).

This collapse affects how we think about religion, gender, and reproductive health as they relate to each other. It is clear by the articulation of this question, and lack of substantive answer on where the separation lies, that it is not apparent. General Stewart could not answer with direct medical sources that challenged the notion of life beginning at viability instead of conception (Oral Arguments *Dobbs v. Jackson Women's Health Organization* 2022). He paused, stuttered, and answered with "I mean, I believe so" (Oral Arguments *Dobbs v. Jackson Women's Health*

Organization 00:29:40), and was unable to provide direct sources or more information to substantiate his claim without citing a religious body. At this moment, the Court acknowledges the underlying religious tendencies to this claim and does not discount the argument in totality. Instead, they take this religious notion that life begins at conception and allows it to guide the remaining conversation on a woman's pregnancy. Moreover, they leave room for their own religious lenses to be employed through the acknowledgement that this claim and religion are synonymous. This is a critical part in viewing the power of a religious lens in the decision-making part of this case. Religious ideology can be noted as motive, yet the Court in this instance still allows a claim to reproductive health restrictions to be made under the presumption of a separation of church and state. Instead, certain Justices use this claim to religious ideologies to help justify the need for creating a state interest at conception.

While these claims examined above are made between General Stewart and the bench, the appellees for the abortion center and the United States government seek to refute the arguments put forward by Stewart by arguing that the pregnant individual *also* has a right to liberty, particularly a right to liberty prior to viability. Women should have the right to determine their lives - and they should have the right to terminate a pregnancy to protect their heath, their labor in the workforce, or more broadly their autonomy. This pushes back against the stereotypical notions brought forward by Stewart and adheres more closely to the types of arguments that we saw espoused by Ginsburg, David Cole, and Cary Franklin, arguments that attempted to unsettle gender stereotypes and allowed women to be equally represented under the law. Hence, there is not just a right to privacy, but also a right to determine their own lives without state interests outweighing that right (Oral Arguments *Dobbs v. Jackson Women's Health Organization* 2022). Moreover, in her opening argument, Rikelman argued that the right

to liberty must apply to pregnant women as living citizens of the state to make the decision of abortion in the similar manner that Stewart argues the right to liberty should be applied to a fetus.

In response to this, Justice Barrett makes an argument about adoption. She asks: why not just carry the pregnancy to term and then make use of safe haven laws to surrender the now-present child?[7] She says: "However, it doesn't seem to me to follow that pregnancy and then parenthood are all part of the same burden. And so, it seems to me that the choice more focused would be between, say, the ability to get an abortion at 23 weeks or the state requiring the woman to go 15, 16 weeks more and then terminate parental rights at the conclusion. Why -- why didn't you address the haven laws and why don't they matter?" (Oral Arguments *Dobbs v. Jackson Women's Health Organization* 00:54:58). Justice Barrett's response to the role of adoption in limiting the need for abortion not only aims to make claims to idealized notions of womanhood, but also to the concept that a woman should desire to be a mother. Even as the actors before the Court change throughout the oral arguments, the discursive language used in favor of more stringent abortion laws operates in line with West's central arguments of difference feminism. The claim to safe haven laws as a solution to antiabortion rhetoric makes connections not only to the idea that women should function as mothers, but it also allows for an "out" for religious objections to abortion by providing women with an option that would allow the child to come to full term, but not require the woman to take part in motherly duties. This line of argumentation employed by Barrett does not leave room for claims of safety of the mother or acknowledge the trauma that is often associated with carrying a pregnancy to term to be reasons a woman may seek an abortion. Moreover, Justice Barrett's argument for adoption to

[7]Amy Coney Barrett, in her own life outside of the Court, has adopted two children from Haiti, her youngest in 2010, after the earthquake and subsequent humanitarian crisis that ensued (Rothberg, 2021).

be the *solution* to abortion questions if women will even need substantive due process rights to abortion services if they have safe haven laws.

This move away from previous notions of protecting private circumstances for women to seek abortion care to a move towards public interpretations of womanhood is not just a claim for a return to state rights in matters of reproductive health regulation. Instead, this shift would also be a return to historical representations of womanhood that were oppressive in nature because they were enacted and enforced prior to women realizing substantive due process rights in the wake of the Civil Rights Movement. The decisions of *Bradwell* and *Muller* which set forth different protections and standards for women based on their ability to be a potential mother, will be the return to the level-and lack thereof- of protections that women are granted by the law. These cases argued on behalf of separation in the protections granted to men and women because of gender alone. A return to this historical representation of women is a representation that has its basis in religious principles, as I have illustrated in the first era of case law. This return impacts not only the types of female identities protected under the law, but also implicitly affects the types of religious identities protected. The law enforces and thereby protects Christian and Catholic religious principles over the rights of women and seeks to place women into traditional maternal roles in the private sphere. As previously noted, this separation is discussed in Catholic religious texts as they create separate realms for men and women to live and operate under the law. Catholic teachings discuss the maternal instincts of a woman, and the role of the man for taking part in work outside of the home, which are echoed by the implementation of legal protections of women based on sex.

While cases such as *Roe v. Wade* (1973) served to upset these stereotypes under the law by providing privacy and properly evaluating the weight of burdens on doctors and women seeking these procedures, *Dobbs* has the potential to remove the legal protections granted in

these cases. If this were to be the trajectory the Court takes, the rights and protections granted in the past would be rendered null. If the Justices determine that society should revert to a pre-*Roe* understanding of women's reproductive health rights, moreover, there is a significant potential for women to lose their substantive due process protections.

A Return to a Historical Lack of Substantive Due Process

This relationship between gender identities and religious teachings as presented to the Justices currently sitting on the Supreme Court has created a circumstance where, for the first time since *Roe v. Wade,* the fundamental right of privacy granted to all women surrounding reproductive health is likely going to be undercut. If the findings of *Roe* are overturned in some capacity, equal protections given to women by law have an avenue to be challenged, and women's substantive due process rights could be lost completely. This decision cannot be viewed on its own; it is more than just an argument to the liberty of a fetus in the State of Mississippi, it instead is an argument that aims to withdraw equal protections for all citizens on the basis of gender. The decision of this case, if it overturns *Roe* will be a move backwards in women's rights to a time before substantive due process was granted, and in doing so, will affirm the Court's willingness to prioritize religious identities- even if not explicitly mentioned in the opinion- over the rights of female citizens of the state.

The shift of rights afforded to women under the law will result in a return to practices of difference feminism and the separation of public and private spheres. These practices and notions gained popularity in the early 20th century as they were centered around the physical and biological differences of men and women, which would inherently require different sets of protections and different levels of ability based solely on gender. As evaluated in previous landmark case law, before the right to equal protection was legally recognized for women, the Court upheld the different roles for men and women as Constitutional. These decisions limited

the rights that female-identifying citizens could be afforded and barred women from receiving certain positive protections under the law. Moreover, it prioritized religious accommodations, male-dominated patterns of work, and state power over female autonomy.

If *Dobbs* succeeds, it will serve to increase state power and control over a woman's body, reinforce stereotypical notions of womanhood, and define who is able to be a mother. A decision to overturn *Roe* would limit female reproductive autonomy unless it fits under a certain protected understanding of womanhood. It also leaves room for all states that would have a Republican majority in state legislatures to pass individual laws that continue to limit reproductive health services in their respective states[8]. These laws would have a weak Constitutional challenge, because of the decision in *Dobbs,* and would likely be increasingly difficult to overturn - unless Congress passed reproductive health legislation that codified the right to abortion services.

The consequences of differential protections of abortion by state are paramount. Women may have to travel significant distances or seek unregulated and unsafe procedures to obtain abortions. Education and support for reproductive health rights and female healthcare in general are in danger of disappearing if abortion clinics could no longer be in service. And abortion providers could face criminal penalties for providing safe medical care and advice[9]. This lack of care and knowledge will burden women, and their right to choose medical procedures that are the best for them.

The decision of *Dobbs v. Jackson Women's Health Organization* should not be a surprising move away from *Roe v. Wade*. When examined closely, it is built on hundreds of

[8] In anticipation of a "positive" outcome in *Dobbs* and the likely overturn of *Roe* multiple conservative states have already shared their willingness to come forward with legislation that will also limit the reproductive health services a woman can seek (Abrams, 2022).
[9] In particular states like Louisiana which would impose a total abortion ban if the decision of *Roe* is overturned (Abrams, 2022)

years of religiously-motivated claims to stereotypical ideas of womanhood and State intervention. There can never be a true separation of Church and State in the judiciary because the religious ideology of individual justices often plays a role in their judicial beliefs. This overlap of judicial and religious ideologies will impact protections for women in all 50 states. If the right to privacy is no longer concrete, women stand to lose their substantive due process rights, and more restrictive legislation on female health will surface. This alarming conclusion looks to be the most likely outcome based on the contemporary moment and makeup of the Court. I once more argue that the role of religious beliefs as presented in *Dobbs* in conjunction with the makeup of the Supreme Court in 2022 will come to a troubling conclusion on the rights afforded to women's reproductive health.

In concluding this thesis, it is important to note that these rights granted by *Griswold* and *Roe* have become the basis of legislation for many hundreds of pieces of legislation. And while reproductive health rights are the focus of this paper, an overturn of *Roe* leaves room for other marginalized groups to have related landmark legislation challenged. Many rights groups, especially cases based on securing rights for LGBTQ+ communities, were grounded in the right to privacy granted by *Griswold.* If *Roe* is rendered void, it leaves the door open for protections granted by *Griswold* to be challenged in a similar manner, which puts at risk protections for other minority groups that rely on this substantive due process right to privacy. Thus, while it is tempting to treat *Dobbs* - and the preservation of reproductive and substantive due process rights - as something that only applies to women, this thesis demonstrates that, if *Dobbs* upholds the Mississippi law, the legal challenges to protective laws for all persons that were previously considered settled will be swift and world-altering.

Epilogue

On May 2nd, 2022, at approximately 8:30pm, Politico published a first draft of the legal opinion of *Dobbs v. Jackson Women's Health Organization.* This draft was leaked nearly a month before it was meant to be published, but was confirmed to be an official Supreme Court document by Chief Justice Roberts the following morning, May 3rd. This first draft, authored by Justice Alito holds that "*Roe* and *Casey* must be overruled" (Alito Majority Opinion first draft *Dobbs v. Jackson Women's Health*) and seeks to return control over abortion regulation back to the state legislatures . One can observe elements of each argument I have created, articulated throughout this draft of the opinion. In crafting his argument, Alito focuses on moral responsibility, state power over female autonomy, and decisions of when life is considered viable and even though the Court does not make direct claims to religious ideologies, they percolate the decision through decisive language choices. The opinion discusses state-centered power, the ideals of adoption, and the dangers of abortive procedures to do harm to the potential mother and child; all rhetorical and discursive choices that indirectly appeal to religiously motivated agendas. The language even further assumes a heteronormative Christian religious identity, by making claims to the morality of motherhood as it should be viewed in a traditional capacity. Moreover, this opinion enforces a narrative of restrictive abortion regulations, and allows for each state to be at the helm of adjudicating abortion rhetoric. The discourse of the oral arguments that I have analyzed and established are not only present throughout the opinion, but also lead to the conclusive loss of substantive due process rights for women and other marginalized communities.

In concluding the leaked draft of the opinion, Alito once more makes a moral argument, stating the moral responsibilities of the State effectively outweigh the contents of *Roe* and *Casey.* As illustrated in the quote by Justice Alito that begins this paper, the Court has used their power

to weigh the morality of unborn fetus over the rights of women. This connection to a moral responsibility once more acknowledges latent interpretations of religion and gives them substantial weight to guide further decisions on substantive due process cases in the future. By vacating these landmark decisions on the basis of moral responsibility, Alito and the others in the majority opinion give power not only to individual states, but to religiously-motivated claims over the rights and bodies of women. The implications of this decision are paramount and will govern rights for women and other marginalized communities in the coming years. The leaked opinion only further demonstrates the timeliness of this thesis and the considerations we must take as a community in order to ensure protection for all who reside in America in the near future.

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