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Dobbs and the Fate of the Conservative Legal Movement

The Supreme Court's ruling in the abortion case, expected next June, will be a defining moment in the Right's battle for the Constitution.

J. Joel Alicea

December 5, 2021

The conservative legal movement finds itself at its most precarious point since its inception in the early 1970s. That might sound implausible. The last four years saw the appointment of three Supreme Court justices, dozens of appellate judges, and nearly 200 district court judges—almost all coming from within the ranks of the conservative legal movement. Conservatives on the Supreme Court now (ostensibly) hold a 6–3 majority, making it, in all likelihood, the most conservative Court we will see in our lifetimes. It would thus be easy to conclude that the conservative legal movement is at its apogee.

But it is precisely the movement's success that puts it in peril. After decades of laying intellectual groundwork, building institutions, and engaging in politics, legal conservatives are in a position to accomplish what they see as the revival of the rule of law. But with that success has come high expectations that the Supreme Court will deliver on the legal goals that have sustained the movement through many disappointments and false starts. Foremost of those goals: overruling *Roe v. Wade*, the 1973 decision establishing a constitutional right to abortion; and *Planned Parenthood v. Casey*, the 1992 decision that reaffirmed *Roe*'s "central holding." More than any other Supreme Court decision, *Roe* is responsible for the emergence of the conservative legal movement. If there were only one reason that the movement has endured for decades, it would be to see *Roe* overturned.

These will be the stakes when the Supreme Court decides *Dobbs v. Jackson Women's Health Organization*—the lawsuit challenging the constitutionality of Mississippi's

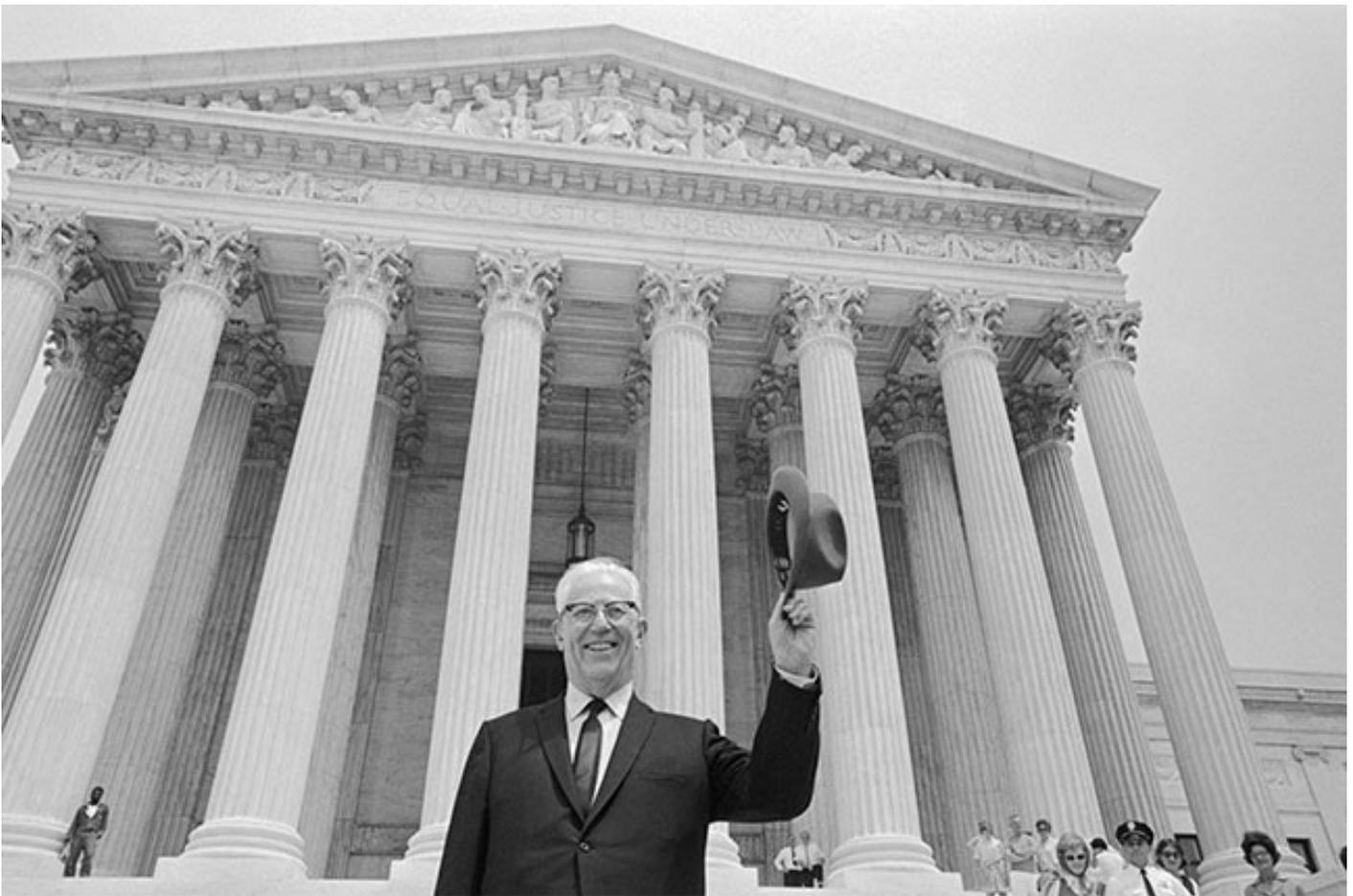
prohibition on abortions after 15 weeks of pregnancy—next summer. As December 1’s Supreme Court oral argument highlighted, Mississippi and its supporting amici have expressly asked the Court to overrule *Roe* and *Casey*, and *Dobbs* squarely presents that issue because, as Jackson’s Women’s Health Organization [asserted](#) in its briefing and at oral argument, Mississippi’s ban “directly contravenes [*Roe*’s] ‘central holding’ and cannot stand” if *Roe* remains good law. This, then, is the moment the conservative legal movement has fought to bring about. If the Court fails to overrule *Roe*, the ruling will likely shatter the movement, and while (under a proper conception of the judicial role) the potential effect of *Dobbs* on the conservative legal movement should be irrelevant to the outcome in that case, it would be a significant legacy of the Roberts Court if *Dobbs* brought an end to one of the most successful intellectual and political projects of the past half-century.

That demise would result not only from dashed expectations but also from intellectual tensions within the conservative legal movement—present since its inception and now coming to the fore. The *Dobbs* decision will likely either increase those tensions to the point of rupture or greatly alleviate them. Next summer will be a defining moment in the battle for the Constitution.

What we now know as the conservative legal movement was born in the aftermath of the Warren Court, the period from 1953 through 1969, when Earl Warren served as chief justice. It was a time of tremendous upheaval in American constitutional law. To take just a few examples, the Court required states to provide indigent criminal defendants with a lawyer, mandated the principle of one-person-one-vote in redistricting, declared a right to use contraception, and required the reading of so-called Miranda Rights to those taken into police custody. All these (and many other) decisions were controversial, and all represented dramatic departures from well-established constitutional law. A revolution in so many areas of law and social life was bound to provoke a counterrevolution in law and politics, and it did.

The legal counterrevolution began when then-Yale law professor Robert Bork published an article that began laying the intellectual foundation for the conservative legal movement. “[Neutral Principles and Some First Amendment Problems](#)” argued that the Supreme Court’s legitimacy rests on its ability to derive principles neutrally from the text and history of the Constitution, define those principles in a neutral manner, and apply them impartially across cases. To the extent the justices instead derive principles from their own viscera, define them arbitrarily, or apply them inconsistently, Bork wrote, they “claim for the Supreme Court an institutionalized role as perpetrator of

limited coups d'état." Bork cited as a prime instance of this illegitimate decision-making the Court's opinion in *Griswold v. Connecticut*, the 1965 case holding that married couples have a constitutional right to use contraception (a right that the Court extended to unmarried individuals in the 1972 case of *Eisenstadt v. Baird*). *Griswold* famously (or, to most legal conservatives, infamously) based its holding on the notion that, while no specific provision of the Constitution clearly established the right to use contraception, "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." To Bork, this was emblematic of the lawlessness of the Warren Court.



From 1953 to 1969, Supreme Court Chief Justice Earl Warren presided over a tremendous upheaval in American constitutional law; the conservative legal movement was born in its aftermath. (Bettmann/Getty Images)

Bork thus began charting an alternative theory of constitutional adjudication based on neutral principles derived from the text and history of the Constitution. It was a path that would lead to the development of originalism, the theory that constitutional provisions must be interpreted and applied in accordance with the meaning they had

when they were ratified. Subsequent works by Justice William Rehnquist and Harvard law professor Raoul Berger furthered originalism's development, and by 1980, it had become a recognized rival to the brand of progressive constitutional jurisprudence embodied by the Warren Court.

The election of Ronald Reagan in 1980 proved decisive to originalism's ascendancy, ushering in a wave of judicial appointments (including of Bork to the U.S. Court of Appeals for the D.C. Circuit) and the elevation of committed originalists to senior positions in the Department of Justice. The appointment of Justice Rehnquist as chief justice and of Antonin Scalia as an associate justice, along with several high-profile speeches defending originalism delivered by Attorney General Edwin Meese in Reagan's second term, made it clear that originalism was here to stay. It had become the default theory of constitutional adjudication for a new coalition that formed the conservative legal movement.

But from the beginning, two major sources of tension beset the movement: a division *among* originalists and a division *between* originalists and conservative non-originalists.

The first, intra-originalist tension was between those who saw originalism as a means to achieving some other substantive end and those for whom it was the only legitimate constitutional methodology. Those holding the instrumentalist view hoped that originalism would achieve various ends but were usually most concerned with shrinking the federal judiciary's role in American life after the Warren Court's aggressive intrusion into the political and social realms. They advocated originalism as a way of achieving "judicial restraint," by which they often meant that the judiciary should generally allow the democratic process to settle controversial political and social questions.

Harvard law professor James Bradley Thayer had articulated this principle in an 1893 lecture "[The Origin and Scope of the American Doctrine of Constitutional Law](#)." The Supreme Court, Thayer argued, should hold a political act unconstitutional only "when those who have the right to make laws have not merely made a mistake, but have made a very clear one—so clear that it is not open to rational question." Progressive constitutional theorists took up Thayer's argument in the early twentieth century as a way of criticizing Supreme Court decisions holding many early progressive and New Deal initiatives unconstitutional. But things took a turn during the Warren Court as the judiciary began assertively intervening in state and federal social policy, leading the New Dealer justice Hugo Black to lament, in his *Griswold* dissent, that the progressive

Warren Court had betrayed the judicial-restraint principles of the progressive New Deal Court.

As Princeton professor Keith Whittington has [observed](#), Black's accusation of the Warren Court's hypocrisy in *Griswold* became a standard attack by early legal conservatives. Bork made the point explicitly in his 1971 article, as did Rehnquist in an important [1976 lecture](#). Early legal conservatism, then, had a strong commitment to judicial restraint, and it saw originalism as a way of reining in an out-of-control judiciary. An important implication of this view was that, to the extent that originalism did not restrain the judiciary, it should be abandoned as having failed to serve its purpose. The instrumentalist commitment to originalism was contingent, not based on deep principle.

Unlike the instrumentalists, other legal conservatives saw originalism as logically entailed by the Constitution and the principles on which it rested. This theme, too, can be found in Bork's 1971 article. Bork argued that the basic principle of our system is that the majority rules. But the majority established limits on its own power through the Constitution, and this placed the judiciary in the position of having to determine, through constitutional interpretation, when the majority had done so. If the Court wrongly held that the Constitution limited majority power when it did not, this abetted tyranny of the minority; if the Court held that the Constitution did *not* limit majority power when it actually did, this abetted tyranny of the majority. Bork called this the Madisonian dilemma, and the only way for the Court legitimately to draw the line between majority and minority power, he maintained, was to interpret the Constitution in line with neutral principles, and that could be achieved only by deriving, defining, and applying those principles based on the text and history of the Constitution—that is, through originalism. Originalism, for Bork, was the only plausible methodology of constitutional adjudication because it was logically required for the legitimacy of judicial review and, by extension, for the Constitution. This commitment to originalism was not contingent.

Over the next several decades, as scholars and jurists (such as Justice Scalia) helped refine the theoretical basis of originalism, the non-instrumentalist view became dominant within conservative intellectual circles, and the judicial-restraint view subsided, though it remained a significant minority position and continues to play an outsized role in conservative political discourse about the Court. Most legal conservatives came to believe that originalism was the only legitimate constitutional methodology and that the Court should enforce the Constitution's original meaning, regardless of how

much or how little intrusion was required. That explains why, for instance, Justices Scalia, Clarence Thomas, and Samuel Alito were prepared to throw out the entire Affordable Care Act, in what would have been the most important repudiation of the political branches since the New Deal; by contrast, Chief Justice John Roberts—the Court’s most committed Thayerian (though never a committed originalist)—was unwilling to do so. While the tension between instrumentalists and non-instrumentalists might, at first glance, appear to be merely a matter of intellectual history, it has had enormous real-world consequences.

The second tension is equally significant. From the beginning, legal conservatives have disagreed about whether originalism rests on a sufficiently robust moral foundation. All constitutional theories, including originalism, ultimately require a moral argument for why we should obey the Constitution. Even if a judge believes, based on some ostensibly morally neutral reason, that the only way to interpret a historical document like the Constitution faithfully is according to its original meaning, that does not show that the judge should *care* about faithfully interpreting the Constitution. If we are not bound by the Constitution, the judge would be free to ignore a faithful interpretation and proceed to rewrite the Constitution instead. To explain why this would be wrong, one would need to show that the judge has an obligation to obey the Constitution as written. Moreover, the moral stance shapes how we interpret the Constitution because this tells us the purpose of interpreting it. If, for example, a judge believes (as many progressive constitutional theorists do) that the only way that the Constitution can have morally binding force is if its meaning can be revised without a formal constitutional amendment, that moral justification would require rejecting originalism and embracing a theory that allowed judges to change the document’s meaning over time.

Since originalism, like any other constitutional theory, ultimately rests on a moral argument, it can be challenged by those who find that argument insufficient. As former Amherst professor Hadley Arkes [wrote](#) in *First Things* recently (addressing both originalism and its statutory counterpart, textualism), because originalism is “deeply reluctant to make [the] move beyond ‘tradition’ and [the text] to the moral truth of the matter,” it “indeed has nothing to say on matters of real consequence. It is a morally empty jurisprudence.” More recently, Harvard law professor Adrian Vermeule has become the leading critic of originalism from the right by contending that originalism is morally bankrupt. Vermeule’s views are complex, but what he has [written](#) thus far attacks originalism from the perspective of the natural-law tradition, in which the moral legitimacy of the Constitution (as a form of positive law) depends on its accordance with

the natural law. As nothing in originalism requires it to accord with the natural law, Vermeule argues, no morally compelling argument favors it.

The moral critique of originalism came to the fore in the summer of 2020 when the Supreme Court decided *Bostock v. Clayton County*, which held that Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sexual orientation or transgender status. The case involved statutory interpretation (textualism), not constitutional interpretation (originalism). But the justifications for, and methodologies of, textualism and originalism overlap significantly, which is why moral critics of originalism often use the term interchangeably with textualism. Arkes, for instance, argued that the *Bostock* opinion, written by the originalist and textualist Justice Neil Gorsuch, proved that originalism lacks a sufficiently compelling moral account. Following *Bostock*, the conservative legal movement expressed widespread frustration and disillusionment with originalism, as manifested by Senator Josh Hawley's [statement](#) that *Bostock* "represents the end of the conservative legal movement." My own anecdotal sense is that the Vermeulian critique of originalism has gained significant momentum among younger legal conservatives since *Bostock*. Once again, what might seem like mere intellectual history does, in fact, have potentially profound practical consequences, since the triumph of the Vermeulian critique would be the end of the originalist project that has been at the heart of legal conservatism for decades.

For nearly 50 years, the goal of overruling *Roe* has united all sides: instrumentalist and non-instrumentalist originalists; critics of originalism's morality and its defenders. It is the only case that inspires such fervent agreement within the intellectual wing of legal conservatism.

Roe is unique among modern constitutional decisions in the intensity with which it has been resisted. It was, in Justice Ruth Bader Ginsburg's [words](#), a "breathtaking" decision; four characteristics of the decision engendered the immediate and enduring backlash. First, *Roe* was unexpected. No long series of decisions had telegraphed the future recognition of this new right (unlike the Court's 2015 decision in *Obergefell v. Hodges* requiring states to recognize same-sex marriages). Second, *Roe* was extraordinarily sweeping in its implications. *Roe* did not merely invalidate the statute challenged in that case; it (in combination with its companion case, *Doe v. Bolton*) effectively [invalidated the abortion laws of all 50 states](#) and effectively mandated that the right to abortion be protected [all the way up to the moment of birth](#). Third, *Roe* wrote into America's fundamental law what many Americans saw then, and see now, as a right to kill babies. Finally, *Roe* was and is widely perceived as having no plausible legal basis, as

commentators from the Right and the Left stated when it was handed down. As then-Yale law professor John Hart Ely—a supporter of the policy outcome dictated by *Roe*—[noted](#) immediately after the decision, *Roe* is “bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be.” Indeed, it is notable that, at the December 1 oral argument in *Dobbs*, none of the justices or advocates who support *Roe* devoted much time to defending the decision as an original matter, instead relying primarily on the principle of stare decisis (the idea that the Court should generally stand by its previous decisions, even if they were wrong).

These characteristics of *Roe* had different political and legal effects. Politically, *Roe* became the case that social conservatives would rally against. While the conservative legal movement started as a reaction against the Warren Court, it matured in reaction against the Warren *and* Burger Courts. The imperative to select justices who would overrule *Roe* was a major reason that social conservatives joined the broad coalition supporting Ronald Reagan, as reflected in the 1980 Republican Party [platform](#) promising “the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.”



Yale law professor Robert Bork helped spark a legal counterrevolution when he argued that the Court's legitimacy rests on its ability to derive principles neutrally from the text and history of the Constitution. (Bob Daugherty/AP Photo)

It is also the primary reason that antiabortion voters have continued to support the Republican Party in the four decades since 1980, including through bruising (and not always successful) confirmation battles. Even after the deep disappointment of the Court's refusal to overrule *Roe* in *Casey*—a refusal spearheaded by three Reagan- and Bush-nominated justices—these voters stayed with the broader conservative legal movement, always being promised that overruling *Roe* was just around the corner. Without these voters, the legal movement would never have achieved the success that it has in remaking the federal judiciary, since political victories are needed to change the orientation of legal institutions. Dahlia Lithwick has rightly [observed](#) that “the notion that *Roe* created an almost irreversible political ‘backlash’ that led to the creation of the powerful modern conservative legal movement is almost an article of faith among legal academics.”

Legally, *Roe* catalyzed the nascent conservative legal movement. Legal conservatives from all camps came to see *Roe* as a constitutional abomination that had to be overturned. From the instrumentalist perspective of judicial-restraint conservatives, *Roe* remains the most aggressive judicial intervention into American social policy since *Brown v. Board of Education*. But unlike *Brown*, which the vast majority of originalists [embrace](#) as [rightly decided](#), no plausible originalist argument exists for *Roe*, so the non-instrumentalist view of originalism has always aligned against *Roe*, too. Overruling *Roe* would, as Justice Brett Kavanaugh put it during the *Dobbs* oral argument, allow the Court to remain “scrupulously neutral on the question of abortion,” an issue that inspires a fervor matched by few in American history. And because originalism's moral critics within the conservative legal movement are typically social conservatives who regard legalized abortion as a moral evil rivaled in our history only by legalized slavery, they, too, have unflinchingly opposed *Roe*. Many positions generate significant divisions among legal conservatives, but that *Roe* is a uniquely lawless decision that must be overruled is not among them.

D*obbs* has the potential to destroy this unity. Just as the goal of overruling *Roe* is unique in its ability to unite the movement, the failure to overrule *Roe* in *Dobbs* would be unique in its ability to destroy the movement.

Expectations play a decisive role in this dynamic. Though (again, under a proper understanding of the judicial role) those expectations should play no role in the Court's decision in *Dobbs*, they are essential in considering the potential effect of *Dobbs* on the conservative legal movement. On the political side, the failure of the Reagan and Bush appointees to overrule *Roe* in *Casey* was a huge blow to the conservative legal movement, and the feeling of disgust after decades of political and legal efforts was palpable. Nonetheless, the movement pressed on over the next 30 years. In the intervening period, two of the five justices who voted to reaffirm *Roe*'s central holding in *Casey* were replaced with committed originalists, as was Justice Ginsburg. Each of those replacements (Justices Alito, Kavanaugh, and Amy Coney Barrett) involved tremendous risks and expenditures of political capital—and, in the cases of Alito and especially Kavanaugh, perseverance through vicious confirmation battles. The conservative legal movement fought those battles with the expectation that, when the day came, the reconstituted Court would finally consign *Roe* and *Casey* to the anti-canon of disgraced constitutional cases, alongside its segregation-defending decision in *Plessy v. Ferguson* (1896).

That day has arrived. In its [opening brief](#) last summer, Mississippi could have tried (unconvincingly) to argue that its abortion restriction was consistent with *Roe* and *Casey*, or that those cases only had to be overruled in part. Instead, it adopted a more coherent approach, spending most of its brief urging the Court to overrule the cases entirely. One reason Mississippi might have taken that approach is that, as Notre Dame law professor Sherif Girgis [has argued](#), there is [no logically sound way](#) for the Court to uphold Mississippi's law without overruling *Roe* and *Casey*, since those cases prohibit states from banning abortion before the child reaches viability, as Mississippi's statute does. Indeed, as noted above, Jackson Women's Health Organization has [made](#) precisely the same argument as Girgis before the Supreme Court: "There are no half-measures here." The organization reinforced that view at oral argument in response to questions by Justice Gorsuch, as did the solicitor general in support of Jackson Women's Health Organization.

Regardless of why Mississippi decided to make overruling *Roe* the focus of its brief, it raised expectations of what the Court would do in *Dobbs*. Those expectations were reinforced when, in the week after Mississippi filed its brief, almost three-quarters of the amicus briefs filed in support of the state called for overruling *Roe* and *Casey*. And they were solidified after oral argument, when at least five of the conservative justices asked questions that were [widely interpreted](#) as [signaling](#) a willingness to overrule *Roe* and *Casey*. With both Jackson Women's Health Organization and the solicitor general

likewise arguing that the Court must either reaffirm or overrule *Roe* and *Casey*, legal conservatives now expect that, after nearly 50 years of unceasing effort to overrule *Roe*, they will finally see the Court do it. If it does not, a sense of betrayal and disillusionment will likely follow.

That would place enormous strain on the intellectual fault lines within the movement. If a Supreme Court with a 6–3 conservative majority consisting of five committed originalists refuses to overrule *Roe* and *Casey*, it is unlikely that any originalist Court will ever do so—raising serious questions within the conservative legal movement about its attachment to originalism. Immediate recriminations and accusations of betrayal would ensue, likely tearing the movement apart. Those who offer a moral critique of originalism would point to *Dobbs* as proof positive that originalism lacks the moral foundation necessary to be a plausible constitutional methodology. Vermeule has openly predicted that if “*Roe* (not merely *Casey*) survives in any form without being overturned [in *Dobbs*], it will represent a shattering crisis for the conservative legal movement.” If the Court fails to overrule *Roe* and *Casey*, there is a very good chance that Vermeule would become the most important intellectual figure in whatever succeeds the current conservative legal movement.

Similarly, those advocating an instrumental view of originalism, especially in favor of judicial restraint, would have good reason to question whether originalism actually achieves the restrained judiciary they favor, since the failure to overrule *Roe* would keep the Court enmeshed in the most contentious social issue in America, without clear constitutional warrant. Some may argue that the more restrained position would be to uphold *Roe*, since that would be minimally disruptive to American constitutional law. But Chief Justice Roberts—the most committed judicial-restraint member of the Court—has shown himself willing to make great changes in constitutional law to keep the Court out of political and social policy if the Court’s intervention has no firm constitutional basis. For example, he wrote the Court’s opinion in *Rucho v. Common Cause* (2019), which held that the federal judiciary has no authority to adjudicate political-gerrymandering challenges to redistricting maps. That controversial decision ended several decades of gerrymandering jurisprudence, but its effect was to withdraw the Court from fraught political and social battles.

Those who believe that originalism is the only legitimate methodology of constitutional adjudication would have no logical reason to abandon their view, since it is not based on the results that originalism achieves. But their theoretical arguments would sound less convincing to an audience that had witnessed such a seismic failure of originalism

to translate its arguments into reality, just as those arguments have already lost some of their purchase after *Bostock*. The conservative legal movement has always been an intensely intellectual but also intensely practical movement; a methodology right in theory but self-defeating in practice will not retain many adherents.

What if the Court instead adopts some middle ground: sustain the Mississippi statute without overruling *Roe*, but lay the groundwork for overruling *Roe* later? That is what the Court did in a series of cases leading up to *Janus v. AFSCME* (2018), in which the Court overruled a previous precedent, *Abood v. Detroit Board of Education* (1977), which had allowed public-sector unions to collect union fees from nonunion members. But two key factors render that step-by-step approach implausible in *Dobbs*. First, as Girgis points out, because of the factual context of *Dobbs*—its straight-on challenge to a core tenet of *Roe* and *Casey*—it is impossible for the Court to craft a logical opinion that sets up the eventual overruling of those two decisions, which was not true of the cases preceding *Janus*. Instead, any middle-ground option would have to divorce the viability standard from *Casey*'s undue-burden standard, which Girgis [rightly argues](#) would fundamentally rewrite *Casey* in a way that would make it very difficult for this same Court to overrule later.

Second, as noted above, both Jackson Women's Health Organization and the solicitor general essentially disavowed such a middle-ground option in their briefs and at oral argument, and Mississippi's briefs effectively acknowledged that an incrementalist approach would be unprincipled or unworkable. Thus, neither side in *Dobbs* seeks a middle ground, and none of the justices at oral argument—other than perhaps the chief justice—seemed interested in such an approach. In light of those two factors and the expectations of a full overruling, commentators make a serious mistake if they think that a timid, first-step opinion making yet another promise of *Roe*'s eventual demise would avoid a potentially fatal blow to the conservative legal movement.

A forthright overruling of *Roe*, however, would significantly alleviate the tensions within the movement and bolster its long-term outlook. It would, in the eyes of instrumentalist and non-instrumentalist originalists alike, vindicate their half-century support for originalism. It would take much of the wind out of the sails of originalism's moral critics, since originalism will have been the means of achieving the critics' most earnestly sought moral goal. There is likely no avoiding the consequences, then, for the conservative legal movement in *Dobbs*: complete victory or crisis-inducing defeat.