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Under Ten Eyes

Anthony Michael Kreis*

In recent years, women donning red cloaks and white bonnets have become a familiar sight at state capitol buildings across the country. In Georgia, scarlet-clad women appeared to protest state legislation to ban abortions once doctors can detect a “fetal heartbeat.”¹ Similar protests emerged in Montgomery in 2019, as Alabama legislators worked to make all abortions a felony unless the mother’s life is in danger.² Women gathered in Ohio to fight a successful legislative initiative to ban dilation and evacuation procedures, the most common method to terminate a pregnancy.³ In 2018, the same, grimly dressed protesters also appeared in Missouri, walking the halls of the state capitol as lawmakers debated blocking public funds for abortion providers.⁴

The protesters were dressed as handmaids, characters depicted in Margaret Atwood’s 1985 novel, *The Handmaid’s Tale*. The book is set in the Republic of Gilead, a religious and patriarchal society where all power lies with men, and women’s fertility dictates their social role. The handmaids serve as surrogates for elite couples in the dystopian, totalitarian state and are under constant surveillance, which they refer to as being

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1. Maya T. Prabhu, *Advocates Start Upping Pressure as ‘Heartbeat Bill’ Advances in Georgia*, ATLANTA J. CONST. (Mar. 8, 2019), <https://perma.cc/Z98G-6J84> (last visited Feb. 17, 2020) (on file with the Washington and Lee Law Review).

2. Morgan Brinlee, *Photos of Alabama Abortion Ban Protests Show the Opposition Is Fierce*, BUSTLE (May 20, 2019), <https://perma.cc/ARN6-23JF> (last visited Feb. 17, 2020) (on file with the Washington and Lee Law Review).

3. Christine Hauser, *A Handmaid’s Tale of Protest*, N.Y. TIMES (June 30, 2017), <https://perma.cc/F45L-MJC4> (last visited Feb. 17, 2020) (on file with the Washington and Lee Law Review).

4. Allison Kite, *‘Handmaids’ Protest Missouri Budget Bill Targeting Planned Parenthood*, KAN. CITY STAR (May 10, 2018, 3:37 PM), <https://perma.cc/U5XJ-LF28> (last visited Feb. 19, 2020) (on file with the Washington and Lee Law Review).

“under his eye.”⁵ The protest garb communicated an unmistakable message: the women understood the quickly escalating attacks on abortion rights in America as a rise of an intrusive state intent on denying women their bodily autonomy in service to the patriarchy.

Carliss Chatman’s *If a Fetus Is a Person, It Should Get Child Support, Due Process and Citizenship* brilliantly captures the moment America is in, where abortion rights hang in the balance as state legislators, like those in Alabama, Georgia, Ohio, and elsewhere clamor to embrace fetal personhood.⁶ But, as Professor Chatman illustrates, legislators have expressed no interest in the full logical extent of this policy or the rights that should attach to a fetus if their measures ultimately become effective. The article incisively demonstrates how fetal personhood is singularly focused on ending abortion in the United States and is gaining traction notwithstanding the fact that its advocates have not reasoned through the “unintended and potentially absurd consequences” of their policy positions.⁷

To be sure, however, the personhood movement’s ambitions predated Alabama’s de facto abortion ban in 2019. In 2011, fifty-nine percent of Mississippi voters rejected a proposed state constitutional amendment that would have defined a fertilized egg as a person.⁸ Similar measures failed to win over North Dakota and Colorado voters in 2014 by two-to-one margins.⁹ The Oklahoma Supreme Court stepped in to kill a proposed constitutional amendment to adopt personhood in the state constitution because the measure would conflict with the Supreme Court’s decision in *Planned Parenthood v. Casey*,¹⁰ which

5. MARGARET ATWOOD, *THE HANDMAID’S TALE* 54 (Vintage Classics 2010) (1985) (demonstrating the scope of control the fictional state of Gilead exerts over its citizens through formulaic and highly ritualized dialogue between characters).

6. Carliss N. Chatman, *If a Fetus Is a Person, It Should Get Child Support, Due Process and Citizenship*, 76 WASH. & LEE L. REV. ONLINE 91, 92 (2020).

7. *Id.* at 6.

8. Aaron Blake, *Anti-Abortion ‘Personhood’ Amendment Fails in Mississippi*, WASH. POST (Nov. 8, 2011), <https://perma.cc/T62D-XBR6> (last visited Feb. 17, 2020) (on file with the Washington and Lee Law Review).

9. Rachana Pradhan, *Personhood Movement Loses Twice*, POLITICO (Nov. 5, 2014, 12:00 AM), <https://perma.cc/GF4G-Z9DA> (last visited Feb. 17, 2020) (on file with the Washington and Lee Law Review).

10. 505 U.S. 833 (1992).

reaffirmed a woman's right to obtain an abortion.¹¹ For a movement that had numerous, resounding defeats in the courts and the ballot box just a few years ago, it has come back roaring without any newfound groundswell of public support.¹²

Therein lies the conundrum of this constitutional moment: the forces laboring to suppress reproductive rights are wielding axes against *Roe v. Wade*¹³ and its progeny, rather than scalpels to eat away at the fringe of abortion rights as states have attempted to do for decades. And all of this comes just years after similar attempts failed with some of the most conservative statewide electorates in the United States. The recent anti-reproductive justice sledgehammers lack nuance and are not fully reasoned through, as Professor Chatman illustrates, because these initiatives are about much more than abortion—they are about the fervor to consolidate counter-majoritarian power before a rapidly closing window of opportunity ends. Legislators and activists are engaged in social engineering unmoored from any popularly embraced social movement in a contentious moment in constitutional time.

Constitutional law is a consequence of social movements and political coalitions. It reflects who we are as a society—it does not come to us from the ether as neutral wisdom which we must receive. This is why constitutional law tends to develop in cycles, which reflect dominant governing coalitions. The Taft Court of the 1920s was a byproduct of a Republican-dominated political era that preceded it. The Warren Court's liberalism evolved from the strength of the New Deal Coalition. The Rehnquist Court reflected the values embraced by Reagan and the Republican coalition that has dominated the American political landscape since the 1980s. The 2020s might well have marked a shift in constitutional time,

11. *In re* Initiative Petition No. 395, 286 P.3d 637, 638 (Okla. 2012) (“Initiative Petition No. 395 conflicts with *Casey* and is void on its face and it is hereby ordered stricken.”).

12. Public opinion on abortion has been relatively stable over the last decade. See *Abortion*, GALLUP, <https://perma.cc/AJ9V-6GM4> (last visited Feb. 17, 2020) (showing that in May 2009 twenty-three percent of respondents in a national poll on abortion opposed abortion in all circumstances, compared to twenty-one percent of respondents opposing all abortions in 2019) (on file with the Washington and Lee Law Review).

13. 410 U.S. 113 (1973).

ushering in the beginning of the end of conservatives' decades' long stranglehold on the judiciary.

Barack Obama was elected and re-elected in 2008 and 2012 by a broad coalition of voters.¹⁴ The Obama coalition signaled the potential for long-term change in American politics. The electorate's demographics are increasingly diverse and veering more liberal, particularly among younger Americans, which challenge the constitutional order's status quo. During the Obama Administration, the United States Supreme Court often divided on salient cases five to four, with the conservative wing of the Court winning out over the Court's liberals. With the death of Justice Antonin Scalia in 2016, Obama had the opportunity to appoint his third Supreme Court justice and tilt the Court to the left for the first time in decades. However, Senate Majority Leader Mitch McConnell refused to afford Obama's nominee, Judge Merrick Garland, the opportunity for a hearing or a floor vote, citing the upcoming presidential election as the reason to block Merrick Garland's confirmation.¹⁵

In a surprise Electoral College win, Republican Donald Trump took the 2016 presidential election by eking out slim victories in Michigan, Pennsylvania, and Wisconsin. Less than 80,000 votes were decisive.¹⁶ Yet, Trump lost the popular vote to Hillary Clinton by almost three million votes and maintained only plurality approval ratings the first year of his presidency, which typically sat in the high 30s percent.¹⁷ Notwithstanding his being out-of-

14. Nate Cohn, *How the Obama Coalition Crumbled, Leaving an Opening for Trump*, N.Y. TIMES (Dec. 23, 2016), <https://perma.cc/LVE2-MU3Q> (describing the Obama coalition as a fusing of black voters, northern whites, millennials, and Hispanics) (last visited Feb. 17, 2020) (on file with the Washington and Lee Law Review).

15. Amita Kelly, *McConnell: Blocking Supreme Court Nomination 'About a Principle, Not a Person'*, NPR (Mar. 16, 2016), <https://perma.cc/Y763-AQEE> (last visited Feb. 17, 2020) (on file with the Washington and Lee Law Review).

16. Philip Bump, *Donald Trump Will Be President Thanks to 80,000 People in Three States*, WASH. POST (Dec. 1, 2016, 3:38 PM), <https://perma.cc/Z5KW-539H> (last visited Feb. 19, 2020) (on file with the Washington and Lee Law Review).

17. Gregory Krieg, *It's Official: Clinton Swamps Trump in Popular Vote*, CNN (Dec. 22, 2016), <https://perma.cc/8D4G-2WRU> (last visited Feb. 17, 2020) (on file with the Washington and Lee Law Review); *Presidential Approval Ratings—Donald Trump*, GALLUP, <https://perma.cc/7T5P-D3Q9> (last visited Feb. 17, 2020) (showing the general decline in the President Trump's approval ratings).

step with majority sentiment and a weak electoral coalition, Trump's Supreme Court pick to fill the Scalia vacancy was no moderate. Trump appointed Neil Gorsuch to the Court, cementing the five-to-four conservative balance. The following year, the Supreme Court conservative bloc's most centrist member and most sympathetic conservative to reproductive rights, Anthony Kennedy, strategically retired and was succeeded by conservative Brett Kavanaugh.¹⁸ Both Trump justices were confirmed by a coalition of senators representing a minority of the population.¹⁹

The irony of the Trump presidency is that the Republican Party lacked a robust mandate to remake the federal judiciary and entrench arch-conservatives on the bench, but the Trump Administration and Senate have reshaped the composition of federal courts in a dramatically counter-majoritarian fashion. And the Supreme Court now has a five-member majority hostile to *Roe v. Wade* and *Planned Parenthood v. Casey*. The rights to bodily autonomy for women in America now rest with five male justices on the Supreme Court because the natural flow of constitutional

from January 2017 to December 2017) (on file with the Washington and Lee Law Review).

18. Robert Barnes, *Justice Kennedy Asked Trump to Put Kavanaugh on Supreme Court List, Book Says*, WASH. POST (Nov. 21, 2019, 3:03 PM), <https://perma.cc/2MUZ-LJ9C> (last visited Feb. 17, 2020) (reporting that during a private meeting “Kennedy told Trump he should consider another of his former clerks, Brett M. Kavanaugh, who was not on the president’s first two lists of candidates”) (on file with the Washington and Lee Law Review); see also Scott Lemieux, *When Do Supreme Court Justices Retire? When the Politics are Right*, WASH. POST (Aug. 28, 2019, 6:00 AM), <https://perma.cc/JJL5-XYCV> (last visited Feb. 19, 2020) (explaining the theory of strategic retirement of Supreme Court Justices) (on file with the Washington and Lee Law Review).

19. Ian Millhiser, *Neil Gorsuch Is the Most Illegitimate Member of the Supreme Court in U.S. History*, THINKPROGRESS (Aug. 23, 2018, 8:00 AM), <https://perma.cc/GL8X-3BP4> (last visited Feb. 17, 2020) (“Gorsuch is unique, in that he is the only person ever confirmed to the Supreme Court by a minority coalition after being nominated by a popular vote loser. . . .”) (on file with the Washington and Lee Law Review); *With Kavanaugh Vote, the Senate Reaches a Historic Low in Democratic Metric*, GOVTRACK (Oct. 7, 2018), <https://perma.cc/94XG-Q7PM> (last visited Feb. 17, 2020) (“Based on a new analysis of Senate votes from 1901 to the present, we found that beginning last year senators voting in the majority [of the vote to confirm Justice Kavanaugh] represented a historically low proportion of the country’s population.”) (on file with the Washington and Lee Law Review).

time has been manipulated and rigged to stand athwart progressive social change.

This power-grabbing dynamic reveals why anti-choice activism has not only been mobilized, but exceptionally emboldened to stake out maximalist positions no matter what the unintended consequences. And it already appears to be paying off. The Supreme Court agreed to hear *June Medical Services, LLC v. Gee*²⁰ this term. In *June Medical*, an abortion provider challenged the constitutionality of a 2014 Louisiana law that requires abortion providers possess hospital admitting privileges at a facility within a thirty-mile radius of the clinic where they provide abortions.²¹ That the Supreme Court took up the case is eyebrow raising because the Court struck down an identical Texas law three terms ago. With Anthony Kennedy in a five-to-three majority in *Whole Women's Health v. Hellerstadt*,²² the Supreme Court struck down Texas' requirement that physicians who perform abortions have admitting privileges at nearby hospitals and that abortion clinics are comparable to ambulatory surgical centers.

Little has changed in the aggregate for abortion politics between 2016 and 2020 to warrant revisiting such recent precedent. There is no new set of facts, no new social movement, and no new public consensus, that has been unearthed in the past three years. Indeed, the only difference is the Court's membership with Kennedy's departure and the fervent desire to capitalize on it by wrestling power away from the demographic inevitable. This wave of legislation and litigation is not *just* about the question of who has power over women's bodies, it is more fundamentally about who holds power. But for now, the question of whether there will be a new law of abortion—a jurisprudential devolution that we might later say was presaged by this hurried wave of anti-choice legislation—now hangs in the balance under the eyes of five men in robes.

20. 905 F.3d 787, 791 (5th Cir. 2018), *cert. granted*, 140 S. Ct. 35 (2019).

21. Adam Liptak, *Supreme Court to Hear Abortion Case from Louisiana*, N.Y. TIMES (Oct. 4, 2019), <https://perma.cc/S5JA-WQ28> (last visited Feb. 17, 2020) (on file with the Washington and Lee Law Review).

22. 136 S. Ct. 2292 (2016).