



Conservative Judiciary Influencing Future of Reproductive Rights

Political Strategy to Pack State Courts is Turning Tide Against Abortion.

Women’s ability to access reproductive health care services is under unprecedented attack in state legislatures around the country. According to the Guttmacher Institute, in 2011 alone, a staggering **92 state law provisions** were enacted in **24 states** restricting women’s access to abortion services. In 2012, 43 laws that sought to restrict access to abortion services were enacted in 19 states. And in 2013, 22 states enacted 70 abortion restrictions. Two states, Arkansas and North Dakota enacted laws banning abortion early in pregnancy. Restrictive laws jeopardize women’s health and ignore medical best practices by, for example:

- **Mandating medical procedures** and “waiting periods” prior to abortions.
- Targeting abortion providers with **unfair and unnecessary regulations**.
- Banning abortion prior to viability—starting as early as 6 weeks before most women even know they’re pregnant—and **not providing any exception for procedures necessary to protect a woman’s health and safety**.
- **Cutting funding** for family planning services.

These laws do not just turn the clock back on women’s rights; many **contradict Supreme Court precedent**. Advocates have taken to the courts to challenge these new restrictions. They have found that **judges appointed by Democratic administrations are more likely to grant preliminary injunctions staying implementation of the provisions and to strike down the laws**.

Even those who recognize how much judges matter may be surprised by the numbers.

Turn the page to see the contrast...

A wake-up call: From the Huffington Post, a map showing the precipitous decline in women’s access to abortion clinics across the country

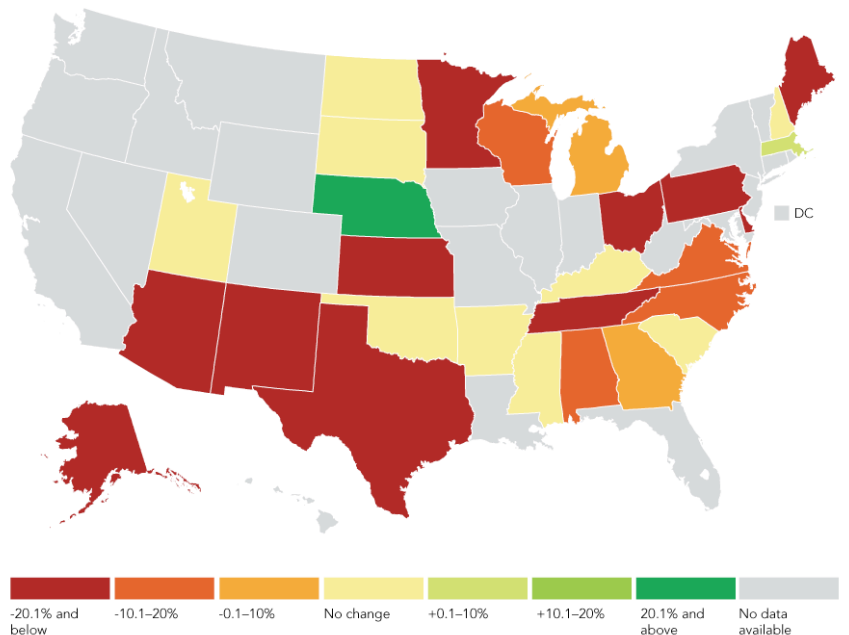
A HUFFINGTON POST GRAPHIC



The Decline Of Abortion Access

Since 2010, at least 54 abortion clinics have closed across the country, many as a direct result of new state laws targeting abortion providers. Even in some states that have seen no closures, such as Mississippi and North Dakota, the sole clinics in those states are only open because judges have temporarily blocked the enforcement of new regulations. Twenty-one states were unable to count their clinics because they don’t regulate abortion providers separately from other medical providers, but most of them did not enact new restrictions on abortion providers in the past three years.

Percentage change in clinics from 2010-2013



Turn the page to see the contrast...

The charts below report the outcomes in recent challenges to state restrictions on women’s reproductive health and rights. We surveyed the significant cases that are being tracked by major reproductive rights organizations like Center for Reproductive Rights, National Partnership for Women and Families, ACLU, Planned Parenthood, and the National Women’s Law Center. The list below is not comprehensive—many of these cases are still moving through the federal courts, and advocates continue to file lawsuits—but it is representative of the litigation landscape, and the picture the cases paint is stark. **Judges appointed by a Republican are far less likely to find a burdensome law unconstitutional.**

Recent federal court challenges to state laws restricting access to abortion services*

Law struck down/Injunction granted

Isaacson v. Horne	Arizona	Marsha Berzon
		Mary Schroeder
Hodes & Nauser v. Moser	Kansas	Carlos Murguia
Stuart v. Huff**	North Carolina	Catherine C. Eagles
Planned Parenthood v. Abbot	Texas	Earl Leroy Yeakel
Hope Medical Group for Women v. LeBlanc	Louisiana	Helen Berrigan
Missouri Insurance Coalition v. Huff	Missouri	Audrey Fleissig
Planned Parenthood v. Bentley	Alabama	Myron Thompson
Planned Parenthood v. Van Hollen	Wisconsin	William Conley
Jackson Women’s Health Organization v. Currier	Mississippi	Daniel Jordan III
Planned Parenthood v Brownback	Kansas	Thomas Marten
Planned Parenthood v. Cansler	North Carolina	James Beaty
Planned Parenthood v. Daugaard	North Dakota	Karen Schreier
Red River Women’s Clinic v. Burdick	North Dakota	Daniel Hovland

Recent federal court challenges to state laws restricting access to abortion services*

Law upheld/Injunction denied

Choice, Inc. of Texas d/b/a Causeway Medical Clinic v. Greenstein	Louisiana	Priscilla Owen
		Edith Clement
Texas Medical Providers Performing Abortion Services v. Lakey	Texas	Patrick Higginbotham
		Edith Jones
		Jerry Smith
Fort Wayne Women’s Health v. Health Commissioner, Fort Wayne - Allen County Department of Health	Indiana	Robert L. Miller Jr.
Bossier City Medical Suite, Inc. of Texas v. Greenstein	Louisiana	James Brady
Planned Parenthood v. Abbot	Texas	Priscilla Owen
		Jennifer Elrod
		Catharina Haynes
Isaacson v. Horne	Arizona	James Teilborg
K.P. v. LeBlanc	Louisiana	Patrick Higginbotham
		Edith Clement
		Catharina Haynes
Planned Parenthood v. Templeton	Kansas	Kathryn Vratil
		William Riley
Planned Parenthood v. Rounds	South Dakota	James Loken
		Lavenski Smith
		Steven Colloton
		Raymond Gruender
		William Benton
		Bobby Shepherd

Appointed by a Republican	Reversed on appeal
Appointed by a Democrat	Reversed on appeal

*Cases decided since 1/1/2010

**Law enjoined in part

Of course, there is far more to a judge’s decision than the party of the president who appointed him or her. Judges are nominated based on their judicial philosophy, how they understand and interpret laws, and value judgments that are informed by their life experiences. **It is too facile to say that any one decision can be reduced to political partisanship, but it would also be naïve to believe that there are not real differences in the judges that each party nominates.**

Challenges to the Contraception Mandate.

In the coming months, the U.S. Supreme Court will hear argument on another set of cases that threatens women's health. Under the Affordable Care Act, contraception methods, such as the pill, are fully covered by a woman's health insurance as a preventive health service—something that is so essential to preserving women's health that all women need access to it.

“Conservatives have always viewed the federal courts as a last line of defense in the country's cultural and political fights. Among their base it is a central tenet that electing Republican presidents is vital precisely because they appoint right-leaning judges who will keep perceived liberal overreach in check.

The issue has never been as powerful for liberals. Consider, for example, how often Republican candidates laud Supreme Court justices like Antonin Scalia and Clarence Thomas compared with how relatively rarely Democrats mention liberal justices like Ruth Bader Ginsburg.

‘Republicans and conservatives have been better about the base understanding the significance of judicial nominations than the groups left of center,’ said Jay Sekulow, chief counsel of the American Center for Law and Justice, which fights for conservative causes in the courts.”

- Jeremy Peters, “Abortion Cases in Court Helped Tilt Democrats Against the Filibuster,” *The New York Times*, Nov. 29, 2013

Including contraception as one of women's “preventive services” under the ACA was a **unanimous recommendation from the non-partisan Institute of Medicine.**

Doctors and specialists understand that contraception has significant benefits for women and, because it allows women to time their pregnancies, for children as well. In addition, the costs associated with an unplanned pregnancy are far greater than the costs of making contraception available. Non-profit religious employers with objections to contraception are exempt from the mandate; they must still provide health insurance for their employees, but contraception coverage is separately funded.

Private employers are not exempt, however, and across the country **90**

lawsuits challenging the rule on contraceptive coverage have been filed by organizations—including more than 40 for-profit businesses—claiming that the Religious Freedom Restoration Act, which protects the religious rights of individuals, should be extended to them. Conservative advocates were hoping to create a “circuit split” among federal appellate courts so that the Supreme Court would take the case—and they achieved their goal.

That is not the only split that has developed. As the following charts show, **judges appointed by Republican presidents have been more open to the argument that the contraception mandate violates employers' religious freedom and more willing to enjoin implementation of the law than those appointed by Democrats.**

The following chart shows challenges to the contraception mandate that have been decided on the merits – and the party of the President that appointed that presiding judge or majority on a panel.

Recent federal court challenges to contraception mandate in Affordable Care Act

Mandate upheld/ Preliminary injunction denied

Gilardi v. HHS	D.D.C.	Emmet Sullivan
Conestoga Wood Specialties Corp. v. Sebelius	Third Cir.	Kent Jordan
		Thomas Vanaskie
Eden Foods Inc. v. Sebelius	Sixth Cir.	Martha Craig Daughtrey
		Guy Cole
		Helene White
Autocam Corp. v. Sebelius	Sixth Cir.	Julia Smith Gibbons
		Jane Stranch
		Denise Page Hood
Mersino Management Co. v. Sebelius	E.D. Mich.	Paul Borman
Chambers v. Secretary of Health & Human Services	E.D. Mich.	Denise Page Hood
Korte & Luitjohan Contractors v. HHS	S.D. Ill	Michael Reagan
Grote Industries v. Sebelius	S.D. Ind.	Sarah Barker
Annex Medical Inc. v. Sebelius	D. Minn	David Doty
Armstrong v. Sebelius	D. Colo.	R. Brooke Jackson
Hobby Lobby Stores, Inc. v. Sebelius	Tenth Cir.	Carlos Lucero
		David Ebel
Hobby Lobby Stores, Inc. v. Sebelius	W.D. Okla.	Joe Heaton

Recent federal court challenges to contraception mandate in Affordable Care Act

Mandate struck down/Preliminary injunction granted

Tyndale House v. Sebelius	D.D.C.	Reggie B. Walton
Gilardi v. HHS	D.C. Circuit	Harry Edwards
		Raymond Randolph
		Janice Rogers Brown
Geneva College v. Sebelius	W.D. Penn	Joy Flowers Conti
Zubik v. Sebelius (Diocese of Pittsburgh v. Sebelius)	W.D. Penn.	Arthur Schwab
Weingartz Supply Co. v. Sebelius (Legatus v. Sebelius)	E.D. Mich.	Robert H. Cleland
Monaghan. v. Sebelius	E.D. Mich.	Lawrence P. Zatkoff
Korte & Luitjohan Contractors v. HHS	Seventh Cir.	Joel M. Flaum Diane S. Sykes
Grote Industries v. Sebelius	Seventh Cir.	Joel M. Flaum
		Diane S. Sykes
American Pulverizer Co. v. United States Department of Health and Human Services	W.D. Mo.	Richard E. Dorr
Annex Medical Inc. v. Sebelius	Eighth Cir.	Roger L. Wollman;
		James B. Loken;
		Steven M. Colloton
Newland v. Sebelius	Tenth Cir.	Scott M. Matheson, Jr.
		Paul Kelly
		Carlos Lucero
Hobby Lobby Stores, Inc. v. Sebelius	Tenth Cir.	Paul Kelly
		Timothy Tymkovich
		Harris Hartz
		Neil Gorsuch
		Scott Matheson
Armstrong v. Sebelius	Tenth Cir.	Robert Bacharach
		Timothy Tymkovich
		Mary Briscoe
Beckwith Electric Co. v. Sebelius	M.D. Fl.	Jerome Homes
		Elizabeth A. Kovachevich

Of the judges voting to uphold the contraception mandate or to deny a preliminary injunction on the merits:		Of the judges voting to strike down the mandate or to enjoin its enforcement on the merits:	
39%	61%	79%	21%
Were appointed by Republicans	Were appointed by Democrats	Were appointed by Republicans	Were appointed by Democrats

Appointed by a Republican	Reversed on appeal
Appointed by a Democrat	Reversed on appeal

NB: Charts reflect cases decided on the merits

Do judges matter? Consider who has made up the majority in the Supreme Court's abortion decisions over the last 30 years. The chart below depicts the Court's majority in these reproductive rights cases.

Gonzales v. Carhart and Gonzales v. Planned Parenthood Federation of America, Inc. (Carhart II)	550 US 124 (2007)	Roberts Scalia Kennedy Thomas Alito	Rust v. Sullivan	500 US 173 (1991)	Rehnquist White Scalia Kennedy Souter
Ayotte v. Planned Parenthood of Northern New England	546 US 320 (2006)	Roberts Stevens O'Connor Scalia Kennedy Souter Thomas Ginsburg Breyer	Hodgson v. Minnesota	497 US 417 (1990)	Rehnquist White O'Connor Scalia Kennedy
Ferguson v. City of Charleston	532 US 67 (2001)	Stevens O'Connor Kennedy Souter Ginsburg Breyer	Webster v. Reproductive Health Services	492 US 490 (1998)	Rehnquist White O'Connor Scalia Kennedy
Stenberg v. Carhart (Carhart I)	530 US 914 (2000)	Stevens O'Connor Souter Ginsburg Breyer	Bowen v. Kendrick	487 US 589 (1998)	Rehnquist White O'Connor Scalia Kennedy
Schenck v. Pro-Choice Network of Western New York	519 US 357 (1997)	Rehnquist Stevens O'Connor Souter Ginsburg Breyer Scalia Kennedy Thomas	Thornburgh v. American College of Obstetricians and Gynecologists	476 US 747 (1986)	Brennan Marshall Blackmun Powell Stevens
Planned Parenthood of Southeastern Pennsylvania v. Casey	505 US 833 (1992)	Blackmun Stevens O'Connor Kennedy Souter	Bolger v. Youngs Drug Products Corporation	463 US 60 (1983)	Burger White Marshall Blackmun Powell Rehnquist Stevens O'Connor
			City of Akron v. Akron Center for Reproductive Health	462 US 416 (1983)	Burger Brennan Marshall Blackmun Powell Stevens