

# THE FUTURE OF ROE V. WADE WITH A CONSERVATIVE SUPER MAJORITY SUPREME COURT

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## I. INTRODUCTION

In 2019, a 20-year-old pregnant woman from Amarillo, Texas drove a staggering 290-miles by herself to New Mexico for an abortion.<sup>1</sup> The abortion fees were topped with an overnight motel stay and a four-hour and twenty-minute return drive through the desert.<sup>2</sup> The single mother explained she could not possibly afford another child.<sup>3</sup> After conducting extensive research, she ultimately found that as a struggling woman living in Texas, this was her best option.<sup>4</sup> Why did she have to go to such extreme lengths? Because access to abortion in Texas is extremely limited. This reality holds true for most women in Texas seeking an abortion in the aftermath of the admitting privileges laws that closed half of the state's clinics, even after the laws were deemed unconstitutional by the Supreme Court in 2016.<sup>5</sup>

A woman's right to have an abortion in the United States has been in question since the latter part of the 19<sup>th</sup> century.<sup>6</sup> Despite the Supreme Court's determination in *Roe v. Wade* that an individual's right to privacy under the Due Process Clause of the 14<sup>th</sup> Amendment includes the right to an abortion, this right has been repeatedly contested.<sup>7</sup> The Court determined the right to an abortion, like all fundamental rights, is not absolute, and instead allowed states to enforce reasonable restrictions to promote the state's interest in potential life.<sup>8</sup> However, political and religious organizations and abortion opponents have created deep turmoil in

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<sup>1</sup> David Crary, *For Some Texans, the Nearest Abortion Clinic is 250 Miles Away*, AP NEWS (Sept. 9, 2019), <https://apnews.com/article/9a2d11a825804c98a1abd6b44ce06194>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *See id.*; *see also* Kate Smith, *Abortion Could be "Profoundly" Impacted in 15 States Depending on Upcoming Supreme Court Ruling, Study Shows*, CBS NEWS (May 11, 2020, 4:27 PM), <https://www.cbsnews.com/news/abortion-supreme-court-ruling-medical-services-russo-impact-15-states/>.

<sup>6</sup> *See Roe v. Wade*, 410 U.S. 113, 129 (1973).

<sup>7</sup> *Roe*, 410 U.S. at 154-155.

<sup>8</sup> *Id.* at 155, 164-65.

the United States regarding this right.<sup>9</sup> In the more recent years since *Roe*, abortion has become one of the major political topics that often determines who citizens vote for and who is appointed by elected officials to positions of power.<sup>10</sup> Although the Supreme Court maintains the perception that its justices are simply arbiters of the Constitution and the law,<sup>11</sup> justices often allow their decisions to be influenced by their respective political party and ideology.<sup>12</sup> That is precisely why the political composition of the Supreme Court has such an enormous impact on individual's rights and freedoms.<sup>13</sup>

This article analyzes the gradual shift in the balance of power on the Supreme Court from a liberal to conservative ideology in recent years.<sup>14</sup> State legislatures have recognized this shift and

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<sup>9</sup> Erwin Chemerinsky, *Symposium: Erwin Chemerinsky's Case Against the Supreme Court: Rethinking Judicial Minimalism: Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government*, 69 VAND. L. REV. 935, 984 (2016) (Notably, during the years immediately following *Roe*, the issue of abortion was far less polarizing than it is today, and party politics then did not stand in the way of conversations on abortion. *Roe* did however eventually contribute to a party realignment where Democrats and Republicans would divide on issues that undermined discourse and consensus).  
<sup>10</sup> *Id.* at 983.

<sup>11</sup> See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of Chief Justice Roberts comparing judges to umpires, reasoning that umpires don't make the rules, they merely apply them); *Confirmation Hearing on the Nomination of Sonia Sotomayor to Be Associate Justice of the Supreme Court: Hearing Before the S. Comm. on the Judiciary*, 11<sup>th</sup> Cong. 79, 59 (2009) (statement of Justice Sotomayor partially accepting Chief Justice Roberts' analogy and upholding the notion that her personal beliefs help her understand, but the law always commands the result of every case); *Amy Coney Barrett Senate Confirmation Hearing Day 3 Transcript*, REV (Oct. 13, 2020), <https://www.rev.com/blog/transcripts/amy-coney-barrett-senate-confirmation-hearing-day-3-transcript> (Barrett standing by her statement in her US Court of Appeals for the 7<sup>th</sup> Circuit nomination hearing that "If there is ever a conflict between a judge's personal conviction and that judge's duty under the rule of law, it is never permissible for that judge to follow their personal convictions in the decision of the case, rather than what the law requires.")

<sup>12</sup> David Orentlicher, *Politics and the Supreme Court: The Need for Ideological Balance*, 79 U. PITT. L. REV. 411, 412-13 (2018) (citing LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 103 (2013)).

<sup>13</sup> *Id.* at 413.

<sup>14</sup> Sidhant Wadhwa, *Replacing Ginsburg Will Pull the Court Right*, CHI. POL'Y REV. (Sept. 23, 2020), <https://chicagopolicyreview.org/2020/09/23/replacing-ginsburg-will-pull-court-right/> (Wadhwa explains that Martin Quinn scores are a one-dimensional representation of Supreme Court ideology that is based upon the probative factors such as voting in cases, circuit of origin, and opinion authorship).

understand the imminent possibility of *Roe*'s overturn.<sup>15</sup> Over time, states have enacted legislation and amended state constitutions to prepare for the possibility that the authority to determine the legalization of abortion may be restored to the states.<sup>16</sup> Unsurprisingly, conservative states such as Tennessee, Louisiana, Alabama, and Arkansas have enacted legislation that undermines *Roe*'s protections with the hope that one day *Roe* will no longer prohibit such restrictions.<sup>17</sup> Between 2011 and 2019, states have enacted 483 new abortion restrictions which accounts for 40 percent of all abortion restrictions enacted by states since *Roe*.<sup>18</sup> Conversely, liberal states such as New Jersey, New York, and Vermont have created legislation and amended their constitutions to allow broad access to abortions and to enumerate the right to an abortion.<sup>19</sup> The possibility of *Roe*'s overturn by the Supreme Court depends on political and social repercussions for the justices and the justices' use of ideology and religion in their decision making.

Should *Roe* be undermined by weakening the protections it set into place, or completely overturned, each state will be granted more latitude or full discretion to implement restrictions on abortion. In restricting access to abortions, states are essentially forcing women into child birth, and by doing so, placing the life of the mother at significantly greater risk. Only one out of every million abortions performed in the first trimester results in death,

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The Martin Quinn scores place Alito and Thomas as the most conservative, followed closely by Barrett. Gorsuch, Kavanaugh, and Roberts are also on the conservative side of the scale, but slightly more moderate. Finally, Breyer, Kagan, and Sotomayor are strongly liberal. With the death of Ginsburg, and the confirmation of Barrett, the scale is tipped in favor of the conservatives.).

<sup>15</sup> See TENN. CONST. art. I, § 36; W. VA. CONST. art. VI, § 57; ALA. CONST. art. I, § 36.06; Freedom of Choice Act, VT. STAT. ANN. tit. 18, § 9494 (2019); Reproductive Health Act, N.Y. PUB. HEALTH LAW § 2599-aa (Consol. 2019); Reproductive Health Act, 775 ILL. COMP. STAT. § 55/1-15 (2019).

<sup>16</sup> See TENN. CONST. art. I, § 36; W. VA. CONST. art. VI, § 57; ALA. CONST. art. I, § 36.06; VT. tit. 18, § 9494; N.Y. PUB. HEALTH LAW § 2599-aa; 775 ILL. COMP. STAT. § 55/1-15.

<sup>17</sup> See TENN. CONST. art. I, § 36; W. VA. CONST. art. VI, § 57; ALA. CONST. art. I, § 36.06; VT. tit. 18, § 9494; N.Y. PUB. HEALTH LAW § 2599-aa; 775 ILL. COMP. STAT. § 55/1-15.

<sup>18</sup> *State Facts About Abortion: Georgia*, GUTTMACHER INST. (Jan. 2021), <https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-georgia>.

<sup>19</sup> See VT. STAT. ANN. tit. 18, § 9494 (2019); N.Y. PUB. HEALTH LAW § 2599-aa; Reproductive Freedom Act, 2020 N.J. Assembly Bill No. 4848 (2020).

while child birth has a mortality rate that is fourteen times higher.<sup>20</sup> Moreover, the states that are likely to ban abortion have the highest maternal mortality rates.<sup>21</sup> Importantly, these rates are substantially higher for black women: 53.4 out of 100,000 black women die in childbirth.<sup>22</sup> Though this number is less for white women, 41.6 out of 100,000, the mortality numbers are exceedingly higher in child birth than abortions.<sup>23</sup> In a United States without the protection of *Roe*, conservative states will promote “life” but will overlook maternal mortality.

This article will analyze the impact that the prospect of, and recent reality of, a conservative super-majority Supreme Court has on states’ legislative actions regarding abortion. The hyper-federalism that is controlling the abortion conversation in the years following the start of the gradual shift in the balance of power on the Court is a reflection of the possibility that a conservative Supreme Court will undermine *Roe*. Moreover, this article will discuss the negative effects that anti-abortion legislation has on women in conservative states, and how a world without *Roe* would magnify such hardships. The Court may very well never actually end up overturning *Roe* due to the extreme controversy surrounding the topic and the deeply rooted precedent that has been set; however, with this Supreme Court, this reality is more possible now than ever before.

## II. DISCUSSION

### A. THE IMPACT OF THE SUPREME COURT’S COMPOSITION

The Supreme Court has experienced significant change over the past four years. President Donald Trump’s nomination of three conservative Supreme Court Justices to replace Justices Scalia, Kennedy, and Ginsburg tipped the scale in favor of conservatism.<sup>24</sup>

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<sup>20</sup> Kerri Miller, *What Happens if Roe is Overturned?*, MPRNEWS (Oct. 19, 2020), <https://www.mprnews.org/episode/2020/10/20/what-happens-if-roe-v-wade-is-overturned> (Mary Zeigler speaking, Professor of Law at Florida State University and author of *ABORTION IN AMERICA: A LEGAL HISTORY OF ROE V. WADE TO THE PRESENT*).

<sup>21</sup> *Id.* (Karissa Haugeberg speaking, Professor of History at Tulane University and author of *WOMEN AGAINST ABORTION: INSIDE THE LARGEST MORAL REFORM MOVEMENT OF THE TWENTY-FIRST CENTURY*).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Michael A. Bailey, *If Trump Appoints a Third Justice, the Supreme Court Would be the Most Conservative it’s Been Since 1950*, WASH. POST (Sept. 22, 2020),

This Court has the most conservative justices that the country has seen in 70 years.<sup>25</sup> The nomination of Justice Gorsuch in 2017 was a loss for the liberal side of the Court that hoped President Obama would have been able to nominate another justice before leaving office.<sup>26</sup> Though Justice Gorsuch was a clear choice for President Trump to replace Justice Scalia to maintain the status quo, Justice Gorsuch was arguably a bit less conservative than his predecessor.<sup>27</sup> On its face, this choice may have been a slight ideological loss for conservatives, but hope remained that Gorsuch would advocate for the conservative side of the Court, and Gorsuch did not disappoint.<sup>28</sup> Within his first term, Justice Gorsuch made his conservative ideology clear and apparent when consistently siding with Justice Thomas and Justice Alito, both of whom are historically conservative, on a variety of controversial topics.<sup>29</sup> Justice Gorsuch's nomination was followed by Justice Kavanaugh's nomination to replace Justice Kennedy in 2018. An analysis of Justice Kavanaugh's previous decisions and writing style found that Justice Kavanaugh is an ideologically conservative judge that typically makes decision on partisan lines.<sup>30</sup>

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<https://www.washingtonpost.com/politics/2020/09/22/if-trump-appoints-third-justice-supreme-court-would-be-most-conservative-its-been-since-1950/>.

<sup>25</sup> *Id.*

<sup>26</sup> Erwin Chemerinsky, *Gorsuch Has Quickly Made his Ideology Clear*, A.B.A. JOURNAL (Aug. 2, 2017), [https://www.abajournal.com/news/article/chemerinsky\\_gorsuch](https://www.abajournal.com/news/article/chemerinsky_gorsuch); see also, Nicholas Goldberg, Column: Amy Coney Barrett's Nomination was Shockingly Hypocritical; *But There May be a Silber Lining*, L.A. TIMES (Oct. 26, 2020), <https://www.latimes.com/opinion/story/2020-10-26/confirmation-amy-coney-barrett-silver-lining> (President Obama nominated Merrick Garland in February 2016 to the Supreme Court to fill the late Justice Antonin Scalia's seat. This nomination was declared null and void by Senate Majority Leader Mitch McConnell due to the pending Presidential election in November 2016. Notably, Mitch McConnell fast tracked Amy Coney Barrett's Senate hearing in October 2020 weeks before the Presidential election where Donald Trump, the nominating president, lost the election).

<sup>27</sup> See Oliver Roeder, *Just How Conservative was Neil Gorsuch's First Term?*, FIVETHIRTYEIGHT (July 25, 2017), <https://fivethirtyeight.com/features/just-how-conservative-was-neil-gorsuchs-first-term/> (citing to Martin Quinn scores to explain that Justice Scalia's score was 1.577 in his last term (higher positive scores represent more conservative positions), and Justice Gorsuch's score was 1.344 in his first term. This placed Justice Gorsuch as the third most conservative justice in 2017, behind Alito and Thomas, and as slightly less conservative than Scalia).

<sup>28</sup> Chemerinsky, *supra* note 26.

<sup>29</sup> *Id.*

<sup>30</sup> Elliot Ash & Daniel L. Chen, *What Kind of Judge is Brett Kavanaugh?: A Quantitative Analysis*, 2018 CARDOZO L. REV. DE NOVO 70, 71 (2018).

Even with two new conservative justices in the past three years, the public viewed the Court as middle of the road prior to Justice Ginsburg's death.<sup>31</sup> This idea that the Court was relatively moderate, or representative of both parties, resonated with the public even though the conservatives held a majority over the liberals on the Court during these years.<sup>32</sup> This was because the conservative majority was slim, which would allow for the centrist justice to be the "swing vote."<sup>33</sup> Because the Justices added to the bench during President Trump's tenure are believed to be more conservative than Chief Justice Roberts, he has become the centrist on the Court.<sup>34</sup> Although historically Chief Justice Roberts leans right and decides conservatively, he had recently, and surprisingly, been siding with the liberal justices on important topics.<sup>35</sup> One such decision, *June Medical Services v. Russo*, was an abortion rights challenge to Louisiana's admitting privileges law.<sup>36</sup> The Chief Justice concurred in the opinion to hold that the admitting privileges law was unconstitutional in a tight 5-4 decision.<sup>37</sup> His concurrence, however, was justified on the basis of the precedent established in *Whole Woman's Health v. Hellerstedt*, a case in which the Chief Justice dissented.<sup>38</sup> Therefore, it seems that Chief Justice Roberts occasionally votes with the liberal wing to preserve the institutional legitimacy of the Court, but not because he subscribes to its values.<sup>39</sup> Notably, his votes in these decisions are not an endorsement of the values expressed in the decision, as usually evidenced by his separate opinions from the liberal justices, and can

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<sup>31</sup> Hannah Hartig, *Before Ginsburg's Death, a Majority of Americans Viewed the Supreme Court as Middle of the Road*, PEW RSCH. CTR (Sept. 25, 2020), <https://www.pewresearch.org/fact-tank/2020/09/25/before-ginsburgs-death-a-majority-of-americans-viewed-the-supreme-court-as-middle-of-the-road/>.

<sup>32</sup> See *id.*; see also Bailey, *supra* note 24.

<sup>33</sup> Bailey, *supra* note 24.

<sup>34</sup> See Wadhwa, *supra* note 14 (Chief Justice Roberts has the lowest positive Martin Quinn score and has the score closest to zero, deeming him as the justice closest to the center of the ideological scale. However, his score is still positive which identifies him as conservative).

<sup>35</sup> See Bailey, *supra* note 24; see also *June Med. Servs. v. Russo*, 140 S. Ct. 2103, 2133 (2020) (Roberts, C.J., concurring).

<sup>36</sup> *Russo*, 140 S. Ct. at 2112.

<sup>37</sup> *Id.* at 2133.

<sup>38</sup> See *id.*; see also *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2321 (2016) (Roberts, C.J., joining Alito's, J., dissenting opinion).

<sup>39</sup> *The Daily from the New York Times: A Major Ruling on Abortion*, N.Y. TIMES (June 30, 2020) (transcript available at New York Times website).

be described as politically liberal but judicially conservative.<sup>40</sup> Even so, the liberals had a fighting chance to swing the vote in their favor when the court was a 5-4 conservative majority.

That was until Justice Ginsburg passed away in late September 2020. Weeks before an election that would have halted the appointment, President Trump had the opportunity and the votes to secure his third conservative Supreme Court nomination.<sup>41</sup> President Trump appointed Amy Coney Barrett to the Seventh Circuit Court of Appeals in 2017, and she had since been considered Trump's likely front runner to fill Justice Ginsburg's seat.<sup>42</sup> Amy Coney Barrett's appointment shifted the Court to a 6-3 conservative majority.<sup>43</sup> Justice Barret replacing Justice Ginsburg was the ultimate tipping point for the conservative super majority on the Court. However, the effects of the conservative super majority are still equally attributable to Justice Kavanaugh replacing Justice Kennedy.

Justice Ginsburg often wrote in dissent as part of a liberal minority, so even if she had been replaced by a liberal, the ideological scale still would have been in favor of conservatives with Justice Kavanaugh's beliefs being more conservative than Justice Kennedy's.<sup>44</sup> Moreover, not only was Justice Ginsburg replaced by a conservative, but Justice Barrett is more conservative than many others on the bench and most candidates that could have been elevated to the bench.<sup>45</sup> Similarly, Justice Kavanaugh replacing Justice Kennedy was a neutral trade insofar as the composition of the Court's conservative majority, but Justice Kavanaugh is expected to be considerably more conservative than Justice

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<sup>40</sup> See *id.*; see also Russo, 140 S. Ct. at 2133.

<sup>41</sup> Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), <https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html>.

<sup>42</sup> Adam Liptak, *Barrett's Record: A Conservative Who Would Push the Supreme Court to the Right*, N.Y. TIMES (Nov. 2, 2020), <https://www.nytimes.com/article/amy-barrett-views-issues.html?auth=login-google>.

<sup>43</sup> *Id.*

<sup>44</sup> See Alicia Parlapiano & Jugal K. Patel, *With Kennedy's Retirement, The Supreme Court Loses its Center*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/interactive/2018/06/27/us/politics/kennedy-retirement-supreme-court-median.html> (using Justice Kennedy's Martin Quinn score to identify him as the centrist and less conservative than Chief Justice Roberts); see also Wadhera, *supra* note 14 (using Justice Kavanaugh's Martin Quinn score to identify him as more conservative than Chief Justice Roberts).

<sup>45</sup> Wadhera, *supra* note 14.

Kennedy on a range of social issues.<sup>46</sup> This change in the ideological composition of the Court has raised legitimate questions about the future of the progressive reforms and rights that the Court has protected for years; specifically, the future of abortion rights and *Roe v. Wade*.<sup>47</sup> During her brief time at the Seventh Circuit Court of Appeals, Justice Barrett had ruled in favor of restrictions on abortion twice, and described abortion as “always immoral,” underscoring her conservative and religious views on the topic.<sup>48</sup>

Justice Barrett previously clerked for the late Justice Antonin Scalia and shares his philosophy.<sup>49</sup> Barrett, like Scalia, is a staunch originalist, interpreting the text of the Constitution as boundaries that may not be exceeded.<sup>50</sup> Originalists typically also follow the rule of precedent and *stare decisis*, meaning justices are bound by previous decisions.<sup>51</sup> In an analysis of Justice Scalia’s battle between being an originalist and *having* to follow what he would consider erroneous precedent, Barrett herself reasoned that *stare decisis* sometimes may only be considered once the validity of the precedent is established.<sup>52</sup> Although it may be seen as contrary to Barrett’s originalist position to narrow or overrule *Roe*, in fact, Barrett’s philosophy following Scalia’s lead would allow her to question the validity of *Roe* as a legitimate precedent. Scalia himself publicly denounced *Roe*’s validity: “My difficulty with *Roe v. Wade* is a legal rather than moral one. I do not – and no one believed for 200 years – that the Constitution contains a right to abortion.”<sup>53</sup> Further, on several occasions Scalia took the opportunity to

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<sup>46</sup> See generally Robert Barnes & Ann E. Marimow, *On Abortion and Other Issues, Kavanaugh’s Heroes Are More Conservative than Kennedy*, WASH. POST (July 15, 2018), [https://www.washingtonpost.com/politics/courts\\_law/on-abortion-and-other-issues-kavanaughs-heroes-are-more-conservative-than-kennedy/2018/07/15/04a3975c-86ad-11e8-8553-a3ce89036c78\\_story.html](https://www.washingtonpost.com/politics/courts_law/on-abortion-and-other-issues-kavanaughs-heroes-are-more-conservative-than-kennedy/2018/07/15/04a3975c-86ad-11e8-8553-a3ce89036c78_story.html).

<sup>47</sup> Liptak, *supra* note 42.

<sup>48</sup> Kate Smith, *What We Know About Amy Coney Barrett’s Judicial Abortion Record*, CBS NEWS (Sept. 26, 2020), <https://www.cbsnews.com/news/amy-coney-barrett-views-postion-abortion-cases/>.

<sup>49</sup> *Full Transcript: Read Amy Coney Barrett’s Remarks*, N.Y. TIMES (Sept. 26, 2020), <https://www.nytimes.com/2020/09/26/us/politics/full-transcript-amy-coney-barrett.html>.

<sup>50</sup> Amy Coney Barrett, *Federal Courts, Practice, and Procedure Symposium: Justice Scalia and the Federal Court: Originalism and Stare Decisis*, 19 NOTRE DAME L. REV. 1921, 1921 (2017).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1942.

<sup>53</sup> Robert Cassidy, *Scalia on Abortion: Originalism . . . But, Why?*, 32 TOURO L. REV. 741, 743 (2016).



condemn the Court for not having the courage to completely overturn *Roe* in cases involving restrictions on abortion implemented by states that exceeded what is allowed under *Roe*.<sup>54</sup> If Barrett conforms so closely to the beliefs and methodology of Scalia as she claims, these are opinions that we would likely see from her in the near future. Barrett's opinions, however, will not be met with as much opposition as Scalia because the Court is more conservative now than it was at the time *Roe* was decided.

### B. RELIGIOUS COMPONENT OF ABORTION REGULATION

The majority in *Roe* gives a detailed history of abortion over centuries. Laws regulating abortion at any time during pregnancy are not ancient, and do not even derive from common law origin.<sup>55</sup> Instead, abortion laws derive from statutory changes that were implemented for the most part in the latter half of the 19<sup>th</sup> century.<sup>56</sup> Abortions were a regular, normal practice in ancient Greece and Rome and there was very little protection for the unborn.<sup>57</sup> If there was any prosecution for abortion, it originated from the father's right to offspring.<sup>58</sup> Furthermore, ancient religion did not bar abortion, and it was not until the emergence of Christianity that profound resistance arose.<sup>59</sup>

The Catholic Church cemented itself at the forefront of the anti-abortion movement.<sup>60</sup> The Catholic interpretation of the commandment "Thou Shall Not Kill" forbids the killing of any innocent life, interpreted to include the life of a fetus.<sup>61</sup> This fetus thus has superior rights to that of its mother, who's life may be at stake as well, because the mother is at least guilty of what Catholics refer to as "original sin."<sup>62</sup>

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<sup>54</sup> *Id.* at 744.

<sup>55</sup> *Roe*, 410 U.S. at 129.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 130.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 131-32.

<sup>60</sup> Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2048 (2011) (explaining that from the outset of the anti-abortion movement, the Catholic Church battled legislative reform state by state, and that its role in opposing abortion reform was prominent and public).

<sup>61</sup> Barbra Pfeffer Billauer, *Abortion, Moral Law, and the First Amendment: The Conflict Between Fetal Rights & Freedom of Religion*, 23 WM. & MARY J. WOMEN & L. 271, 326 (2017).

<sup>62</sup> *Id.*

Importantly, Amy Coney Barrett is the sixth Catholic justice on the Supreme Court.<sup>63</sup> While most justices claim that they can set aside their religious beliefs when making decisions, as Barrett claimed in her Senate confirmation hearing, this assertion remains questionable.<sup>64</sup> As mentioned previously, Barrett herself believes abortion to be morally wrong, but separating morality, religion, and ideology from judicial decision making is an imperative duty of the impartial role of the Supreme Court.<sup>65</sup> Yet, time and again we see the Court divide on ideological lines. Ideology, however, encompasses these moral and religious beliefs, as shown by the conservative Republican Party promoting anti-abortion legislation and pro-life theories that originate from Catholic teachings at much higher rate than Democrats.<sup>66</sup> In fact, 77 percent of conservative Republicans believe that abortion should be illegal in most or all cases.<sup>67</sup>

Though only 42 percent of Catholics believe that abortion should be illegal in most or all cases, when split between party lines, the statistics drastically change.<sup>68</sup> About 63 percent of Catholics who identify as Republican, or lean right, believe that abortion should be *illegal* in most or all cases, while 77 percent of Catholics that are Democrat believe abortion should be *legal* in most or all

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<sup>63</sup> Tom Gjelten, *Amy Coney Barrett's Catholicism is Controversial but May Not be Confirmation Issue*, NPR (Sept. 29, 2020), <https://www.npr.org/2020/09/29/917943045/amy-coney-barretts-catholicism-is-controversial-but-may-not-be-confirmation-issu> (noting that not all Catholic justices think alike, and can be, like Justice Sotomayor and Justice Thomas, ideological opposites).

<sup>64</sup> *Amy Coney Barrett Senate Confirmation Hearing Day 2 Transcript*, REV (Oct. 13, 2020), <https://www.rev.com/blog/transcripts/amy-coney-barrett-senate-confirmation-hearing-day-2-transcript>.

<sup>65</sup> See Smith, *supra* note 48.

<sup>66</sup> Greenhouse, *supra* note 60 at 2049 (noting that the Catholic church not only opposed abortion reform, but that it entered the political arena to ensure the law continued to reflect the Church's teachings. In response to a 1967 New York abortion reform bill, the Church had pastors across 1700 churches in New York read a letter that warned "the right of innocent human beings is sacred" and "comes from God himself").

<sup>67</sup> *U.S. Public Continues to Favor Legal Abortion, Oppose Overturning Roe v. Wade*, PEW RSCH. CTR. (Aug. 29, 2019), <https://www.pewresearch.org/politics/2019/08/29/u-s-public-continues-to-favor-legal-abortion-oppose-overturning-roe-v-wade/>.

<sup>68</sup> *8 Key Findings About Catholics and Abortion*, PEW RSCH. CTR. (Oct. 20, 2020), <https://www.pewresearch.org/fact-tank/2020/10/20/8-key-findings-about-catholics-and-abortion/>.

cases.<sup>69</sup> Therefore, while Catholicism itself is no longer the predominate or sole source of anti-abortion activism, when political ideology is introduced into the equation, the Christian conservatives are found to be the major source of the anti-abortion movement. This is squarely where Barrett falls.

### C. CONSERVATIVE STATE RESPONSES TO SUPREME COURT IDEOLOGICAL CHANGE

In response to the shift in the composition of the Supreme Court, many states have considered the future of abortion rights and implemented legislation to arguably reflect the values of the state. For instance, the 2020 Supreme Court abortion case *June Medical Services v. Russo* considered a Louisiana law that required physicians performing abortions to have hospital admitting privileges, meaning the physician is allowed to admit a patient to a particular hospital and to personally provide medical services at that hospital.<sup>70</sup> This law was determined to be unconstitutional for unduly burdening women's access to abortion in the state because too many physicians couldn't obtain the admitting privileges.<sup>71</sup> Abortions are too safe for physicians to admit enough patients each year to qualify for admitting privileges and this in turn resulted in the closure of abortion clinics and restricted access to abortions.<sup>72</sup> Moreover, the Court said it was an unnecessary regulation for the health and safety of the mother since abortions are relatively safe procedures.<sup>73</sup> Specifically, this requirement would have closed down all three clinics in the state of Louisiana.<sup>74</sup> Though this was the most recent case on this type of law, it certainly was not the first. Louisiana's statute was a mirror image of the Texas admitting privileges law that was unconstitutional in *Whole Women's Health v. Hellerstedt* for the same reasons.<sup>75</sup>

Admitting privileges laws are historically tied to abortion closures.<sup>76</sup> In Texas between 2013 and 2016, the number of abortion clinics decreased from 41 to 22, and although this law was deemed

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<sup>69</sup> *Id.*

<sup>70</sup> *See Russo*, 140 S. Ct. at 2112; *see also* LA. REV. STAT. ANN. §40:1061.10(A)(2)(a) (West 2020).

<sup>71</sup> *Russo*, 140 S. Ct. at 2112.

<sup>72</sup> *Id.* at 2114.

<sup>73</sup> *Id.* at 2131.

<sup>74</sup> Smith, *supra* note 5.

<sup>75</sup> *Hellerstedt*, 136 S. Ct. at 2300; *Russo*, 140 S. Ct. at 2112.

<sup>76</sup> Smith, *supra* note 5.

unconstitutional in 2016, the number of clinic facilities has not rebounded.<sup>77</sup> There are five other states with similar admitting privileges laws that are not in effect due to Supreme Court precedent but would be effective should *Roe* be overturned: Tennessee, Alabama, Arkansas, Mississippi, and Oklahoma.<sup>78</sup> These statutes entail post-*Roe* restrictions that were implemented likely with the knowledge that they would be challenged in court and with the hope that the states would have another chance to undermine *Roe*.<sup>79</sup> Though the rejection of the admitting privileges law in Louisiana happened only in 2020, the decision was close, and the composition of the Court after Barrett's nomination could have substantially changed the result. If Justice Barrett was on the Court at this time instead of Justice Ginsburg, she likely would have sided with the conservative justices that dissented, which would have given the conservative justices the 5-4 majority.

Conservative states have also been amending their constitutions to ensure it explicitly does not protect the right to an abortion. In the 2020 election, Louisiana's legislature proposed a ballot initiative to amend the state constitution to explicitly not secure the right to an abortion.<sup>80</sup> It passed with 62 percent of the vote.<sup>81</sup> This law mirrored similar amendments by other states such as Tennessee in 2014, West Virginia in 2018, and Alabama in

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.* a; Life Defense Act of 2012, TENN. CODE ANN. § 39-15-202 (2012) b; Alabama Human Life Protection Act, ALA. CODE § 26-23H-4 (LexisNexis 2019) c; ARK. CODE ANN. § 20-16-1504 (2015) d; MISS. CODE ANN. § 41-75-1 (2012) e; OKLA. STAT. ANN. tit. 63, § 1-748 (2016) f.

<sup>79</sup> See Jenny Jarvie, *Conservative States Enact Abortion Bans in Hope of Overturning Roe v. Wade*, LA TIMES (May 11, 2019), <https://www.latimes.com/nation/la-na-abortion-bans-states-roe-wade-supreme-court-20190511-story.html> (quoting Alabama's House Representative and sponsor of Alabama's Human Life Protection Act, Terri Collins, stating that the bill is intentionally unconstitutional, inferring that the purpose of the bill is to bring the question of abortion legality to the courts again. Representative Rich Wingo, who helped draft the Alabama bill, said that a conversation regarding *Roe* needs to happen); see also Kevin Stawicki, *Alabama Justices Urge High Court to Overturn Roe*, LAW 360 (Oct. 30, 2020) (discussing in a case decision that a group of Alabama Supreme Court justices urged the Supreme Court to revisit and overturn *Roe* reasoning that it tramples on the Constitution and states' rights).

<sup>80</sup> *Louisiana Amendment 1, No Right to Abortion in Constitution Amendment (2020)*, BALLOTPEDIA, [https://ballotpedia.org/Louisiana\\_Amendment\\_1\\_No\\_Right\\_to\\_Abortion\\_in\\_Constitution\\_Amendment\\_\(2020\)](https://ballotpedia.org/Louisiana_Amendment_1_No_Right_to_Abortion_in_Constitution_Amendment_(2020)) (last visited Sep. 22, 2021).

<sup>81</sup> *Id.*

2018.<sup>82</sup> Alabama's amendment recognized the right of life for unborn children.<sup>83</sup> According to one of its sponsors, Republican Representative Matt Fridy, this amendment was passed with the intention to ensure that the Alabama Constitution does not support the right to an abortion.<sup>84</sup>

Notably in response to this amendment, Alabama passed what is likely to be considered the strictest abortion statute in United States history.<sup>85</sup> This piece of legislation is commonly referred to as a "heartbeat bill," which is mirrored in other states such as Georgia, Missouri, Mississippi, Louisiana, and South Carolina.<sup>86</sup> These laws make abortion illegal after the physician can detect a fetal "heartbeat," which can typically be found at 6-8 weeks, effectively banning abortion entirely.<sup>87</sup> Alabama's statute would not allow for exceptions for cases of rape or incest.<sup>88</sup> Though experts question whether what is found at this stage of pregnancy is even considered a heartbeat due to the fetal development process, the intention of this legislation is not about ensuring enforcement. Rather, their underlying motivation involves provoking the Supreme Court to make a ruling that will weaken abortion protections or overturn *Roe* completely.<sup>89</sup> This purpose is reflected in most, if not all, of the recent abortion/health legislation that has been passed by conservative states, which have increased in frequency the past two years correlating with the major shift in the Supreme Court composition. The most direct way for a state to add anti-abortion regulation is through such legislation, and the states that have been creating such legislation are not the only states that

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<sup>82</sup> See TENN. CONST. art. I, § 36; W. VA. CONST. art. VI, § 57; ALA. CONST. art. I, § 36.06.

<sup>83</sup> *Alabama Amendment 2, State Abortion Policy Amendment (2018)*, BALLOTPEDIA, [https://ballotpedia.org/Alabama\\_Amendment\\_2,\\_State\\_Abortion\\_Policy\\_Amendm ent\\_](https://ballotpedia.org/Alabama_Amendment_2,_State_Abortion_Policy_Amendm ent_) (last visited Sept. 26, 2021).

<sup>84</sup> *Id.*

<sup>85</sup> See Alabama Human Life Protection Act, ALA. CODE § 26-23H-4 (LexisNexis (2021)).

<sup>86</sup> See Tara Law, *Here are the Details of the Abortion Legislation in Alabama, Georgia, Louisiana, and Elsewhere*, TIME (July 2, 2019, 5:21 PM), <https://time.com/5591166/state-abortion-laws-explained/>; see also, Fetal Heartbeat and Protection from Abortion Act, S.C. CODE ANN. § 44-41-680 (2021).

<sup>87</sup> See TENN. CONST. art. I, § 36; W. VA. CONST. art. VI, § 57; ALA. CONST. art. I, § 36.06.

<sup>88</sup> See ALA. CONST. art. I, § 36.06.

<sup>89</sup> Law, *supra* note 86.

are in a position to try it.<sup>90</sup> Any state like South Dakota, Arizona, Indiana, and Ohio, that has an anti-abortion governor and a majority anti-abortion legislature, can enact legislation that could be challenged in the Supreme Court or lie dormant as unconstitutional until *Roe* is undermined.<sup>91</sup>

#### D. Liberal State Responses to Supreme Court Ideological Change

Conversely, liberal states have been taking steps to protect abortion in light of the changes within the Supreme Court. In 2020, New Jersey Governor Murphy unveiled legislation to codify *Roe* into New Jersey state law and expand abortion services.<sup>92</sup> This legislation would remove some unnecessary restrictions on abortion that advocates claim are medically unnecessary, require health insurers to cover abortions, and allow for a wider range of health care providers, including physician assistants, to perform abortions.<sup>93</sup> With the help of pro-choice advocates, Governor Murphy is preparing New Jersey to be a state where individuals can travel to get an abortion if needed.<sup>94</sup> The purpose is to make abortion as accessible as possible for as many people as possible, particularly within the reach of individuals that live in conservative states that may one day no longer have access to abortion. This bill would grant any individual in the state, regardless if they are domiciled or not, a fundamental right to an abortion.<sup>95</sup> As of October 8, 2020, this bill is in committee awaiting a hearing date.<sup>96</sup>

New York, Vermont, and Illinois also passed laws designed to protect abortion rights from changes in the Supreme Court ideological balance.<sup>97</sup> In 2019, New York passed the Reproductive Health Act that protects abortions in the state so that the procedure

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<sup>90</sup> *Will the Supreme Court Let Unnecessary Admitting Privileges Imperil Abortion Access*, GUTTMACHER INST. (May 11, 2020), <https://www.guttmatcher.org/article/2020/05/will-supreme-court-let-unnecessary-admitting-privileges-requirements-imperil#>.

<sup>91</sup> *Id.*

<sup>92</sup> Sarah McCammon, *With Roe v. Wade on the Line, Some States Take Steps to Protect Abortion Rights*, NPR (Oct. 2, 2020, 6:19 AM), <https://www.npr.org/2020/10/02/919298214/with-roe-v-wade-on-the-line-some-states-take-steps-to-protect-abortion-rights>.

<sup>93</sup> *See id.*; *see also* Reprod. Freedom Act, A.B. 4848, 219th Leg. (N.J. 2020).

<sup>94</sup> McCammon, *supra* note 92.

<sup>95</sup> *Id.*

<sup>96</sup> *NJ S3030 "Reproductive Freedom Act"*, BILL TRACK 50, <https://www.billtrack50.com/BillDetail/1244767>.

<sup>97</sup> *See* Reproductive Health Act, N.Y. PUB. HEALTH LAW § 2599-aa (Consol. 2019); Freedom of Choice Act, VT. STAT. ANN. tit. 18, § 9494 (2019); Reproductive Health Act, 775 ILL. COMP. STAT. § 55/1-15 (2019).

is treated as health care, not a criminal act, encodes *Roe* standards, protects health care providers, and recognizes abortion as a fundamental right.<sup>98</sup> Vermont also instituted protections in 2019 in the form of legislation guaranteeing the fundamental right to an abortion.<sup>99</sup> This did not change the status quo of access to abortion in Vermont, but instead encoded the protections the state citizens already enjoyed.<sup>100</sup>

Similarly, Illinois passed the Illinois Reproductive Health Act which provides that every individual has fundamental rights with respect to their reproductive health with limited government regulation, including the right to choose or refuse an abortion, to use or refuse contraception, and the right to carry a pregnancy to term and give birth.<sup>101</sup> Interestingly, and not uncoincidentally, Illinois passed this legislation after most of its surrounding states, such as Missouri, Indiana, and Kentucky, have major restrictions set in place that would take effect should *Roe* be undermined or overruled.<sup>102</sup>

The liberal states that have been codifying abortion rights through statutes and amendments are ensuring that the right to an abortion will survive *Roe*'s demise. For instance, Illinois's Freedom of Choice Act ensures that individuals have access to abortion in a neighboring state. Though this would not be ideal, and arguably may not even give individuals a realistic opportunity to have an abortion, Illinois stands in the Midwest as a beacon of hope for those seeking access to an abortion in a world without *Roe*. Beyond just Illinois, all liberal states with statutes codifying the right to an abortion that will withstand *Roe*'s demise will too become an outlet for women in conservative states seeking an abortion. However, this

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<sup>98</sup> *What You Need to Know About the Reproductive Health Act*, NYCLU (June 29, 2020 3:47 PM) <https://www.nyclu.org/en/campaigns/what-you-need-know-about-reproductive-health-act>.

<sup>99</sup> Kate Taylor & Julie Turkewitz, *Vermont Moves to Protect Abortion Rights as Other States Impose Bans*, N.Y. TIMES (May 21, 2019), <https://www.nytimes.com/2019/05/21/us/vermont-abortion-bill-h57.html>; see Freedom of Choice Act, VT. STAT. ANN. tit. 18, § 9494 (2019).

<sup>100</sup> *Id.*

<sup>101</sup> Reproductive Health Act, 775 ILL.COMP.STAT.ANN. § 55/1-15 (LexisNexis 2019).

<sup>102</sup> Maureen Foertsch McKinney, *As Other States Restrict Abortion Rights, Illinois Protects and Expands*, NPR ILLINOIS (June 12, 2019, 6:58 PM), <https://www.nprillinois.org/post/other-states-restrict-abortion-rights-illinois-protects-and-expands#stream/0>.

solution is unduly burdensome, often not feasible for many women, and offers patchwork access that is minimal.<sup>103</sup>

Currently, between 22 to 26 states indicate they will have stringent abortion laws if *Roe* is overturned, and if this happened, the average distance to abortion clinics for women would increase by 285 miles.<sup>104</sup> This means that in rural America, where most states are conservative, women could face a 500-mile drive to the nearest abortion clinic in nearby liberal states.<sup>105</sup> Decreasing access to abortion has a number of faults. First, this will more often than not force women into childbirth which, as mentioned before, has a significantly higher mortality rate than first trimester abortions, which is even higher for black women.<sup>106</sup> The statistics for women in conservative states, such as Georgia, is even more troubling; the maternal death rate for white women in Georgia is more than twice that for white women nationally.<sup>107</sup> The maternal death rate for black women in Georgia is twice that for white women in Georgia and six times the rate for white women, nationally.<sup>108</sup> Moreover, it would likely have a disparate impact on women of lower socio-economic classes because wealthier women will find access easier.<sup>109</sup> Second, due to advances in medical technology, women will seek to access abortion pills illegally.<sup>110</sup> Though this arguably empowers women because pills are more easily accessible and an easier method, this too can be dangerous if the pills enter the illegal drug market and pass through too many hands.<sup>111</sup> Finally, in desperate situations like the country saw prior to *Roe*, women will seek unsafe, unauthorized or self-performed abortions.<sup>112</sup> Despite the abortion protections codified in liberal states, it will likely not be enough to abate the life-threatening hardships that will undoubtedly befall women in conservative states.

### III. CONCLUSION

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<sup>103</sup> Miller, *supra* note 20.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *The Problem: Georgia Has a Maternal Mortality Crisis*, ACLU OF GEORGIA, <https://acluga.org/reproductive-rights-the-problem/>.

<sup>108</sup> *Id.*

<sup>109</sup> Miller, *supra* note 2.

<sup>110</sup> *See id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*



With the largest number of conservative justices on the Supreme Court in 70 years, the abortion conversation has been centered around federalism.<sup>113</sup> The possibility that *Roe* could be overturned is more likely now than ever before. Prior to Amy Coney Barrett's confirmation, in a close 5-4 decision, the Court decided that Louisiana's admitting privileges laws were unconstitutional in *June Medical Services v. Russo*.<sup>114</sup> Though Chief Justice Roberts sided with the liberal wing of the Court, his decision was based on the originalist doctrine of *stare decisis* rather than subscribing to the fundamental rights values of the issue.<sup>115</sup> If Chief Justice Roberts had instead sided with the conservative wing of the Court, the decision would have allowed the admitting privileges law to stand, resulting in the closure of all three abortion clinics in Louisiana. Thus, when the highly conservative Amy Coney Barrett replaced one of the Court's most liberal justices, Ruth Bader Ginsburg, it solidified the idea that if the Court were to consider the constitutionality of abortion restrictions again, the decision would likely fall in favor of the conservatives.<sup>116</sup> The fear is that if this Court is faced with the issue of abortion, the conservative majority will undermine the validity of *Roe* as a super-precedent by either limiting *Roe*'s protections or completely overturning it.<sup>117</sup>

As a result of this possibility, the states have responded accordingly with legislation to either protect or restrict abortion. However, the question shifts towards whether implementing abortion restrictions is even representative of the public's opinion. The average person, even in very conservative states, does not necessarily support these extremely stringent abortion restrictions.<sup>118</sup> In Mississippi, for instance, the legislature

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<sup>113</sup> Bailey, *supra* note 24.

<sup>114</sup> *Russo*, 140 S. Ct. at 2112.

<sup>115</sup> The New York Times, *supra* note 39; *Russo*, 140 S. Ct. at 2133.

<sup>116</sup> See Adam Liptak, *Supreme Court Revives Abortion-Pill Restriction*, N.Y. TIMES (Jan. 12, 2021), <https://www.nytimes.com/2021/01/12/us/supreme-court-abortion-pill.html> (in the Supreme Court's first ruling on abortion since the arrival of Amy Coney Barrett, the six conservative justices formed the majority reinstating a federal requirement that women seeking to end their pregnancies using medications pick up a pill in person, rather than it be mailed, from a hospital or medical office in the midst of the COVID-19 pandemic. Though this decision is not wholly indicative of the Court's likeliness to undermine *Roe*, it gives the public a glimpse into what may come).

<sup>117</sup> See Barrett, *supra* note 50 at 1942 (arguing that *stare decisis* may not always preclude the validity of a precedent from being questioned).

<sup>118</sup> Miller, *supra* note 20.

attempted to pass an amendment that defined life as beginning at conception, but the voters turned it down, meaning that the state legislature has been attempting to enact laws that are not representative of its constituency.<sup>119</sup> In general, 70 percent of Americans oppose overturning *Roe*, and about 60 percent are concerned that states are making it too difficult to get an abortion.<sup>120</sup> Though some may argue that the demise of *Roe* may open up better opportunities for abortion dialogues and allowing the states to be more representative of their constituency, abortion restrictions in general disparately impact black women and women of lower socioeconomic status, and are arguably not even representative of public opinion.

Recognizing the uncertain public discourse surrounding abortion, President Biden issued a statement on the anniversary of *Roe v. Wade* advocating its codification and committed to appoint judges that respect foundational precedents like *Roe*.<sup>121</sup> Within the first few days of his presidency, President Biden moved to protect and expand access to abortion by overturning his predecessor's restrictions on the use of taxpayer dollars for clinics that refer or counsel patients to terminate pregnancies.<sup>122</sup> While the future of *Roe* is unclear, but there is hope that the ideological composition of the Court will not mean this is the last of *Roe*.

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<sup>119</sup> *Id.*

<sup>120</sup> *U.S. Public Continues to Favor Legal Abortion, Oppose Overturning Roe v. Wade*, PEW RSCH.CTR. (Aug. 29, 2019), <https://www.pewresearch.org/politics/2019/08/29/u-s-public-continues-to-favor-legal-abortion-oppose-overturning-roe-v-wade/>.

<sup>121</sup> *Statement from President Biden and Vice President Harris on the 48<sup>th</sup> Anniversary of Roe v. Wade*, WHITE HOUSE (Jan. 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/22/statement-from-president-biden-and-vice-president-harris-on-the-48th-anniversary-of-roe-v-wade/>.

<sup>122</sup> *Biden Signs Orders Aimed Expanding Health Care*, N.Y. TIMES (Jan. 29, 2021), [https://www.nytimes.com/live/2021/01/28/us/biden-trump-impeachment?action=click&module=STYLN\\_live\\_transition\\_alerts\\_auto&variant=1\\_show&state=default&pgtype=Article&region=body&context=storyline\\_push\\_signup&referringSource=articleShare#biden-to-sign-orders-aimed-at-expanding-health-care-access-including-abortion-and-opening-obamacare-enrollment](https://www.nytimes.com/live/2021/01/28/us/biden-trump-impeachment?action=click&module=STYLN_live_transition_alerts_auto&variant=1_show&state=default&pgtype=Article&region=body&context=storyline_push_signup&referringSource=articleShare#biden-to-sign-orders-aimed-at-expanding-health-care-access-including-abortion-and-opening-obamacare-enrollment).