THE GLOBAL PATTERN OF U.S. INITIATIVES CURTAILING WOMEN'S REPRODUCTIVE RIGHTS: A PERSPECTIVE ON THE INCREASINGLY ANTI-CHOICE MOSAIC

Julia L. Ernst, Laura Katzive, and Erica Smock*

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* The authors are lawyers with the Center for Reproductive Rights, a nonprofit legal advocacy organization dedicated to promoting and defending women’s reproductive rights worldwide. This Article is primarily based on a presentation given by Julia Ernst at the University of Pennsylvania Law School Journal of Constitutional Law’s symposium, “The Legacy of Roe. The Constitution, Reproductive Rights, and Feminism,” on February 8, 2003.
INTRODUCTION

The impact of the Supreme Court’s decision in Roe v. Wade\(^1\) has been immeasurable, both in the United States and around the world. In its opinion, the Supreme Court acknowledged that a woman’s right to decide whether to terminate her pregnancy was protected under the constitutional principles of individual autonomy and privacy. For the first time, reproductive choice was recognized as a fundamental right, entitled to the same protection as guarantees of religious freedom and free speech, and afforded the highest standard of constitutional protection under the doctrine of strict scrutiny.\(^2\) The decision not only secured the legality of abortion in the United States, but also gave strength to an emerging reproductive rights movement that transcended national borders.

Roe was decided at a time when legislatures and courts around the world were showing increasing respect for women’s right to self-determination in all aspects of life, including in deciding whether or not to bear children. Roe, therefore, both informed and was informed by a larger global movement to recognize reproductive health and self-determination as integral components of women’s equality. By the late 1970s and 1980s, this movement had led to collaboration in United Nations conferences and other fora toward the development of international standards for the protection of women’s human rights, including their reproductive rights.

At the same time, since 1973, a vocal anti-choice movement within the United States has chipped away at the core of the principles espoused by Roe. This gradual backsliding in the legal framework and

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1. 410 U.S. 113 (1973) (establishing fundamental constitutional right to abortion).
2. The Supreme Court established a trimester framework for evaluating restrictions on abortion, balancing a woman’s right to privacy with the state’s interest in protecting potential life. It required states to demonstrate a “compelling interest” in imposing any restriction, and permitted previability restrictions only to promote the health of the pregnant woman. After viability, the state could take steps to promote its interest in protecting fetal life, including banning post-viability abortions, but even postviability restrictions were required to respect a woman’s right to have an abortion in order to protect her life and health. In a companion case, Doe v. Bolton, the Supreme Court clarified that the health exception requirement includes physical, emotional, psychological, and familial factors. 410 U.S. 179, 197 (1973).
jurisprudence affecting women’s right to abortion, together with an increasingly anti-choice U.S. foreign policy, pose serious threats to women’s ability to exercise their right to reproductive choice, not only in the United States but around the globe. Early attempts by anti-choice fundamentalists to reverse Roe through frontal attacks on the right to abortion have steadily been replaced by a more sophisticated, surreptitious, multifaceted approach. In 1980, the right wing of the Republican Party succeeded in compelling the party to adopt a platform supporting a constitutional amendment to outlaw abortion.  

Having realized that a pro-choice majority within the United States opposed such a constitutional amendment, abortion opponents have largely turned to more incremental tactics to erode women’s ability to exercise their right to abortion. For example, they espouse restrictions primarily affecting those who are least likely to be able to exercise the franchise or have a voice in government, such as low-income women, adolescents, and women in other countries. In addition, anti-choice leaders have learned to moderate their rhetoric, using deceptive tactics to lull policy makers and the American public into believing that core reproductive rights are not being threatened by their individual policy initiatives. The sophisticated and disproportionately powerful anti-choice movement has been alarmingly influential to the current Bush administration, posing substantial threats to the right to choose both within our borders and overseas.

Pro-choice lawmakers have tended to confront each of the proposed infringements upon women’s reproductive rights as an isolated problem, not placing it within the context of the broader anti-choice offensive. In taking this disconnected approach, policy makers have enabled those opposing choice to control the debate. Anti-choice lawmakers have thus focused on isolated issues with limited constituencies, again, such as initiatives targeting low-income women or adolescents. Or they have taken measures with apparently limited direct—and therefore less visible—consequences, such as promoting fetal rights or stacking the federal judiciary. Furthermore, pro-choice lawmakers have largely failed to make the links between the anti-

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4 See id. at 55 (discussing Senate’s refusal to consider the amendment).

5 See CTR. FOR REPROD. LAW & POLICY, TIPPING THE SCALES: THE CHRISTIAN RIGHT’S LEGAL CRUSADE AGAINST CHOICE 1 (1998) (noting that anti-choice legal advocacy organizations, “[l]ike other sectors of the religious and secular right... are extraordinarily well-organized, focused, and vocal,” and “perhaps their chief asset is the mantle of respectability and legitimacy conferred on them by the law”). See also CNN/USA Today/Gallup Poll (Mar. 30-Apr. 10, 2000), http://www.gallup.com/poll/releases/pr000410.asp, which found that 28% of the American public think that abortion should be legal under any circumstances and an additional 51% think it should be legal under certain circumstances.
choice agenda in the United States and the U.S. foreign policy imposed upon women in the rest of the world. As one commentator put it, "George Bush...is gearing up to police the wombs of the world's women."6

This Article argues that each seemingly disconnected initiative advanced by the U.S. anti-choice movement must be viewed collectively as part of a unified agenda to undermine global recognition of women's reproductive rights. The argument is premised on the observation that global respect for reproductive rights, like all human rights, can be greatly enhanced or hindered by the policies and actions of the U.S. The Article first examines Roe in its historical, global context, considering the extent to which the decision was influenced by the legal approach to abortion taken in other countries and discussing its contribution to the liberalization of abortion laws that has been occurring around the world since the early 1970s. It next considers the gradual backsliding in abortion rights in U.S. domestic and foreign policy between 1973 and 2000. The Article then examines the vigorous momentum under the Bush administration toward an increasingly stringent schema of restrictions on women's access to safe and legal abortion services in the United States and worldwide. It calls attention to the negative implications of the United States' increasingly anti-abortion policies for women globally. Finally, the Article concludes with a call for pro-choice lawmakers to recognize the interconnectedness of each of the anti-choice initiatives—within both domestic and foreign policy—in order to expose the broad political agenda of the far right and more effectively fight against each initiative by placing it within this comprehensive framework.

I. BACKGROUND: Roe v. Wade in the Global Context

At the time of the Roe decision, countries around the world were instituting reforms that collectively laid the groundwork for international recognition of women's right to reproductive self-determination. Reproductive rights activism in the United States during the late 1960s and early 1970s drew strength from liberal abortion reforms overseas, particularly in Western Europe.7 Roe, in turn, bolstered a global trend toward abortion law liberalization that continues to this day. Furthermore, by grounding a woman's right to

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6 Michele Landsberg, Bush Continues His Right-Wing War on Women, TORONTO STAR, Nov. 16, 2002, at L01.

7 Seectr. for Reprod. Rights, Roe v. Wade and the Right to Privacy 54–58 (3d ed. 2003) (describing the reforms in the United Kingdom, Sweden, Denmark, and France), http://www.reproductiverights.org/pdf/roeprivacy.pdf. In addition, during the years leading up to Roe, concerted efforts by medical, public health, religious, legal, and women's organizations led to the liberalization of abortion laws in one-third of the states in the U.S. Id. at 10.
choose abortion in the guarantees protected by the U.S. Constitution, the U.S. Supreme Court offered a rights-based conceptual framework that has influenced constitutional decisions in the courts of other nations and has been read into the protections of international human rights treaties.

Part A of this section provides an overview of the legal status of abortion around the world prior to *Roe* and the developments overseas that gave momentum to the reproductive rights movement in the United States. Part B discusses abortion reforms overseas that coincided with the *Roe* decision or immediately followed it. Part C surveys the history of global abortion law reform since *Roe*, with particular emphasis on reforms that were to some degree influenced by the Supreme Court's reasoning in *Roe*. Part D reflects upon the extent to which *Roe*'s recognition of reproductive choice as a "right" has been adopted in international legal and policy instruments.

A. The World Before Roe: Pre-1973 Abortion Laws Worldwide

The practice of abortion predated all laws regulating the procedure and, historically, cultural and customary norms around the world took varying approaches to it. With the adoption of formal legal structures and institutions, however, most nations criminalized the practice. The first legal condemnations of abortion appeared in religious law, notably the Code of Canon Law of the Catholic Church, beginning in the twelfth century. With the enactment of the 1803 Irish Chalking Act, England became the first country to prohibit abortion at all stages of pregnancy in its secular law, punishing the offenders with life imprisonment. This law would lay the ground for the 1861 Offenses

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9 See id. ("Except for a brief period in the mid-sixteenth century, when abortion could be punished by excommunication, the view that abortion was not a punishable act if it occurred in early pregnancy was held by the Christian Church until 1869, when the Pope decreed that quickening takes place at conception and for Roman Catholics, excommunication was once more the punishment for abortion." (citation omitted)); see also REBECCA J. COOK ET AL., REPRODUCTIVE HEALTH AND HUMAN RIGHTS: INTEGRATING MEDICINE, ETHICS, AND LAW 102 (2003) (noting that the Roman Catholic Church encourages countries to pass laws recognizing conception as the moment when protected life begins).

Against the Person Act, which again criminalized abortion in England and became the basis of abortion's criminal status throughout the Commonwealth countries. France's 1810 Napoleonic Code, a legal codification widely replicated in Europe and imposed upon French colonial territories, also prohibited abortion. Highly influenced by the Code of Canon law, the Napoleonic Code treated abortion as homicide and imposed stiff criminal penalties upon women consenting to the procedure, as well as those providing it.

The early twentieth century saw some softening of the prevailing legal stance on abortion. In 1920, the Soviet Union, guided by Marxist principles of gender equality, became the first country in modern times to make abortion legal at a woman's request. Access to abortion in that country was severely curtailed by subsequent legal measures, but a decree in 1955 established once again that a woman could have an abortion on request during the first twelve weeks of pregnancy. In Great Britain in 1938, the House of Lords handed down *Rex v. Bourne*, a highly influential judicial decision recognizing that abortion was lawful when performed to protect a woman's life or health, including when an abortion would prevent a woman (in the case before the court, a fourteen-year-old rape victim) from becoming a "mental wreck" due to the pregnancy. China, beginning in 1953, crafted its abortion policy to support the national objective of curbing population growth, making abortion available at a woman's request during the first six months of pregnancy. Both the Soviet Union and China regulated abortion in an ideological context that contrasted sharply with that of the United States. Neither, therefore, was significantly influential in the evolution of the rights-based

13 Id. at 13–14.
15 Id.
16 Rex v. Bourne, 1 K.B. 687, 695 (1938) (Gr. Brit.).
18 See Mark Savage, *The Law of Abortion in the Union of Soviet Socialist Republics and the People's Republic of China: Women's Rights in Two Socialist Countries*, 40 STAN. L. REV. 1027, 1029 & n.8 (1988) (noting that understanding the content of abortion rights in the Soviet Union or China requires "knowing what constitutes a right in those individual countries by studying the jurisprudence there from its own perspective" and recognizing that their "conceptions of rights are unlike the American conception").
approach to reproductive choice that would ultimately shape the *Roe*
decision.

Later reforms preceding *Roe* occurred in Great Britain and India. Great Britain was the first country in Western Europe to liberalize its abortion legislation. The Abortion Act of 1967 allowed two medical practitioners to authorize an abortion during the first twenty-eight weeks of pregnancy if the continuation of the pregnancy would involve greater risk to the woman's physical or mental health than if the pregnancy were terminated.19 The Abortion Act recognized social and economic grounds for abortion by providing for consideration of the woman's actual or reasonably foreseeable environment when evaluating the potential threat to her mental health. While the Abortion Act gave medical practitioners—not women—the power to determine their eligibility for an abortion, liberal interpretation of the law rendered abortion available virtually on request.20

India's Medical Termination of Pregnancy Act,21 enacted in 1971, set forth liberal grounds for obtaining an abortion. Abortion was made legal within the first twelve weeks of pregnancy when a registered medical practitioner determined in good faith that the pregnancy posed a threat to a woman's physical or mental health or that the fetus was likely to suffer a serious physical or mental disability.22 The law recognized, among other things, contraceptive failure, rape, and the woman's actual or reasonably foreseeable environment as considerations affecting her mental health.23

The movement for abortion law reform in the United States was to some degree influenced by attitudes toward abortion and other reproductive health issues that were reflected in the laws of other countries. This influence began in the 1920s and 1930s, when early "birth control" advocates took note of movements to liberalize abortion in Europe.24 In later years, there was also an indirect influence. In 1962, the famous case of Sherri Finkbine, a woman who was unable to obtain an abortion in the United States after having taken thalidomide (a drug discovered to cause severe fetal impairments), brought to light the injustice of abortion's highly restricted status in

19 Abortion Act, 1967, c. 87 (Eng.).
20 See Kersi B. Shroff, *Great Britain*, in LAW LIBRARY OF CONGRESS, REPORT FOR CONGRESS: ABORTION LAWS AND POLICIES IN 19 JURISDICTIONS 67, 68-69 (1996) (noting that this interpretation was based on surveys of medical practitioners).
22 Id. at § 3.
23 Id.
this country. With much public sympathy, Finkbine was able to have an abortion in Sweden, where the law—though not yet liberal—recognized broader exceptions to its abortion prohibition than did that of Arizona, Finkbine's state of residence. Finkbine's story illuminated for many the injustice of an absolutist stance against abortion and women's right to private decision making regarding reproduction, at least under some circumstances.

B. Roe-Era Reforms

Roe coincided with a period of rapid abortion law reform throughout the world. As a dramatic victory for an emerging transnational reproductive rights movement, Roe brought the United States in line with a prevailing trend, thereby giving strength to activists in other countries. Denmark's Pregnancy Act of 1973 made abortion legal at a woman's request during the first twelve weeks of pregnancy. Sweden further liberalized its abortion law in 1974, making abortion legal at a woman's request through the eighteenth week of pregnancy. France enacted provisional legislation liberalizing abortion in 1975, giving the law, with minor modifications, permanent status in 1979. France's law provided that during the first twelve weeks of pregnancy, a woman who declared herself to be in "distress" could legally obtain an abortion, provided she underwent counseling and observed the mandatory waiting period of one week. Because the woman herself was made the final judge of whether or not she was in "distress," abortion was effectively made available on request.

The United States was unusual at this time for securing its abortion guarantee in a constitutionally protected right. In most cases, abortion law reform took place in national legislatures. While constitutional challenges to abortion legislation were not uncommon in

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25 See JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY 252 (1978) (noting that Finkbine's "odyssey in search of the abortion she wanted became an international news item").
26 See id. at 253.
30 Law No. 75-17 of Jan. 17, 1975, J.O., Jan. 18, 1975, p. 739; D.S.L. 1975, p. 48 (Fr.).
31 Law No. 79-1204 of Dec. 31, 1979, J.O., Jan. 1, 1980, p. 3; D.S.L. 1980, p. 71 (Fr.).
32 Id.
33 Id.
Europe from both supporters and opponents of reform—and some notable decisions were handed down in Austria (1974), France (1975), and Italy (1975)—none at the time upheld the primacy of individual autonomy in reproductive decision making.

C. Global Developments Since Roe

Since 1973, over forty countries have adopted abortion laws that permit abortion under most circumstances, and this trend continues to this day. Abortion law reform has been justified on numerous grounds, including women's health, demographic considerations, and reproductive rights. In a few countries that share the United States' common law legal tradition, the reasoning of Roe has been asserted to support legalization of abortion.

Roe's influence is most evident in the 1988 Canadian Supreme Court decision of R. v. Morgentaler. In this case, doctors charged under a restrictive abortion provision challenged the legitimacy of that law under the Canadian Charter of Rights and Freedoms. The majority ruled that "[f]orcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person." In a concurring opinion, Justice Wilson referred explicitly to Roe and the line of Supreme Court cases reaffirming that decision. Wilson stated:

In my opinion, the respect for individual decision-making in matters of fundamental personal importance reflected in the American jurisprudence also informs the Canadian Charter. Indeed, as the Chief Justice

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34 See Verfassungsgerichshof [VfGH] [Constitutional Court] Decision of the Constitutional Court of 11 October 1974, VfSlg 39, summarized in 1974 ANNUAL REVIEW OF POPULATION LAW 49 (1974) (holding that decriminalizing abortion during the first trimester does not violate the Austrian Constitution or the European Convention, which has the status of constitutional law in Austria).


36 See Corte Costituzionale [Corte cost.] [Constitutional Court], 18 feb. 1975, n.27, Racc. uff. corte cost., Giur. It. 1975, I, 1, 1716 (It.) (holding that in a conflict between protecting the life of an embryo or the health of the mother, the latter must prevail), cited in Giovanni Salvo, Italy, in LAW LIBRARY OF CONGRESS, REPORT FOR CONGRESS: ABORTION LAWS AND POLICIES IN 19 JURISDICTIONS 91, 94 (1996).


39 Id. at 45.

40 Id. at 56–57.
pointed out in *R. v. Big M Drug Mart Ltd.*, beliefs about human worth and dignity "are the *sine qua non* of the political tradition underlying the Charter". I would conclude, therefore, that the right to liberty contained in s. 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives.\(^{41}\) The reasoning of *Roe* and *Morgentaler* resonate in the approach to abortion taken in post-apartheid South Africa. South Africa's Choice on Termination of Pregnancy Act, enacted in 1996, is one of the world's most liberal abortion laws, making abortion legal at a woman's request during the first twelve weeks of pregnancy.\(^{42}\) The abortion law reflects principles stated in the South African constitution, also adopted in 1996, which provides in Section 12 that "[e]veryone has the right to bodily and psychological integrity, which includes the right . . . to make decisions concerning reproduction."\(^{43}\) The constitution has thus explicitly incorporated principles of autonomy in reproductive decision making into broader notions of individual liberty. Evidence of *Roe*'s reach in South African jurisprudence is found in a decision of the High Court of Pretoria, which turned to *Roe* to respond to a constitutional challenge brought in 1998 against the nation's abortion law.\(^{44}\) In ruling on the question of whether a fetus has protected constitutional rights, the court commented, "In its landmark ruling in *Roe v. Wade* the United States Supreme Court held that a foetus is not a 'person' within the meaning of the fourteenth amendment and accordingly does not enjoy a constitutional right to life."\(^{45}\)

By grounding the right to choose abortion in principles of privacy and individual liberty, the United States Supreme Court contributed to a conceptual framework that could be applied by courts of other nations. *Roe*'s influence as a potential jurisprudential model can also be measured in the reactions of governments that oppose reproductive choice. The evident power of a constitutional approach to ensuring abortion's legality has prompted the imposition of constitutional protections for "unborn life" in some countries, particularly those where politicians are most influenced by the official position of the Catholic Church. For example, fears in Ireland that the supreme court of that country would adopt the reasoning of *Roe* prompted a 1983 referendum that resulted in a constitutional protection for the right to life of the fetus.\(^{46}\) With a similar motivation, the Philippine

\(^{41}\) *Id.* at 171.

\(^{42}\) *Choice on Termination of Pregnancy Act 92 of 1996, § 2(1) (a) (S. Afr.).*

\(^{43}\) S. AFR. CONST., ch. 2, § 12.

\(^{44}\) *Christian Lawyers Ass'n v. Minister of Health, 1998 (50) BMLR 241 (T) (S. Afr.).*

\(^{45}\) *Id.* at 252 (citation omitted).

\(^{46}\) See Liam Hamilton, *Matters of Life and Death*, 65 FORDHAM L. REV. 543, 548–51 (1996) (noting that the amendment to the Irish constitution was intended to "copperfasten the existing
government included in the 1986 constitution a provision requiring the state to "equally protect the life of the mother and the life of the unborn from conception."47

Roe's impact in the political processes of other countries may be somewhat more subtle and less apparent than its influence on courts. However, it has contributed to a general trend—one that continues, albeit with signs of a conservative counttrend—of liberalization of abortion laws by governments throughout the world. Today, over 60% of the world's population lives in the sixty-six countries that permit abortion without restriction as to reason or on broad grounds.48 While the speed of abortion law liberalization has slowed in recent years, we are continuing to see dramatic changes in national abortion policies, with reforms aimed at making abortion more available to women. For example, in 2002, Nepal and Switzerland made abortion available at a woman's request during the first twelve weeks of pregnancy.49 Nepal's recent shift from absolutely prohibiting abortion to removing most restrictions during the first three months of pregnancy is a particularly striking example of the continued force of abortion reform movements around the world.

These liberalizations have coincided with the imposition of incremental infringements upon choice in other countries. In recent years, two countries, El Salvador and Chile, removed narrow therapeutic exceptions to their abortion bans in favor of absolute prohibitions of the procedure, even prohibiting abortions to save the life of a woman.50 In addition, the adoption of anti-choice constitutional amendments has continued in Latin America in such countries as El Salvador and Guatemala.51 Eastern and Central Europe is also under the sway of an increasingly powerful anti-choice movement, fueled by a post-Communist rush of religious fundamentalism and national-

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48 See CTR. FOR REPROD. RIGHTS, INTERNATIONAL FACTSHEET, THE WORLD'S ABORTION LAWS (Sept. 2003) (listing countries that permit abortions without restriction as to reason and countries that permit abortions on socioeconomic grounds or to preserve mental or physical health), http://www.reproductiverights.org/pub_fac_abortion_laws.html.
50 See Rahman et al., supra note 37, at 60 (noting that Chile bans abortion "on all grounds" and El Salvador removed "all exceptions to its prohibition on abortion").
51 See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE EL SALVADOR tit. I, ch. I, art. 1 (recognizing that human life begins at "the moment of conception"); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA tit. II, ch. I, art. 3 ("The State guarantees and protects human life from the time of conception, as well as the integrity and security of the person.").
While these conservative inroads have not yet challenged the clear trend toward abortion law liberalization worldwide, they are troubling reminders of the fragility of the advances women have made in the area of reproductive rights thus far, and parallel the threat to Roe that is currently being leveled within the United States.

D. The Influence of Roe in International Fora

Advocates for reproductive rights have argued that international human rights instruments support a right to reproductive self-determination. Protections of the right to health, nondiscrimination, and bodily integrity are fundamental to the rights to reproductive health and self-determination. The textual basis of these rights is recognized in the definition of “reproductive rights” adopted at the International Conference on Population and Development (“ICPD”), a United Nations conference held in Cairo in 1994 aimed at seeking consensus on basic norms relating to reproductive health and rights.

The ICPD Programme of Action provides:

[R]eproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.

While documents adopted at United Nations conferences, including the ICPD, are not themselves binding human rights instruments, they are declarations of political commitment and therefore important in the development of emerging human rights standards and norms.

In international fora, governments have not applied the principle of reproductive choice specifically to abortion. In fact, the provisions on abortion in the ICPD Programme of Action and elsewhere state specifically that abortion should not be considered a method of “family planning.” However, governments have recognized the need to


Id. at ¶ 7.3.

Id. at ¶ 8.25
address the issue of unsafe abortion as a public health concern. The ICPD Programme of Action characterizes unsafe abortion as a public health issue and calls for greater safety and compassion for women seeking abortions.\textsuperscript{56} The Platform for Action of the Fourth World Conference on Women, held in Beijing, went further by urging governments to consider removing criminal penalties for women who have undergone illegal abortions and to take affirmative steps toward understanding and addressing the causes and consequences of illegal abortions.\textsuperscript{57} At review meetings held five years after each of these conferences, their positions on abortion were reaffirmed and extended to a commitment to make abortion safer and more accessible where legal, despite opposition by reactionary governments.\textsuperscript{58} Although a right to safe and legal abortion has not garnered explicit international legal support, reproductive rights advocates and international human rights scholars have begun to challenge restrictive abortion policies through the application of accepted human rights standards.

In recent years, the strength of the rights-based approach to reproductive health adopted at these conferences has been called into question by the efforts of an increasingly radicalized cadre of conservative governments to block consensus on measures to promote reproductive rights. With the 2000 election of President George W. Bush, the United States joined this group. While the ultimate outcome of these attempts to undermine the Cairo and Beijing consensus is still uncertain, it appears that there will not be significant gains for reproductive rights—particularly abortion rights—at international conferences in the immediate future. Indeed, rather than moving forward, progressive governments are now engaged in a struggle to prevent the dismantling of existing reproductive rights standards and to minimize damage that may be inflicted in the next few years at the hands of the United States and other conservative powers.

\textsuperscript{56} Id.

\textsuperscript{57} See The Beijing Declaration and the Platform for Action, Fourth World Conference on Women, Beijing, China, 4-15 Sept. 1995, ¶ 106(k), 109(i), U.N. Doc. DPI/1766/Wom (1996) [hereinafter Beijing Platform for Action] (arguing that laws authorizing punitive measures against women who undergo illegal abortions should be reviewed).

II. *Roe's Inauspicious Journey: The Gradual Entrenchment of Anti-Reproductive Rights Policies in U.S. Law and Foreign Policy from 1973–2000*

Ironically, as the international community has generally moved toward greater respect for women's equality and self-determination through increased recognition of reproductive rights, the United States has swung on a counterpendulum. Since *Roe* was decided in 1973, the anti-choice movement in the United States has engaged in a coordinated and well-financed campaign to chip away at the right to individual autonomy and privacy recognized by that landmark Supreme Court decision. The concerted efforts of that movement would eventually obtain disproportionate power and influence, ultimately effusing all three branches of federal government as described in the next section. Using a "divide-and-conquer" tactic aimed at the easiest targets, anti-choice policy makers have focused their efforts on the most vulnerable and disenfranchised populations—such as low-income women, young women, and impoverished women living in other countries.

This section provides a brief synopsis of the history of increasing federal and state restrictions on access to abortion by women within the United States, and the accompanying judicial backsliding in constitutional protections that have occurred since *Roe*. It also demonstrates how anti-choice forces within the United States have expanded their assault on reproductive rights to target women in other countries. This review will provide the historical context through which to view the current onslaught against women's reproductive rights addressed in the next section.

A. Backsliding of Abortion Rights Within the U.S.

One unfortunate and largely unanticipated outcome of *Roe v. Wade* was the galvanization of far-right elements within the United States who oppose women's right to individual autonomy and privacy and support government control of women's reproductive capacity. Soon after the *Roe* victory in the U.S. Supreme Court, conservative forces began to chip away at women's reproductive rights both in the federal and state governments and in the courts. Their anti-choice strategy has been multifaceted, including attempts to carve out exceptions to *Roe*, marginalize certain groups of women, and impose

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59 See Craig & O'Brien, supra note 3, at 35–73 (discussing interest groups' attacks on *Roe v. Wade*).
60 See id. at 43 (describing conservative backlash in wake of *Roe* decision).
61 See id. at 39, 42 (describing pro-life interest groups' reaction to *Roe*).
barriers to exercising reproductive privacy rights. The right wing has specifically targeted low-income women and young women. Additionally, although initially rebuffed by the U.S. Supreme Court, the anti-choice conservatives have become increasingly successful in their efforts to impose generally applicable restrictions on women's access to abortion in the United States.

1. Restrictions on Access to Abortion by Low-Income Women

One early strategy to restrict abortions targeted low-income women by cutting off their funding for abortion services. Just three years after Roe was decided, Representative Henry Hyde initiated restrictions, passed by Congress in 1976 and renewed regularly ever since, that eliminated Medicaid funding for abortions except in limited cases, such as rape, incest, or when a woman's life was endangered by her pregnancy. These restrictions have become known as the "Hyde Amendment." Congress has also repeatedly prohibited funding for abortion services for other specific groups of women. These policies obviously have more of an impact on low-income women within these categories than they do on women with greater resources. For example, each year Congress includes a specific provision in the treasury postal appropriations bill prohibiting coverage of abortion services under the Federal Employees Health Benefits Program. The contraceptive coverage provision of the program explicitly states: "Nothing in this section shall be construed to require coverage of abortion or abortion-related services." Additionally, Congress has, either through the appropriations process or through statutory provisions, banned funding for abortions for women in federal prisons, low-income women in the District of Columbia, women serving in the Peace Corps, Native American women, and teenagers participating in the State Child Health Insurance Plan.

The U.S. Supreme Court has consistently upheld restrictions on funding for abortions. In the Supreme Court's 1977 decision in Maher v. Roe, the majority held that the principles expounded upon in Roe did not require states to provide funding for abortions that are

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62 See id. at 47, 77 (describing efforts to cut abortion funding).
63 See id. at 44 (citing press report naming Hyde as author of ban on federal funding of abortion).
not medically necessary under their Medicaid program, even if the state provides public funding for childbirth services.\textsuperscript{67} The Court held:

An indigent woman who desires an abortion suffers no disadvantage as a consequence of [the] decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. . . . The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the . . . regulation . . . . [Therefore, the] regulation does not impinge upon the fundamental right recognized in \textit{Roe}.\textsuperscript{68}

A few years later, the Court extended this decision in \textit{Harris v. McRae}, upholding the constitutionality of the Hyde Amendment and finding that states do not even have to fund abortions that are medically necessary.\textsuperscript{69} This case differed from \textit{Maher}, as \textit{Harris} raised the issue of funding in the context of women’s health. The appellants argued that the Hyde Amendment was unconstitutional in that it prohibited funding even when the woman’s health was at risk, thereby further infringing on her constitutional right to privacy.\textsuperscript{70} The Court dismissed this distinction, finding the right to choose did not include a right to access abortions, even if the woman’s health was at risk. The Court held that the state is not required to remove obstacles to obtaining an abortion: “[I]t simply does not follow that a woman’s freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.”\textsuperscript{71}

This infringement on the principles originally recognized in \textit{Roe} became even clearer in two additional Supreme Court cases limiting access to public facilities for abortions. In \textit{Webster v. Reproductive Health Services}, the Court ruled that “the State need not commit any resources to facilitating abortions,” and upheld a law restricting the use of public employees and facilities for abortions.\textsuperscript{72} In \textit{Poelker v. Doe}, the Court held that an indigent woman had no right to obtain a nontherapeutic abortion at a publicly funded hospital.\textsuperscript{73}

The federal government has promoted other post-\textit{Roe} initiatives to limit access to abortion services by low-income women, including proposals to block funds to family planning organizations that engage in abortion-related activity with nongovernment funding sources. For

\begin{itemize}
\item \textsuperscript{67} \textit{Maher v. Roe}, 432 U.S. 464 (1977).
\item \textsuperscript{68} \textit{Id.} at 474.
\item \textsuperscript{69} \textit{Harris v. McRae}, 448 U.S. 297 (1980).
\item \textsuperscript{70} \textit{Id.} at 303.
\item \textsuperscript{71} \textit{Id.} at 316.
\item \textsuperscript{72} \textit{Webster v. Reprod. Health Servs.}, 492 U.S. 490, 511 (1989).
\item \textsuperscript{73} \textit{Poelker v. Doe}, 432 U.S. 519, 521 (1977).
\end{itemize}
example, in 1988, a restriction to the Title X program was proposed, known as the domestic "gag rule," which prohibited recipients from providing full counseling on pregnancy options, thereby restricting discussion of abortion and dissemination of information about abortion. The domestic gag rule was upheld by the Supreme Court in Rust v. Sullivan, but was revoked by the Clinton administration in 2000.

Anti-choice lawmakers have also imposed a ban on abortion for women serving in the U.S. military and for military dependents. Congress first enacted this ban in 1978 through a provision in the fiscal year ("FY") 1979 Department of Defense ("DoD") appropriations bill prohibiting DoD funding of abortions except in cases of life endangerment, rape, incest, or severe health consequences. In 1988, the DoD issued a memorandum that extended the ban to include abortions paid for with a patient's own money. President Clinton lifted the restriction on privately funded abortions by executive order in 1993; however in 1996, anti-choice forces in Congress maneuvered to place the ban on privately funded abortions in the U.S. code, which still remains despite repeated attempts to remove it. Again, the harshest effects of this ban fall upon women in the lower ranks, who are less able to afford to travel off their base (perhaps to another country or back to the United States) to obtain an abortion, and who must also seek permission from a superior officer to be allowed to do so.

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74 Title X was established under the Public Health Service Act, Family Planning Services & Population Research Act of 1970, Pub. L. No. 91-572, 84 Stat. 1504 (1970) (codified as amended at 42 U.S.C. §§ 300 to 300a-41 (2000)), in order to provide public family planning and preventive health screening services to low-income women by providing direct grants to both private and public entities, such as family planning clinics and state health departments. Title X money was not made available for abortions, but recipient organizations could provide limited counseling on patients' options, including pregnancy termination.

75 See CTR. FOR REPROD. RIGHTS, DOMESTIC FACTSHEET NO. F051, TITLE X FAMILY PLANNING: AMERICA MUST CONTINUE ITS COMMITMENT TO REPRODUCTIVE HEALTH (Jan. 2003) [hereinafter TITLE X FAMILY PLANNING] (discussing restrictions on use of Title X funds), http://www.reproductiverights.org/pubfac_titlex2.html.

76 Rust v. Sullivan, 500 U.S. 173 (1991) (upholding the domestic gag rule's requirement of physical and financial separation of abortion-related activities from Title X funded services).

77 TITLE X FAMILY PLANNING, supra note 75.


79 CTR. FOR REPROD. RIGHTS, DOMESTIC FACTSHEET NO. F056, PENALIZED FOR SERVING THEIR COUNTRY: THE BAN ON ABORTION FOR WOMEN IN THE MILITARY (June 2003), http://www.crlp.org/pub_fac_military.html.

80 Id.

81 See Armed Forces Act, 10 U.S.C. § 1093(b) (2000) (prohibiting the use of DoD facilities to perform abortions unless mother's life is endangered or pregnancy is result of rape or incest) (subsection (b) effective Feb. 10, 1996).
2. Limitations on Access to Abortion by Adolescents

Soon after Roe was decided, state legislatures began enacting laws that treated adolescents differently than adult women, affording young women diminished reproductive rights. Many of these laws required the consent of one or both parents for a minor to obtain an abortion ("parental consent laws"), thereby intruding upon the young woman's privacy right by vesting near total control in her parents over the decision as to whether she would be allowed to terminate her pregnancy. In 1979, only six years after Roe, the U.S. Supreme Court considered a Massachusetts law requiring the consent of both parents for a minor to obtain an abortion, and upheld the basic principle that states could enact limitations on a minor's right to choose. The Court in Bellotti v. Baird stated: "We are not persuaded that, as a general rule, the requirement of obtaining both parents' consent unconstitutionally burdens a minor's right to seek an abortion. The Supreme Court's endorsement of parental involvement laws has been reaffirmed in numerous other cases, and states continue to introduce bills restricting minors' right of access to abortion. The Bellotti decision and its progeny thus reinforced the anti-choice strategy of dividing women into different classes and created broad exceptions to the constitutional right of reproductive choice.

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82 See CRAIG & O'BRIEN, supra note 3, at 89 (describing changes in state law after Roe).
83 See id. (describing challenge to Massachusetts's parental consent requirement).
85 Id. at 649. The Court justified this intrusion into a minor's rights by claiming that parents serve a role in protecting the minor from her own immaturity and in determining their daughter's best interests. Id. at 637. The Court did require, however, that the state law include a judicial bypass option whereby minors could assert their privacy rights by requesting a hearing before a state judge on whether they were "mature" or an abortion was in their best interests. Id. at 643-44. The Court's ruling upheld an earlier decision in Planned Parenthood v. Danforth, 428 U.S. 52 (1976), which held that a state could not lawfully authorize an absolute parental veto over a minor with regard to the abortion decision.
3. Generally Applicable Restrictions on Abortion

Opponents of *Roe* sought to chip away at the Supreme Court's decision in other ways as well, passing legislation that created further obstacles to women's ability to exercise their right to choose. For example, anti-choice state legislatures enacted laws requiring women to wait requisite amounts of time before obtaining abortions ("waiting periods"), thereby interfering with women's access to abortion and potentially increasing the health risks of abortion. State legislatures also mandated that women receive certain information or counseling—mostly geared toward promoting childbirth over abortion and often containing medically inaccurate information—prior to the procedure. Some legislatures went as far as enacting spousal consent requirements (which had the effect of imposing a husband's will on his wife's body) and unnecessary regulations of the abortion procedure (such as requiring that abortions be performed in hospitals, despite the strong safety records of clinics; or that two physicians be involved in the abortion decision, even though one doctor's participation is sufficient).87

In the decade following *Roe*, while the Supreme Court endorsed the weakening of constitutional protections for such politically disenfranchised groups as low-income women and minors, the Court initially invalidated many of these other barriers to abortion access. For example, in the 1973 case *Doe v. Bolton*, the Court struck down requirements that abortions be performed in hospitals, that hospital committee approval be obtained prior to an abortion procedure, and that two additional physicians participate in the abortion decision.88 In 1976, the Court invalidated a spousal consent requirement and struck down a ban on the saline amniocentesis method of abortion in *Planned Parenthood v. Danforth*.89 In 1983, the Court struck down a law requiring, among other things, a 24-hour waiting period and biased counseling, fetal disposal in a "humane and sanitary" manner, and the performance of second trimester abortions in hospitals.90 Three years later, in *Thornburgh v. American College of Obstetricians & Gynecologists*, the Court invalidated a Pennsylvania statute with requirements that included onerous "informed" consent procedures, reporting to the state by providers regarding abortions performed, and involvement of a second physician in certain abortions.91 Thus, in the thir-

87 See CRAIG & O'BRIEN, supra note 3, at 79–81, 88–89 (describing state abortion regulations).
teen years following *Roe*, the Court repeatedly struck down many state-imposed obstacles to reproductive health.\(^{92}\) With the advent of a changing Court composition and the increased stridency of anti-choice rhetoric, however, the Court’s intolerance of these abortion barriers began to diminish in the late 1980s and 1990s.\(^{93}\)

4. *Further Weakening of Roe*

During the 1990s, opponents of reproductive choice successfully employed yet another strategy to undermine *Roe*—challenging the level of constitutional scrutiny and protection applied to laws infringing on reproductive autonomy. In *Planned Parenthood v. Casey*,\(^{94}\) the Court—while claiming to reaffirm *Roe*’s constitutional protection of women’s right to abortion—replaced *Roe*’s trimester framework by explicitly extending the state’s interests in protecting potential life and maternal health to apply throughout pregnancy.\(^{95}\) The Court also abandoned the strict judicial scrutiny standard established in *Roe* and replaced it with a weaker, ill-defined “undue burden” standard.\(^{96}\) Under this new standard, regulations that would have been held unconstitutional under *Roe* were now considered valid unless they had the “purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”\(^{97}\) Applying this new standard, the Court in *Casey* upheld restrictions that it had previ-


\(^{93}\) See CRAIG & O’BRIEN, *supra* note 3, at 63, 65 (describing the change in the Court’s composition since *Thornburgh* and the alarmed reaction of pro-choice groups to pro-life political successes).


\(^{95}\) The Court stated:

A logical reading of the central holding in *Roe* itself, and a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life, require, in our view, that we abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life. The trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman’s interest; and in practice it undervalues the State’s interest in potential life, as recognized in *Roe*.

*Id.* at 873.

\(^{96}\) The Court stated:

The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.

*Id.* at 876.

\(^{97}\) *Id.* at 877.
ously ruled invalid in other cases,\textsuperscript{98} such as a requirement that doctors must deliver biased information to patients and a mandatory 24-hour waiting period for abortions.\textsuperscript{99} The new standard weakened the Court's previously established protections and provided greater opportunity for anti-choice policy makers to continue chipping away at abortion rights. Legislatures were thus given the liberty to enact laws favoring childbirth, promoting "fetal life," burdening access to abortion, and restricting abortion based on "morality" (often a code word for anti-abortion religious views), as long as the vaguely defined line of "undue burden" was not crossed. As a result of 	extit{Casey}, many women now cannot exercise their reproductive rights without encountering substantial encumbrances.\textsuperscript{100}

Another anti-choice tactic has been to enact broad bans on abortion methods through so-called "partial-birth abortion" legislation. Legislatures thirty-one states have have enacted such laws.\textsuperscript{101} These laws purportedly ban abortions only late in pregnancy and ostensibly target only one specific abortion method. In reality, however, these laws limit ban safe and effective abortion methods used as early as twelve to fifteen weeks in the pregnancy.\textsuperscript{102} The Supreme Court considered Nebraska's "partial-birth abortion" law in 	extit{Stenberg v. Carhart},\textsuperscript{103} a case brought by the Center for Reproductive Rights in 2000. The Court struck down the ban in a 5–4 decision, finding it an unconstitutional violation of 	extit{Roe} and 	extit{Casey} by failing to include an exception to

\textsuperscript{98} See supra text accompanying notes 86–89 (describing the previously invalid restrictions on abortion).

\textsuperscript{99} 	extit{Casey}, 505 U.S. at 884–87.

\textsuperscript{100} To date, twenty-six states have enacted mandatory delay or biased information laws, most of which are being enforced. See CTR. FOR REPROD. RIGHTS, FACTSHEET NO. F037, MANDATORY DELAYS AND BIASED INFORMATION REQUIREMENTS (July 2003) (listing state laws involving mandatory waiting periods and informed consent requirements), http://www.reproductiverights.org/pub_fac_manddelay1.html. States have also enacted numerous stringent regulations of abortion providers, which have the effect of burdening providers and interfering with a woman's right to choose. Currently thirty-three states and Puerto Rico have regulatory schemes that apply to abortion providers, imposing additional levels of government intrusion and oversight that are often not imposed on comparable medical practices. See CTR. FOR REPROD. RIGHTS, FACTSHEET NO. F006, TARGETED REGULATION OF ABORTION PROVIDERS (TRAP): AVOIDING THE TRAP (Aug. 2003) (arguing that such medical provider regulations operate to restrict women's right to choose abortion), http://www.reproductive rights.org/pub_fac_trap.html. Several of these are currently being challenged in court. Similar laws in fourteen other states have been struck down pursuant to court decisions, attorney general opinions, or department policy. Id.

\textsuperscript{101} All the laws have been blocked through court challenges or are unenforceable. CTR. FOR REPROD. RIGHTS, SO-CALLED "PARTIAL-BIRTH ABORTION" BAN LEGISLATION: BY STATE (Feb. 2004), http://www.reproductiverights.org/pub_bp_pbastate.html.

\textsuperscript{102} See CTR. FOR REPROD. RIGHTS, BRIEFING PAPER NO. B029, UNCONSTITUTIONAL ASSAULT ON THE RIGHT TO CHOOSE: "PARTIAL-BIRTH ABORTION BAN" IS AN AFFRONT TO WOMEN AND TO THE U.S. SUPREME COURT (Dec. 2003) [hereinafter UNCONSTITUTIONAL ASSAULT] (arguing that "partial-birth" abortion legislation is an ill-disguised attempt to criminalize abortion and to severely erode 	extit{Roe}), http://www.reproductiverights.org/pub_bp_pba.html.

\textsuperscript{103} 	extit{Stenberg v. Carhart}, 530 U.S. 914 (2000).
preserve the health of the woman.  It also found the statute unconstitutional because it imposed an undue burden on a woman's ability to choose an abortion by banning the safest and most common abortion procedures performed before viability in the second trimester. Although the decision in Carhart preserved a core right to reproductive autonomy, it affirmed the Casey standard affording fewer constitutional protections to reproductive privacy, thereby further solidifying the substantial step away from Roe's original principles. In addition, the 5-4 decision was an ominous sign for Roe's future. The fragile majority decision indicates the new balance of the Court, which is only one vote away from overturning Roe.

B. U.S. Policies Undermining Global Abortion Rights

Anti-choice policy makers within the U.S. have demonstrated that they are not content with limiting their assaults on reproductive choice to the established rights of women in this country. The exercise of U.S. influence in other countries has been a primary tool in their attempts to prevent access to safe and legal abortion worldwide. Of course, opponents of women's reproductive rights have not always been successful, and at times the United States has been a leading proponent of women's reproductive rights internationally. For example, the U.S. championed women's reproductive rights during the 1994 International Conference on Population and Development, the 1995 Fourth World Conference on Women, and the five-year reviews of these conferences. However, as the following examples demonstrate, U.S. foreign policy has also been used to impose incremental infringements upon women's reproductive rights, beginning in 1973 and setting the stage for the start of the Bush administration.

1. The Helms Amendment

The United States government has supported international assistance for family planning and other reproductive health services since the 1960s. However, in 1973—the same year that Roe was decided—ultraconservative Senator Jesse Helms sponsored an

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104 Id. at 930. The Court's decision rendered invalid 30 similar state laws. See UNCONSTITUTIONAL ASSAULT, supra note 102.
105 Carhart, 530 U.S. at 930.
amendment to the Foreign Assistance Act prohibiting the use of federal money "for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions." The following year, the U.S. Agency for International Development ("USAID") established its own policy, later codified, that prohibits U.S. funding for "information, education, training, or communication programs that seek to promote abortion as a method of family planning." USAID later adopted an extremely restrictive interpretation of the phrase "abortion as a method of family planning," construing it to mean that no U.S. funding could be used for any abortion except to save the life of a woman or in cases of rape or incest. Moreover, U.S. government officials have attested that no U.S. funding has been used to provide abortions even in those limited circumstances.

2. The Global Gag Rule

In 1984, the Reagan administration imposed further restrictions on U.S. assistance for family planning and reproductive health services. The so-called "Mexico City Policy"—the predecessor to the current "global gag rule"—prohibited nongovernmental organizations ("NGOs") in other countries from receiving U.S. funds if, with their own funds and in accordance with the laws of their own countries, they "perform[ed] or actively promote[d] abortion as a method of family planning." The Reagan administration issued extremely

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110 See JOHN BLANE & MATTHEW FRIEDMAN, POPULATION TECHNICAL ASSISTANCE PROJECT, OCCASIONAL PAPER NO. 5, MEXICO CITY POLICY IMPLEMENTATION STUDY A-4 (1990) (stating that "[a]bortion is a method of family planning when it is for the purpose of spacing births"); Memorandum on the Mexico City Policy, 29 WEEKLY COMP. PRES. DOC. 88 (Jan. 22, 1993) (directing USAID to remove anti-abortion conditions from USAID grants).
111 See USAID, supra note 107, which states:

It should be noted that since 1973, with the enactment of the Helms Amendment, USAID has been legally prohibited from supporting or encouraging abortion as a method of family planning. USAID has strict procedures to ensure that no USAID-provided funds are used for abortion, including legally binding contracts with organizations receiving funds, separate accounting procedures to ensure that no USAID funds support prohibited activities, close technical monitoring, and regular financial audits by outside nationally-recognized accounting firms.

restrictive regulations that interpreted the phrase “abortion as a method of family planning” to mean almost all abortions, with the only exceptions for cases of rape, incest, or when the life (but not health) of the woman would be endangered if the fetus were carried to term.\textsuperscript{113}

The three primary lawsuits challenging the original Mexico City Policy were unsuccessful.\textsuperscript{114} The courts in two of the cases addressed the issue of nonjusticiability, and concluded that although USAID’s implementation of the Mexico City Policy was deemed to be justiciable, the Mexico City Policy itself was deemed to be a nonjusticiable political question.\textsuperscript{115} The challenges to USAID’s implementation of the former Mexico City Policy on the First Amendment grounds of freedom of association and speech were also rejected.\textsuperscript{116} President Clinton abolished the global gag rule during his presidency,\textsuperscript{117} except for a brief period when anti-choice members of Congress demanded re-imposition of the restriction in exchange for payment of arrearages of U.S. dues to the United Nations.\textsuperscript{118}


Another sporadic victim of right wing activism has been the United Nations Population Fund (“UNFPA”), an agency that provides

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\item mines the internationally recognized right to freedom of speech, impedes the development of the democratic process, civil society, and women’s participation in society and would be unconstitutional if directly applied to U.S.-based NGOs, creating a hypocritical double standard.
\item See sources cited supra note 110.
\item See Planned Parenthood I, 915 F.2d at 61–62 (noting that in Planned Parenthood I the court had “agreed that the policy itself was nonjusticiable,” but “upheld AID’s conditions on funding for foreign nongovernmental organizations as the least restrictive means of implementing a nonjusticiable foreign policy decision”); DKT Mem’l Fund Ltd. v. Agency for Int’l Dev., 810 F.2d 1236, 1238 (D.C. Cir. 1987) (“DKT I”) (stating that “attacks on foreign policymaking are nonjusticiable,” but allowing plaintiffs’ challenge because they did “not seek to litigate the political and social wisdom of AID’s foreign policy,” but instead challenged “the legality of AID’s implementation of the Policy”). The court in Pathfinder only addressed the justiciability of a challenge to the implementation of the Mexico City Policy; it did not address whether the Mexico City Policy itself would be nonjusticiable. Pathfinder, 746 F. Supp. at 196 n.7.
\item Because Planned Parenthood of New York City (“PPNYC”), a domestic NGO, is the proposed plaintiff in a challenge to the new global gag rule and/or its implementation, this analysis focuses on the feasibility of a challenge by a domestic NGO plaintiff, as opposed to foreign NGO plaintiffs, which may raise issues of standing. See DKT II, 887 F.2d at 291 (holding that foreign NGOs lack standing to bring a First Amendment challenge to the Mexico City Policy).
\item The Clinton administration ended the Mexico City Policy in 1993. BUSH GLOBAL GAG RULE, supra note 109 (citing Memorandum on the Mexico City Policy, 29 WEEKLY COMP. PRES. DOC. 88 (Jan. 22, 1993)).
\item \textit{Id.}
\end{itemize}
no abortion services. From UNFPA's establishment in 1969 through the mid-1980s, the United States was a leading supporter of its work to improve the health of women and children around the world. However, under the Reagan administration in the mid-1980s, family planning opponents targeted U.S. assistance for UNFPA by alleging that it was complicit in coercive population policies in China, including forced sterilization and abortion. Even though a 1985 USAID review found that UNFPA did not promote or support coercive practices, the U.S. withheld its contribution from fiscal years 1986–1992, using the mere existence of a UNFPA program in China as its rationale. A lawsuit challenging the United States' withdrawal of UNFPA funding was rejected.

Since that time, the United States has been an unreliable UNFPA funding source, because reproductive rights opponents exploit concerns about China's policies as an excuse to withhold assistance for UNFPA's reproductive health services. In FY 1999, anti-family

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122 Id. at 1–2.
123 See Ctr. for Reprod. Law & Policy v. Bush, No. 01 Civ. 4986, 2001 U.S. Dist. LEXIS 10909, at *3 (S.D.N.Y. July 31, 2001) (dismissing complaint on the grounds that the injury was conjectural and not caused by the conduct challenged).
124 Funding levels for USAID family planning and reproductive health programs have also been targeted by anti-reproductive rights activists within the U.S. government. Such appropriations reached a high of $541.6 million in fiscal year 1995, but the following year, when Republicans took control of both chambers of Congress, the level plummeted to $356 million, and has never been fully restored. CTR. FOR REPROD. RIGHTS, INTERNATIONAL FACTSHEET No. F048, INTERNATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH (June 2003), http://www.crlp.org/pub_fac_ifp.html. In addition to the 35% cut in funds in FY 1996, Congress imposed complex spending restrictions, permitting the release of funds only in small monthly installments (known as "metering"). In FY 1997, Congress enacted unprecedented and cumbersome rules governing the release of USAID family planning and reproductive health funds. CTR. FOR REPROD. RIGHTS, BRIEFING PAPER NO. B004, CAIRO +5: ASSESSING U.S. SUPPORT FOR REPRODUCTIVE HEALTH AT HOME AND ABROAD (Feb. 1999) [hereinafter CAIRO +5], http://www.reproductiverights.org/pub_bp_icpdfund2.html. Before such funds could be released, the president was required to make a finding, and Congress to approve such finding, that delaying a metered release of funds until July 1997, rather than releasing funds in March 1997, would have a negative impact on the proper functioning of the family planning program. Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997, Pub. L. No. 104-208, § 518A(d), 110 Stat. 3009, 3009-145 (1996); see also CAIRO +5, supra (explaining the rules regarding use of USAID funds). President Clinton made such a finding and issued an accompanying report. See USAID, IMPACT OF DELAYING USAID POPULATION FUNDING FROM...
planning members of Congress succeeded in completely stripping UNFPA funds from the budget, although U.S. funding was reinstated the following year.


Since the installation of the Bush administration in January 2001, the core principles of Roe have been vigorously challenged through a variety of measures that threaten women’s reproductive rights. Moreover, the anti-choice forces within the Bush administration seem determined to project their ideology onto women throughout the world. This section provides a glimpse into both the heightened offensive against reproductive rights within the United States and the torrent of anti-abortion fundamentalism that is being exported throughout the world by the Bush administration and the anti-choice factions controlling Congress. The examples of initiatives discussed below expose a consistent pattern of measures that, when considered as a whole, reveal a mounting assault on women’s reproductive rights around the world.

A. Domestic Initiatives Eroding Abortion Rights

As described in previous sections, while abortion opponents have made significant strides between 1973 and 2000, their most severe attacks on women’s right to terminate unwanted pregnancies have to a certain extent been rebuffed (for example, a constitutional amendment outlawing abortion, abortion method bans, and spousal vetoes). During the Reagan and first Bush presidencies, federal anti-choice initiatives were held somewhat in check due to a Democrat-controlled Congress. This standoff reversed during the Clinton administration: after the Republican takeover in Congress in 1995, numerous attempts to roll back reproductive rights through federal legislation


Five leading research organizations in the United States have estimated that the 35% reduction in reproductive health assistance between FY 1995 and 1996 alone resulted in 4 million unplanned pregnancies, 1.6 million abortions, 8,000 maternal deaths, and 134,000 infant deaths due to increased high-risk births. ROCKEFELLER FOUND., HIGH STAKES: THE UNITED STATES, GLOBAL POPULATION AND OUR COMMON FUTURE 25 (1997).

Cohen, supra note 121, at 1.
were largely unsuccessful due to the backstop of a pro-choice presidential veto.\textsuperscript{126} Although anti-choice gains were certainly realized during these periods, the general impasse between anti- and pro-choice forces in the federal government to a certain extent frustrated the anti-choice movement's attempts to make greater progress on the national political front.\textsuperscript{127} However, with the inauguration of President George W. Bush in 2001, the opponents of choice again embarked upon a quest to assert their power at the federal level. Additionally, as a result of the 2002 midterm elections, the reproductive rights movement is facing the most hostile political environment in this country's modern history. As the various initiatives below demonstrate, the newly strengthened opponents of choice in the Bush administration and Congress are attempting to further undermine Roe's core principles.

Several key initiatives demonstrate President Bush's determination to undercut Roe's principles within the United States. Perhaps most significantly, the President is stacking the federal judiciary with judges who oppose \textit{Roe v. Wade}, and has vowed to do the same with U.S. Supreme Court appointments.\textsuperscript{128} President Bush has indicated that he is seeking to fill the judiciary with individuals in the mold of Justices Antonin Scalia and Clarence Thomas, two of the most conservative members of the Supreme Court, who are opposed to women's reproductive rights. With the addition of one additional anti-choice justice to the Court, the landmark decision in \textit{Roe v. Wade} protecting a woman's right to privacy could be overturned.\textsuperscript{129}

\textsuperscript{126} The veto threat from President Clinton on anti-choice legislation was a sufficient backstop to keep most anti-choice legislation from being passed. Anti-choice members of Congress were successful in passing legislation banning so-called "partial-birth" abortion in 1996 and 1997, but each time Clinton vetoed the legislation because it did not contain an exception for women's health. Thomas, Bill Summary & Status for the 104th Congress, H.R. 1833, 104th Cong. (1996) (vetoed by President Clinton on Apr. 10, 1996), http://thomas.loc.gov/bss/d104query.html (last visited Mar. 13, 2004); Thomas, Bill Summary & Status for the 105th Congress, H.R. 1122, 105th Cong. (1997) (vetoed by President Clinton on Oct. 10, 1997) (last visited Mar. 13, 2004).

\textsuperscript{127} During the relative lull in Washington, D.C., the far right largely took its battle to the state legislatures, as well as to the local communities, holding vigils outside abortion clinics, blocking clinic entrances, and resorting to violent tactics such as bombs, arson, and murder by the more militant members. See Craig & O'Brien, supra note 3, at 56-57 (examining the violence directed at abortion clinics); Nat'l Abortion Fed'n, 2001 Year-End Analysis of Trends of Violence and Disruption Against Reproductive Health Care Clinics (same), at www.prochoice.org/Violence/Trends/2001.htm (last visited Mar. 13, 2004).


\textsuperscript{129} The right-wing radicals have experienced two peak periods in their federal quest to eradicate reproductive rights—the first during the Reagan and first Bush administrations, and the second now ongoing under the current Bush administration. Both waves of the movement have envisioned their best chance at eliminating the constitutional protection of reproductive rights
The President has also implemented numerous policy initiatives that undermine the legal underpinnings of \textit{Roe}. For example, the Bush administration has implemented regulations bestowing rights upon fetuses, embryos, and even fertilized eggs, making them eligible as beneficiaries for the State Children's Health Insurance Program ("SCHIP"). These regulations establish an embryo or fetus, from the moment of conception, as a separate beneficiary of government programs, in an attempt to undermine \textit{Roe}'s finding that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." While efforts should be made to expand women's access to pregnancy-related health care, the extension of SCHIP to cover fetuses—rendering pregnant women's health needs incidental—is fraught with legal and practical problems. In a similar vein, President Bush also directed the Advisory Commission on Human Research Protection to consider embryos as "human research subjects," which raises similar tension with \textit{Roe}'s core principles.

In another bow to the right wing, President Bush has appointed Dr. David Hager—seemingly more credentialed in theology than in science—to the Reproductive Health Drugs Advisory Committee, which is the Food and Drug Administration's ("FDA") committee overseeing women's reproductive health. Under the Bush administration, the FDA has let the committee's charter lapse, thus allowing the president to fill all eleven positions with new members. During

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132 Low-income pregnant women deserve actual, not merely incidental, health insurance coverage that covers all of their pregnancy-related needs. By contrast, the regulations place the health of pregnant women at risk, by failing to cover maternal health care needs that are separate from that of the fetus, failing to cover postpartum care, and threatening a woman's integral right to control her own health care. There are superior means of ensuring prenatal care for women whose incomes fall within the SCHIP-eligibility criteria in their state. See, \textit{e.g.}, Mothers and Newborns Health Insurance Act of 2001, H.R. 2610/S. 724, 107th Cong. (2001) (opposing amendments to expand coverage for targeted low-income pregnant women and their progeny).


his career, Dr. Hager has reportedly refused to prescribe contraceptives to unmarried women, suggested that women who suffer from premenstrual syndrome should seek help by reading the Bible and praying, and endorsed the medically inaccurate assertion that the common birth control pill is an abortifacient.\textsuperscript{155} Initially President Bush had floated the idea of appointing Dr. Hager to chair the committee, but due to the national outcry in opposition, the President ultimately decided against such a controversial move and appointed Hager to be a member of the committee, but not chair.

Additionally, under the Bush administration, the U.S. Department of Health and Human Services ("DHHS") has compromised minors' access to confidential health services by modifying the federal privacy rules.\textsuperscript{156} The new regulations give broad discretion to health care providers to disclose medical information to a minor's parent, as long as the disclosure does not violate applicable state law.

Right-wing lawmakers are also moving anti-choice legislation through Congress. Just one day after the 2002 midterm elections, the then-incoming Senate Majority Leader Trent Lott promised to enact a ban on so-called "partial-birth abortions."\textsuperscript{157} As promised, in 2003, Congress passed and President Bush signed into law the "Partial-Birth Abortion Ban Act of 2003."\textsuperscript{158} This abortion ban directly flouts the U.S. Supreme Court's opinion in \textit{Stenberg v. Carhart}, which the Center for Reproductive Rights successfully litigated in 2000.\textsuperscript{159} The federal law is being currently challenged in federal district court by the Center for Reproductive Rights on behalf of Dr. Leroy Carhart, by the American Civil Liberties Union on behalf of the National Abortion Federation, and by Planned Parenthood Federation of America. All three challenges have yielded temporary restraining orders at the time of this Article's publication.

Another example of a federal initiative aimed at undermining abortion access is the Child Custody Protection Act ("CCPA").\textsuperscript{160}

\textsuperscript{155} See Letter from Members of Congress, to George W. Bush, President of the United States (Oct. 16, 2002) (conveying their "deep reservations" about Hager's candidacy for chairman of the Advisory Committee for Reproductive Health Drugs) (on file with authors).


\textsuperscript{157} Dana Milbank, \textit{Lott's Promise To Bring up Abortion Worries Bush Aides}, WASH. POST, Nov. 12, 2002, at A23 (quoting Lott as saying "I will call it up, we will pass it, and the president will sign it" in reference to the ban on partial-birth abortions).


\textsuperscript{159} \textit{Stenberg v. Carhart}, 530 U.S. 914 (2000) (holding that a Nebraska law criminalizing the performance of "partial birth abortions" violates the U.S. Constitution).

\textsuperscript{160} Child Custody Protection Act, S. 851, 108th Cong. § 2431 (2003).
CCPA would criminalize the act of knowingly transporting a minor across state lines for the purpose of obtaining an abortion if the minor has not first complied with the forced parental involvement law of her state of residence. CCPA would apply to any person other than a minor's parent, including another relative or a doctor. This legislation would place an undue burden on a minor's ability to obtain an abortion by undermining her ability to have the procedure in a neighboring state. It would further violate principles of federalism and state sovereignty by imposing federal standards and foreign state laws on the state to which the minor is traveling. Finally, it would violate the constitutional right to travel.

In addition to promoting abortion method bans and undermining access, abortion opponents are also supporting the expansion of fetal rights through the Unborn Victims of Violence Act ("UVVA"). This bill, similar to many introduced in state legislatures, would amend the federal criminal code to create a separate offense for death or bodily injury to a fetus during the commission of a federal crime. The penalty would be the same as that of death or injury to the pregnant woman herself. The bill elevates the status of a fetus, embryo, blastocyst (pre-implantation embryo), or zygote (fertilized egg) to that of the woman for purposes of the offense, and would treat such entities as independent persons for purposes of federal law. Furthermore, lawmakers have rejected an approach that would accomplish the same end without establishing fetal rights.

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141 Id.
144 Id.
145 Congress also enacted the Born-Alive Infants Protection Act of 2002, H.R. 2175, 107th Cong. (2002). The law amends the U.S. code by defining the terms "person," "human being," "child," and "individual" to include "every infant member of the species homo sapiens who is born alive at any stage of development" who is extracted or expelled from its mother. Id. at § (2) (a) (8). Although the law does not change legal protections of fetuses or newborns and does not change the applicable medical standard of care, anti-choice forces have hailed it as an important symbolic victory in recognizing the sanctity of early life (and an important step in their attempt to eventually overturn Roe). See, e.g., Kenneth L. Connor, The Born Alive Act Is a Win for Humanity, PITTSBURGH POST-GAZETTE, Aug. 5, 2002, at A-15 ("President Bush recognizes that every child ought to be protected in law from the moment of conception. With his public signing of this bill today, he once again broadens the scope of basic human rights in America."), available at http://www.post-gazette.com/forum/comment/20020805edfam05p1.asp.
The Abortion Non-Discrimination Act ("ANDA") is another bill on the anti-choice agenda. Rather than providing protection from "discrimination" for those who decline to provide abortions, as the bill's sponsors claim, this misleading and far-reaching legislation attempts to reduce available health care options for women, reverse longstanding state and federal protections for women's reproductive rights, and usurp the authority of state and local governments to regulate health care. This bill would allow a broad range of health care entities to refuse to comply with federal, state, and local laws and regulations pertaining to abortion services. The vagueness of the bill's language makes its exact implications unclear. However, the law arguably prevents states or local governments that receive any federal funding from enforcing laws requiring provision or referral for abortions, or payment or coverage for abortion services. Moreover, because the term "abortion" is not defined, anti-choice extremists will undoubtedly claim that certain forms of contraception, such as birth control pills, IUDs, and emergency contraception, are covered by the Act.

B. Abortion Politics in U.S. Foreign Policy

Along with the increasingly restrictive domestic abortion policies, the global anti-choice campaign through U.S. foreign policy has intensified since President George W. Bush first took office. For example, on January 22, 2001, President Bush re-imposed the global gag rule on funding for international family planning and reproduc-

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147 Abortion Non-Discrimination Act of 2002, H.R. 4691, 107th Cong. (2002). By way of background to ANDA, although there are a declining number of trained abortion providers in the United States, and despite the Accreditation Council for Graduate Medical Education's ("ACGME") rule that medical residency programs must provide abortion training, Congress passed the Coats Amendment in 1996, which provided protections for medical schools that refused to provide this training and undermined ACGME's standards. 42 U.S.C.S. § 238n (Supp. 2003). More specifically, the amendment provided that medical schools could not be discriminated against by governments for failure to provide abortion training; and further that:

[T]he Federal Government, or any State or local government that receives Federal financial assistance, shall deem accredited any postgraduate physician training program that would be accredited but for the accrediting agency's reliance upon an accreditation standard that requires an entity to perform an induced abortion or require, provide, or refer for training in the performance of induced abortions, or make arrangements for such training, regardless of whether such standard provides exceptions or exemptions.

Id. at (b)(1). ANDA would expand these protections beyond medical schools to apply to any "health care entity," and would go beyond training and provision of services to include payment, insurance coverage, and referrals.

148 While such claims run contrary to well-established scientific and medical conclusions, supporters of the bill might argue that such forms of contraception are abortifacents and thus urge "health care entities" to refuse to provide or cover them as well.
tive health programs provided through USAID. In an attempt to take this policy a step further, in the fall of 2002, several members of Congress sent a letter to the Bush administration requesting that the global gag rule be extended to apply to U.S.-based organizations, a move that would clearly be unconstitutional, and also to apply to U.S. assistance for international HIV/AIDS programs. Initially the Bush administration indicated its intent to impose a version of the global gag rule on HIV/AIDS funding, but it retreated in the face of significant protest against this proposal. However, there is no assurance that the global gag rule will not be applied to HIV/AIDS programs in the future.

Additionally, President Bush did expand the global gag rule in August 2003 to include all family planning programs funded through the U.S. Department of State. The original gag rule applied only to funding administered through the U.S. Agency for International Development. Senator Harry Reid (D-NV) quickly reacted to the expansion and included an amendment to the Commerce, Justice, State appropriations bill that would effectively block the use of State Department funds to implement the expanded policy. In addition to the Reid amendment blocking the expansion of the gag rule, Senator Barbara Boxer (D-CA) offered an amendment to the Foreign Relations Authorization Act that would repeal the gag rule. The amendment passed the Senate by a vote of 53–43, but will most likely be taken out in the conference report of the bill due to a veto threat from the president.


150 Letter from Congressman Christopher Smith, to Andrew Natsios, Administrator, U.S. Agency for International Development (Oct. 24, 2002); see also Rust v. Sullivan, 500 U.S. 173, 196 (1991) (stating that a Title X grantee may continue to perform abortion-related services, as long as they are outside of their Title X projects); FCC v. League of Women Voters, 468 U.S. 364, 402 (1984) (stating that although the FCC and Congress have power to regulate speech by noncommercial stations, they could not completely deny funding based on the stations' editorializing) (on file with author). The same restrictions, if placed directly on U.S.-based organizations, would be an unconstitutional violation of freedom of speech under the First Amendment to the U.S. Constitution.


152 Memorandum from White House Office of the Press Secretary, to Colin L. Powell, Secretary of State (Aug. 29, 2003) (on file with author).


In July 2002, after pressure from anti-family planning groups, the State Department announced that it was once again blocking the $34 million appropriated by Congress for the UNFPA. Opponents of UNFPA again insisted that since coercive abortions and sterilizations have occurred under China's population program, UNFPA must be deemed guilty by association. Disregarding UNFPA's documented efforts to convince the Chinese government to adopt a voluntary reproductive health program and abandon the "one-child policy," the conservatives in the U.S. demanded that the United States abandon UNFPA. They were even undeterred by the findings of a "blue-ribbon" panel of experts appointed by the Bush administration to investigate the allegations against UNFPA. The panel found that not only were the allegations unsubstantiated, but also that UNFPA's work in China is an effort to encourage the Chinese government to adopt voluntary family planning services and should continue to be supported.

At the United Nations General Assembly Special Session on Children in May 2002—which was intended to address all issues affecting the lives of children, including the high rates of HIV/AIDS infection, unwanted pregnancy, sexual violence and exploitation, and child marriage—the Bush administration's delegation opposed the phrase "reproductive health services" in the consensus document, claiming that it implied access to abortion. In the end, the U.S. agreed to retain references to reproductive health care, and in return was granted its bid to weaken references to the importance of the Con-

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155 In a letter dated February 12, 2002, Representatives Hastert, Armey, and DeLay requested that the president investigate the claims of UNFPA involvement in the population control program of the People's Republic of China. Letter from Denny Hastert, Dick Armey, and Tom DeLay, members of United State House of Representatives, to George W. Bush, President of the United States (Feb. 12, 2002). Subsequently, an official memo from Secretary of State Colin L. Powell addressed to Senator Patrick Leahy, dated July 21, 2002, states the decision to withhold funding of $34 million to UNFPA. Memorandum from Colin L. Powell, Secretary of State, to Patrick J. Leahy, Chairman, Subcommittee on Foreign Operations, Committee on Appropriations, United States Senate (July 21, 2002) (on file with author).


157 See Letter from Ambassador (Ret.) William A. Brown, Ms. Bonnie L. Glick, and Dr. Theodore G. Tong, to Colin L. Powell, Secretary of State (May 29, 2002) (stating findings and recommendations), available at http://www.state.gov/g/prm/rls/rpt/2002/12122.htm. In a similar move, the Bush administration also indicated that it is postponing a decision on funding for the World Health Organization's Human Reproduction Program, which conducts research on medication that induces abortions.

158 The delegation also tried to restrict sexual education and information to "abstinence-only until marriage." Katie Marton, The New AIDS Fight; Protect Women, Stop a Disease, N.Y. TIMES, Mar. 1, 2003, at A19.
vention on the Rights of the Child in the agreement. This is but one example of the Bush administration’s continued opposition to reproductive health services at numerous international conferences, with others including the HIV/AIDS Summit and the Summit on Sustainable Development.

Additionally, in December 2002, U.S. officials at the Fifth Asian and Pacific Population Conference in Bangkok, Thailand, indicated that they would not “reaffirm” provisions from previous agreements on reproductive health and family planning, and would only “take note of, acknowledge or recall” these commitments agreed to at earlier international conferences. One of these agreements was the Programme of Action adopted at the International Conference on Population and Development (“ICPD”), which was adopted in 1994 by 179 nations, and which the United States had been instrumental in drafting. The Bush administration delegation in Bangkok stated that the United States does not support language promoting the concept of “reproductive rights,” since that term can be interpreted as promoting abortion.

The United States’ refusal to ratify the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) is also due in part to anti-abortion politics. Numerous opponents of CEDAW have made unsubstantiated claims that this treaty creates an obligation to allow “abortion on demand.” The treaty, itself, how-

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162 CTR. FOR REPROD. RIGHTS, ON THE HILL: BUSH ADMINISTRATION THREATENS TO WITHDRAW FROM CRUCIAL FAMILY PLANNING AGREEMENT (Nov. 7, 2002), http://www.reproductiverights.org/hill_usfp_icpd.html.

163 See CAIRO +5, supra note 124 (noting that the U.S. was “a key leader in reorienting international population assistance toward a broader approach that emphasizes meeting individual health needs”).


166 Editorial, Down with Motherhood?, WASH. TIMES, June 13, 2002, at A20; see also Phyllis Schlafly, U.N. Treaty on Women, COPLEY NEWS SERV., May 22, 2002 (arguing that the treaty’s “feminist jargon” creates a legal obligation for the United States to allow “abortions at any time for any reason”).
ever, does not mention abortion, and the U.S. State Department has indicated that the treaty is "abortion neutral." Senator Helms, during a 1994 hearing, added an "understanding" to the treaty that reaffirms the position that the treaty is "abortion neutral" and does not promote abortion as a method of family planning. Numerous countries with restrictive abortion laws have ratified this treaty without reservations. The committee monitoring implementation of the treaty has made no direct calls for recognition of a right to choose abortion. It has, however, reiterated internationally shared concerns about women's inability to prevent unwanted pregnancy and about high levels of maternal mortality due to unsafe and illegal abortions. It has further recommended that governments address these problems by reviewing their countries' family planning and abortion laws and policies. The committee has also condemned coercive abortion and the use of abortion for sex-selection. In light of these facts, the claims of CEDAW opponents are, at best, misleading attempts to derail U.S. ratification of this important foreign policy instrument.

IV. VIEWING THE WHOLE PICTURE: REFLECTIONS ON THE GLOBAL IMPLICATIONS OF U.S. ANTI-CHOICE POLICIES

Just as Roe v. Wade's positive reverberations were felt worldwide in the decades that followed, U.S. backpedaling on reproductive choice has had negative implications around the world. The mounting assault on women's reproductive rights in other countries through explicit U.S. foreign policy directed at undermining those rights is pain-

169 To date, 174 countries have ratified CEDAW. Ratifying countries include those whose governments oppose abortion and/or have restrictive abortion laws. For example, Chile, Egypt, El Salvador, Ireland, Kenya, Lebanon, Mexico, Nepal, the Philippines, and Poland have all ratified CEDAW. See U.N. Div. for Advancement of Women, States Parties (listing all states that are party to CEDAW), at http://www.un.org/womenwatch/daw/cedaw/states.htm (last visited Mar. 13, 2004). Chile and El Salvador have some of the most restrictive abortion laws in the world. See CTR. FOR REPROD. RIGHTS, WOMEN BEHIND BARS 17 (1998) (analyzing Chilean abortion laws from a human rights perspective).
170 The Committee on the Elimination of Discrimination Against Women members are elected by states' parties and meet periodically to review governments' compliance with the Convention. Their findings and recommendations to reporting governments are made public.
fully apparent. However, all too often the policy makers in Washington, D.C., do not make the connection between their actions and the significant impact those actions have upon the health, well-being, and, indeed, the very lives of women living in remote areas of the globe.

It is much easier for opponents of choice to convince U.S. lawmakers to impose restrictions on the reproductive rights of women in other countries than on the rights of women in the U.S. For one thing, the protections of abortion rights guaranteed to American women under the U.S. Constitution do not apply beyond the borders of the United States. Additionally, women in other countries have little influence over U.S. politics. As one writer observed:

> [G]iven that abortions are legal in the United States and are required to be medically sound, why would an American president seek to deny that standard of healthcare protection to the rest of the world?

Here's why: Women in other countries can't vote in U.S. elections, but the members of the National Right to Life Committee not only vote but also donate to candidates and political action committees. U.S. policy makers can placate a conservative constituency by imposing severe abortion restrictions on women in other countries and, at the same time, turning a blind eye to the impact of those policies.

Moreover, U.S. policy makers and the general public are also largely unaware of the significant impact that the domestic abortion debate within the U.S. has upon the issue of abortion in other countries. Foreign governments and nongovernmental organizations who depend upon U.S. assistance for survival have every incentive to implement policies within their own countries that will not offend the U.S. government and jeopardize their funding. When anti-choice rhetoric surrounding domestic politics in the United States increases, it has a ripple effect upon public response to abortion in other countries. This section briefly examines the impact that the anti-choice U.S. foreign and domestic policies have upon women's access to abortion around the world.

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172 In the summer of 2001, the Center for Reproductive Rights, formerly known as the Center for Reproductive Law and Policy ("CRLP"), brought a challenge against the global gag rule, suing the President, Secretary of State, and Administrator of the United States Agency for International Development. Ctr. for Reprod. Law & Policy v. Bush, 304 F.3d 183 (2d Cir. 2002). CRLP charged that the global gag rule's censorship of NGOs directly interferes with the ability of the CRLP's legal advisors to advocate for abortion law reform in the U.S. and internationally, in violation of their rights to free speech protected by the First Amendment and international law. The Second Circuit Court of Appeals, however, dismissed the First Amendment claim, holding that the harm alleged by the CLRP "did not rise to the level of a constitutional violation." Id. at 190 (quoting Planned Parenthood Fed'n v. Agency for Int'l Dev., 915 F.2d 59, 64 (2d Cir. 1990)).

A. Direct Impact of Anti-Choice U.S. Foreign Policy

The U.S. foreign policy decisions made in Washington, D.C., based on anti-choice political considerations, have drastic consequences upon the lives of women throughout the world, especially in impoverished countries. An estimated forty to fifty million abortions take place annually, and at least twenty million are performed under unsafe, illegal conditions. Up to half of women undergoing unsafe abortions require post-abortion care for complications. Millions of women suffer permanent physical injuries, and at least 70,000 women die each year. Most of these deaths and injuries are preventable, and occur in countries where abortion is either illegal altogether or highly restricted.

Although the restrictions on women’s right to choose imposed upon women within the United States are considerable and growing, as discussed in the previous sections, the restrictions that the U.S. government imposes upon women in other countries have much more severe consequences. Within the United States, almost no deaths or injuries result from unsafe abortion, and the maternal mortality rate is relatively low at seven deaths per 100,000 live births. By way of contrast, in Kenya, where abortion is forbidden except to save the life of a pregnant woman, the maternal mortality rate is 590 deaths per 100,000 live births, and 35% are due to unsafe abortions. Between 30% and 60% of all admissions to gynecology wards in Kenya are women needing medical care for post-abortion complications. Yet the United States is exporting policies that ensure that the legal status quo will remain in place in countries such as Kenya, and that women will not have access to safe abortion services. Where


\[175\] Id. at 7.

\[176\] It has been estimated that before Roe, "between 200,000 and 1.2 million illegally induced abortions occur[ed] annually in the United States." Willard Cates, Jr. & Robert W. Rochat, Illegal Abortions in the United States: 1972–1974, 8 FAM. PLAN. PERSP. 86, 92 (1976). Moreover, the incidence of abortion-related deaths declined after Roe. In the 1960s, it was estimated that women in the United States died at an annual rate of 5,000 to 10,000 per year due to illegal abortions, and many others suffered severe physical and psychological injury. LAWRENCE LADER, ABORTION 3 (1966). Researchers estimated that after Roe, the number of abortion-related deaths decreased. See Cates & Rochat, supra, at 88 (charting the decline in abortion deaths from 1972 to 1974); see also Nancy Binkin et al., Illegal-Abortion Deaths in the United States: Why Are They Still Occurring?, 14 FAM. PLAN. PERSP. 163, 166 (1982) (assuming that "the risk of death is several times greater after an illegal abortion than after a legal abortion).

abortion is restricted, the legal constraints on women's decisions will not end abortions, but will inevitably lead to higher health risks, especially for indigent women.

It is extremely difficult to determine the full extent of the harm to women caused by the global gag rule, in large part because the restriction "gags" organizations from discussing abortion. Nonetheless, some reports of its impact have emerged. The government of Bolivia has reportedly indicated that, as a direct result of the U.S. policy, it will no longer endorse life-saving care for women suffering complications from illegal, unsafe abortions. Bolivian organizations also report that because of the global gag rule, their government has suspended efforts to permit distribution of emergency contraception, which prevents pregnancy and thereby reduces abortions. In Zimbabwe, the director of a health care organization has privately indicated support for liberalization of Zimbabwe's stringent abortion law to reduce the number of women dying from abortion. Since his organization is subject to the global gag rule, however, he stated in an interview for a newspaper article that his organization did not support the legalization of abortion. At the time President Bush rein-stated the global gag rule in 2001, in Nepal over 500 women were dying from pregnancy-related complications for every 100,000 live births (compared with seven maternal deaths per 100,000 births in the United States)—half as a result of illegal, unsafe abortion. The global gag rule forced several organizations in Nepal to choose between giving up their desperately needed U.S. assistance or giving up their efforts to reform the abortion law (that allowed no exceptions, even if a woman would die as a result of a pregnancy) under which 20% of women in prison were incarcerated for the crime of abortion. In Kenya, the global gag rule forced a vital health care

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178 See supra text accompanying notes 105–11.
179 The Center for Reproductive Rights has conducted a study examining the impact of the global gag rule on four countries. BREAKING THE SILENCE, supra note 177.
181 Id.
182 Id. at 1.
organization to shut the doors of three of its health care clinics in rural areas of the country.¹⁸⁵

The outcry against the global gag rule has resonated across the globe. In the days immediately following President Bush's announcement, countries including Australia, Canada, Sweden and the United Kingdom ran television, radio, and newsprint stories about the severity of the restriction.¹⁸⁶ Governments condemned the new U.S. directive as not only detrimental to women's health and lives, but also as an affront to international human rights standards protecting freedom of speech and the right of citizens to participate in their own democratic political processes. In direct response to this outcry, four representatives from European parliaments traveled to Washington, D.C., in June 2002 to try to convince their American counterparts to listen to the rest of the world—or at least to their closest allies—and repeal global gag rule. Representative Tony Worthington from the United Kingdom stressed that, "[m]y colleagues and I believe that if America gives into the domestic pressures that it faces, it will not cut the number of abortions—it will stimulate them, particularly unsafe abortions for the poorest women in the world. [The global gag rule] will kill large numbers of people."¹⁸⁷

It is also difficult to measure the impact of the Helms Amendment upon women's access to abortion around the world. As noted above, the Helms Amendment forbids U.S. funding of abortion services, as well as advocacy concerning abortion law reform. Because, like the global gag rule, its effect has been to petrify laws that criminalize abortion, law reform that may otherwise have taken place has not gone forward. Over the last three decades, such law reform might have prevented innumerable deaths resulting from unsafe, illegal abortions. The Helms Amendment's chilling effect on discussion of the health impact of restrictive abortion laws is reflected in the "Guidelines for Authors" of the publication International Family Planning Perspectives, a peer-reviewed journal serving, among others, policy makers and members of the public health community. The guidelines state: "Because the journal receives funding from the U.S. Agency for International Development, it is prohibited under the Helms Amendment (P.L. 93-189) from publishing material that pro-


¹⁸⁶ One of the authors participated in interviews for these reports in January 2001.

The president of Ipas, an organization founded in 1973 to prevent unsafe abortion in impoverished countries, stated (partly in response to the Helms Amendment):

U.S.-funded family-planning clinics in developing countries where abortion is legal have systematically denied poor women the basic rights to safe abortion care that most American women would come to take for granted.

The Helms Amendment not only denied women services in U.S.-funded programs but effectively gave U.S. endorsement to unjust, restrictive policies that have endangered the lives and health of millions of women.

Furthermore, the Bush administration's decision to eliminate funding for UNFPA due to domestic abortion politics is severely restricting that agency's ability to provide reproductive health care services in approximately 140 countries, compromising the health, well-being, and even lives of millions of women and their children. UNFPA provides women access to vital reproductive health care services such as emergency obstetric care, pre- and postnatal care, contraception, sexually transmitted infection prevention and treatment, post-abortion care, and other desperately needed services. The thirty-four million dollars in funding that was withdrawn by the United States in 2002 could have enabled UNFPA to prevent two million unwanted pregnancies, nearly 800,000 abortions, over 77,000 infant and child deaths, and 4,700 maternal deaths.

By withholding funding for reproductive health services due to domestic abortion politics, and by imposing the global gag rule and Helms Amendment, which deny women access to safe and legal abortions, the United States government is complicit in the injuries and deaths of hundreds of thousands of women throughout the world each year.

B. U.S. Contribution to Hostility Toward Global Abortion Rights

As discussed in previous sections, although the global trend is a movement toward increasing human rights for women, including reproductive rights, there is a small but growing counterrcurrent bent on dismantling these rights. This international countercurrent has been significantly strengthened by the reinvigorated anti-choice agenda espoused by the current U.S. government—not only through its foreign policy agenda, but also through international exposure of the assaults on abortion rights in the U.S. Therefore, in addition to the direct impact of U.S. foreign policy restrictions, such as the global gag rule, the Bush administration’s high profile condemnation of abortion in its domestic policy and positions taken at international fora may also be having an effect on national-level campaigns to liberalize abortion in countries where it is illegal.

The United States government has given ammunition to conservative forces in other countries who couch opposition to abortion in moral—and even misguided health-related—terms, based upon their interpretation of U.S. abortion policies. For example, in Mali, a women’s rights activist spoke of a common assumption that if the United States takes a position on an issue, it has done so following evaluation of concrete, scientific evidence. In addition, the United States’ willingness to withhold funding as punishment for support—or perceived support—of abortion has led to a fear in some countries that abortion law reform may result in a loss of U.S. financial assistance. For example, prior to the liberalization of abortion in Nepal, there were fears among those aware of the de-funding of UNFPA that abortion law reform would lead to a similar reprisal against the government of Nepal. While these fears ultimately did not prevent reform in that country, they may have a more significant chilling effect in other countries.

The Bush administration and anti-choice members of Congress have ignored the fact that women’s rights advocates in every nation where abortion remains restricted continue to fight for safe, legal abortion because they see it—as the majority of women in the U.S. do—as integral to their ability to control their fertility, preserve their health and well-being, and participate as equals in their societies.

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192 For example, an NGO representative in Mali noted that controversy about abortion is not just a problem in Mali, but all over—there are even doctors in the United States who have to hide from assassins. Anonymous interview with NGO activist, in Bamako, Mali (May 18, 2001) (on file with authors).

193 Anonymous Interview with NGO activist, in Bamako, Mali (May 17, 2001) (on file with authors).

194 Anonymous Interview with NGOs, in Kathmandu, Nepal (Mar. 21–26, 2002) (on file with authors).
Women in these countries want what women in the U.S. have come to take for granted—access to safe abortion services as part of their reproductive health care. In response, the Bush administration is joining forces with its fundamentalist counterparts at the United Nations and in regional venues, thereby giving strength to emerging far right religious movements worldwide.195

The U.S. government's renewed fundamentalism raises questions about further consequences, especially when considered in the context of women's struggles to achieve fulfillment of their broader reproductive rights. For example, is the fundamentalism and traditionalism that the United States exports to other countries helping to foster the climate in which the Vatican launches a campaign against life-saving condoms in the midst of a worldwide HIV/AIDS crisis?196

In which the government of Iran can contemplate promoting “temporary marriages” to allow men to purchase the sexual services of women—who are often young and forced into prostitution by abusive families or husbands, a practice defended as permissible under the Shiite branch of Islam?197 In which pregnant women needing emergency obstetric care in Afghanistan are still inhibited from seeing a doctor by religious clerics stating that their situation is “Allah’s will”?198 According to a press release from the Alan Guttmacher Institute concerning the Bush administration’s string of anti-choice initiatives, “the Bush administration has sided with the Vatican, as well as ‘axis of evil’ countries Iran and Iraq and others not known for their

195 Concerning the United States’ involvement at the United Nations General Assembly Special Session on Children, the International Sexual and Reproductive Rights Coalition observed:

Working hand-in-glove with conservative extremists, the US has constantly and consistently undermined efforts to achieve consensus at this United Nations meeting. While the US preaches and promotes democratic participation around the globe, it is abusing its power and alienating traditional allies by compromising the health of adolescents in Europe, Latin America, Africa and Asia. Using its power as a big donor country, the US has silenced other countries that provide their young people with sexual and reproductive education and services.


196 See CATHOLICS FOR CONTRACEPTION, FAMILY PLANNING UNDER ATTACK: DOMESTIC AND INTERNATIONAL POLICY CONCERNS (“Catholic church officials have condemned HIV/AIDS education and prevention programs that include the promotion of condom use as an effective method to stop the spread of HIV/AIDS.”), at http://www.catholicsforchoice.org/contraception/family.htm (last visited Mar. 13, 2004).


198 See Pamela Constable, Safe Childbirth Not Yet One of Afghan Women's Rights, WASH. POST, Sept. 26, 2002, at A1 (explaining that most deliveries by Afghan women still occur at home, partly because the Taliban placed “women's 'honor' above their health” and “banned women from traveling—even in emergencies—unless a male relative accompanied them”).

support of women's rights, including Libya, Sudan and Syria." The press release quoted Adrienne Germain, president of the International Women's Health Coalition, as stating that "[t]his alliance shows the depths of perversity of the [U.S.] position. On the one hand we're presumably blaming these countries for unspeakable acts of terrorism, and at the same time we are allying ourselves with them in the oppression of women." As noted in the conclusion, pro-choice policy makers must vocally oppose all forms of reproductive rights abuses against women, which are exacerbated globally by the United States through what has been described as President Bush's "war against women."

CONCLUSION

In 1973, Roe v. Wade contributed to an emerging global understanding of women's reproductive autonomy as a basic human right. Today, in contrast, the global pro-choice movement is working to counter U.S. policies that deny women needed reproductive health care services. It should be increasingly clear to women in the U.S. that their own reproductive rights are not invulnerable. For this reason, and because pro-choice advocates overseas have little power to influence the decisions of American politicians, attacks on reproductive rights abroad should engender resistance and protest at home.

Likewise, pro-choice policy makers in the U.S. need to connect the dots among the assaults on choice by the Bush administration, Congress and the federal judiciary. While each of these initiatives carries implications for the women directly affected by it, its threat to basic freedoms for the larger pro-choice public might not be immediately evident. This "divide-and-conquer" tactic incrementally takes away access to abortion from discrete groups in the U.S. and abroad, while seemingly leaving a skeleton of the "right to choose" in place. When regarded together, as a unified, coordinated plan to dismantle the protections afforded women by the U.S. Constitution and human rights instruments, these individual steps paint a more ominous picture.

Piecemeal attempts to slow these anti-choice assaults have met with uneven success. Pro-choice policy makers in the U.S. need to respond to their opponents in kind, by presenting an alternative, comprehensive, positive vision of women's reproductive rights and health,

200 Id.
including not only access to safe and legal abortion, but also to comprehensive reproductive health care services, education, and information. History has shown that, for better or for worse, the U.S. can have tremendous influence on the reproductive rights, health, and well-being of millions of women across the globe. Now it is time for U.S. leaders to listen to voices of women worldwide who know far too well what it means to live without choice. The rights of all women may depend on it.