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# An Exploration of the Wide-Reaching Effects of The Repeal of *Roe v. Wade* on Women's Access to Abortion

Mitchell J. Foster  
*Portland State University*

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An Exploration of the Wide-Reaching Effects of The Repeal of *Roe*  
*v. Wade* on Women's Access to Abortion

By  
Mitchell Foster

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Thesis Advisor:  
Christopher Shortell, Ph.D.

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## Abstract:

Since 1973, the federal government, through the Supreme Court of the United States, has acted to protect, the rights of women in their ability to choose to have an abortion without excessive governmental restriction. This thesis analyzes how and why access to abortion will shift in the face of the Supreme Court's overturning of *Roe v. Wade* (1973), likely to occur this June. This thesis begins with an in-depth description of how and why abortion became illegal, how and why abortion became legal, and how opposition has developed against legal abortion. Through the last few decades, though especially in the last few years, most states have signed into law statutes that greatly limit a woman's access to abortion, and several have signed into law statutes that will act to ban abortion in nearly all cases if *Roe* is repealed. This thesis examines what precisely state law, as well as lasting precedents put forth by the Supreme Court in other cases related to abortion, and the response of the other branches of the federal government to the issue of abortion, will mean for a woman's access to abortion throughout the United States. I found, over the course of this project, that access to abortion will shift most substantially in states which do not, by constitutional interpretation or statute, protect one's fundamental right to acquire an abortion. This shift will, also, be felt most by impoverished persons, as these persons are less likely to be able to travel for abortions.

## Introduction

Throughout this thesis, the overarching goal is to understand how access to abortion will change following the likely repeal of *Roe v. Wade* (1973) this summer in *Dobbs v. Jackson Women's Health Organization*. While the outcome is not yet settled, a repeal of *Roe* appears likely either this term or in the near future. In understanding what this judgment will signify, we should clarify what precisely the judgment regarding *Roe v. Wade* meant for access to abortion within the country. This case, as filed under the name Jane Roe, to protect the identity of the plaintiff Norma McCorvey, began in Texas in 1970 when the plaintiff sued Henry Wade, the District Attorney of Dallas County, Texas at the time of filing, for violating her constitutional rights (Abortion: U.S. Supreme Court Decisions 2018). The language of the Texas law, specifically articles 1191 through 1194 and 1196 to the Texas Penal Code in 1925, was such that abortion was only legal in cases where the mother's health was the reason for the abortion (Baton 2010). More specifically, Article 1191, of this criminal code, described abortion as the process by which “the life of the fetus or embryo shall be destroyed in the woman’s womb or that a premature birth thereof be cause,” and the aforementioned article, along with Articles 1192-1194, described the punishment for those seeking procurement or procuring abortions, as well as essentially anyone involved in the process. Via the Due Process Clause in the Fourteenth Amendment, the Supreme Court found these statutes unconstitutional, as they infringe upon these constitutional rights, a judgment previously reached by the U.S. District Court for the Northern District of Texas prior to Wade’s appeal to the Supreme Court of the United States (*Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970) n.d.; *Roe v. Wade*, 410 U.S. 113 (1973)). While the Supreme Court did not agree with *Roe* regarding completely free and unrestricted access to abortion without governmental restriction, the Supreme Court did, in a seven-two

decision, judge that the laws which aimed to restrict access to abortion excessively were unconstitutional, with attention to the placement of the abortion in the timeline of the trimester framework. In the language of this judgment, laws aiming to restrict access to abortion would be subject to strict scrutiny, as the right to choose abortion was to be held as a fundamental right guaranteed to women (Abortion: U.S. Supreme Court Decisions 2018; *Roe v. Wade*, 410 U.S. 113 (1973) n.d.; Batten 2010).

Of course, *Roe v. Wade* is not the only judgment by which access to abortion is governed. Perhaps, a more vital judgment in understanding the shift from limited restrictions on access to abortion to more significant restrictions on access to abortion at the state level, as will be described in greater detail in Chapter Three, is *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992). Having altered the structure by which the legality of abortion may be discerned by state governments, from the trimester framework to the viability standard, and changing the standard by which restrictive laws may be judged by the court, from strict scrutiny to undue burden. *Planned Parenthood of Southeastern Pennsylvania v. Casey* proved to, while upholding the fundamentals of *Roe v. Wade*, provide states significantly greater leeway in deciding how access to abortion may look within their jurisdictions (Devins 2009).<sup>1</sup> This case was brought by Planned Parenthood in representation of several clinicians. The case, which found issue with Pennsylvania's newly amended abortion control laws in 1988 and 1989, was a rather close battle (five-to-four), in which only one provision, necessity for spousal notice prior to abortion, was struck down due to undue burden.<sup>2</sup> Robert P. Casey, the defendant in this case, was targeted for this suit, as he was the Governor of Pennsylvania at this time and signed into

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<sup>1</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992).

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

law these abortion control laws. With that noted, this judgment is vital in understanding how and why legislation, at both the federal and state level, restricting access to abortion has developed to the extent it stands today. With these two judgments described in basic detail, we may learn about the other facets related to the evolution of the abortion debate.

Currently, the majority of Supreme Court justices are strongly conservative and have indicated support for a repeal of *Roe v. Wade* (Metroka 2017, 2). With the passage of the Gestational Age Act by the Mississippi state government in 2018, as well as similar legislation recently passed or close to passage in other states, this presents a direct challenge to the basic protections of *Roe v. Wade* (Andrusko 2021). Given the current makeup of the court, it is likely that Mississippi's law will be found constitutional, and the current federal protection for access to abortion will be repealed (Andrusko 2021). Further description of the Roberts court will appear in Chapter Two, as its membership has proven vital to understanding contemporary trends in abortion legislation.

The question which guides the work of this thesis is formulated as follows: "In what ways would the repeal of *Roe v. Wade* impact access to abortion for women of child-bearing age in the United States?" Understanding how the repeal of *Roe v. Wade* may alter the access to abortion for this population is vital, as further probed in Chapter Three, to understanding the greater significance of the Mississippi decision, as the Supreme Court will likely reach a verdict this June. If the current Supreme Court repeals *Roe v. Wade*, which has provided protections central to understanding the rights of women and their ability to reach decisions regarding their bodies, the conversation regarding abortion in the United States is expanded for state governments, as well as other branches of the federal government. It is worth noting that the focus is not on arguments for or against legalized access to abortion. These arguments are merely

analyzed to understand a timeline for legislation, as well as the legal precedents that could come out of governmental response to these changes. I will remain neutral in the matter of whether abortion is morally just or in the best interest of prospective mothers, as these arguments are irrelevant to the question at hand.

Chapter One focuses on the development of arguments against abortion and the formation of alliances that would fight federally mandated access to abortion, like the response of the American Medical Association (AMA) to state laws requiring relevant clinicians to provide abortions in the mid-to-late nineteenth century, and the later Republican platform shift to one pitted against federally protected abortion (Greenhouse and Siegel 2011, Telzrow 2008). In the United States, abortion was once legal under common law and was common practice, without any major adversary from religious public action groups or otherwise (Ginsberg and Shulman 2021; Greenhouse and Siegel 2011). From 1857, with the movement of the AMA championing anti-abortion legislation on the state level against rising tides of feminism, abortion was illegal in most U.S. states, though several states outside the Midwest and South regions held exceptions relating to the health of the mother or exceptions in cases of incest and rape. Within this period of changing popular opinions, there were several phases worth considering in different lights, as legal abortion became much more vital in the mid-20<sup>th</sup> century and grew in support of further expansion of the Civil Rights Movement. Understanding which states allowed abortion under certain circumstances, and those which outright banned abortion, is vital to understanding how access to abortion will look nationally if *Roe v. Wade* is repealed. In states where abortion was illegal in all circumstances prior to *Roe*, there was a relatively limited framework of clinicians willing to pursue illegal abortions, with higher complications for the recipients of these illegal



abortions, compared to the much more extensive framework in the Western and Eastern states (Telzrow 2008).

With federal intervention, via *Roe v. Wade*, one may believe that abortion, especially if the recipient lives in a state on the West or East Coast, is easily accessible to those who need or want an abortion today. Instead, several states have severely limited access to abortion for females of child-bearing age, as well as the much-needed aftercare, via several methods. Chapter Two, which focuses on the state of access to abortion as it stands before the Mississippi decision in June 2022, delves into the ways in which many states have fought against the protections provided by *Roe v. Wade*. Texas, as it has been one of the strongest opponents of the legality of abortion since it became an issue, has moved to greatly restrict abortion to the point where women have to drive miles upon miles to reach a clinic which will perform an abortion. The method by which the abortion is performed is limited, and women may only acquire abortions if there is no detectable heartbeat (Baum et al. 2016; Bentele, Sager, and Aykanian 2018; Fuentes et al. 2020). This section includes a description of several other state laws and the actions certain states, primarily in the South-Southeast United States, have taken to limit access to abortion significantly. There is also attention paid to the expanding effects of these laws, from access to abortion procedures, which are often needed in cases wherein women have imminent miscarriages, and a woman's ability to acquire proper aftercare from a medical professional, which has been proven vital to their survival (Bahoh 2009).

Furthermore, the thesis considers the differences between states in their attempts to either expand protection and access to abortion for those who desire it, or undermine the protections provided by *Roe v. Wade* and *Doe v. Bolton* (1973). These two landmark cases, as decided by the Supreme Court of the United States, are merely the most prominently known Supreme Court

decisions regarding abortion rights and are the widest in berth of protection. Due to the liberal majority under the Burger Court (1969-1986) and the position of Warren Burger as Chief Justice during this period, this was a session in which liberal reform prospered in the rulings of the Supreme Court (Abortion: U.S. Supreme Court Decisions 2018). The Burger Court represented a steppingstone from the Warren Court, known as the most effective period of the Supreme Court in implementation of liberal social justice reform via its rulings, to the period of conservative courts which has lasted to this day (expanded by the Supreme Court nominations under Donald J. Trump). The political control the Republicans, Democrats, or certain NGO's have over state and local government is important in understanding why and how a given state has adopted legislation, from restrictive laws prior to the repeal of *Roe v. Wade* to trigger laws in place if *Roe v. Wade* is repealed. Chapter Three delves into renditions of trigger laws and certain states' actions to repeal or alter trigger laws they put into place directly after the decision of *Roe v. Wade* (Andrusko 2019; Reproductive Rights - State Law - Illinois repeals anti-abortion law 2018).

Given the importance of political leanings within a court, popular sentiment and the wills of political action groups are vital elements to the establishment, or destruction, of any body of law. This information is combined with the history of our nation, with respect to access to abortion prior to 1973, and a thorough understanding of trigger laws in Republican and Democrat dominated states helps draw conclusions about how access to abortion will shift. The focal point of this subsection of Chapter Three is to describe how access to abortion will likely transition after the removal of its federal protection. Conclusions must be rooted in legal precedent and must be logically derived, though they remain tenuous, as we cannot be sure how state governments will act to uphold their laws, if said conclusions are to have merit in the

academic community. Local governments may act in ways dissimilar to state laws if the state does not enforce these laws at the county level; just as state governments that have shifted in political leanings may entirely disregard their trigger laws.

Chapters Four bleeds into the Conclusions section in a description of how access to abortion will look. We cannot be certain how this legal shift will affect the daily operations of local governments in restricting or promoting access to abortion. Local governments often act in ways dissimilar to the wills of the state government in counties where the political leanings of the citizens are far more conservative or liberal than the state government. I provide commentary on the issues which need further study, like access to the procedure, which removes a miscarriage in places where abortion is difficult to acquire, and how other methods for acquiring abortions will become popular in the face of less access. Transportation to states that provide abortion services and relevant aftercare may become a primary method to protect the rights of women via Planned Parenthood, and other such organizations. By the end of this section, we may understand how the repeal of *Roe v. Wade* will affect the lives of women in their child-bearing years via their access to abortion in cases where the Republicans lead over the Democrats. This access will likely be most greatly affected in states that have already acted to restrict abortion access, where further restrictive laws will be triggered upon the repeal of *Roe v. Wade*. Though, due to similar predictive bills with inverse intentions, many states on the coasts will likely see little change in access to abortion or aftercare. Funding for NGO's which protect women's rights will likely increase exponentially, allowing their efforts to bleed into Southern and Midwestern states.

## Chapter One: Access to Abortion prior to *Roe v. Wade*

Abortion is an issue often neglected in civil discourse among acquaintances, though it has been a hot button issue for just over a century since its entrance to state and local politics. This issue has reentered the discussion at the Supreme Court of the United States. It was in the mid-19<sup>th</sup> century that this topic became an issue for members of state governments, as the American Medical Association pushed for legislative change.

English common law, which represented much of the body of law in the United States in the 18<sup>th</sup> century, held abortion as legal prior to the “quickening,” described as when the unborn child can be recognized as a life (Telzrow 2008, 34). This test, while it is inaccurate by today’s standards due to significant medical advancement, was fairly lenient to those who desired abortion, and had to be proven without a doubt to deny abortion (Telzrow 2008, 34–35). Proper medical understanding of the processes of a pregnancy was simply far more limited. It was the understanding of many physicians, and the public alike, that life was not truly viable until evidence of that life was visually clear from outside the womb (Telzrow 2008, 34–35). Moralistic and religious arguments against abortion were limited until after the viability of the life inside was abundantly clear, so women of this era found no issue with abortions generally.

As understanding grew regarding fetal development, the medical field became the champion of anti-abortion legislation (Telzrow 2008, 37). Through the early 19<sup>th</sup> century, the medical practitioners of the United States, having suffered a fairly poor reputation due to their failures to accurately respond to medical issues of their patients (often worsening their conditions through practices like bloodletting), developed greater education practices for the profession, as well as far stricter restrictions on who was allowed to practice medicine (Telzrow 2008, 37–38).

In this push for universality in medical treatment and advancement in medical knowledge came the formation of the American Medical Association (AMA); this organization would push forward the envelope of anti-abortion legislation by presenting their understanding of inception, the point at which an egg is fertilized, to state legislators (Telzrow 2008, 37-38). Of course, the claims of doctors were not so easily trusted, nor was the importance of their medical findings abundantly clear to state legislators (Reagan 1997, 80-82). With this fact in mind, the AMA began its coordinated assault on legal abortion by, first, “reeducating American women and the public about the immorality and dangers of abortion (Reagan 1997, 82).” Following this move, anti-abortion physicians purged abortionists within the AMA, as well as other medical societies, which worked closely with the AMA, and finally presented to the state legislature the notion that abortion was the project of immigrant midwives (Reagan 1997, 82-85: 94-102). With most abortion recipients being middle-class white women, this was, to the greater public, a frightful image; one especially frightful to the primarily white voting class and primarily white legislators (Peterson 2012; Reagan 1997, 81). It was through this image that race and social class were the driving factors of importance, that state legislators were, by their constituents (who desired greater growth of the white population) and by rampant petitions against legal abortion from the AMA, forced to take action against abortion via legislation aimed to criminalize abortionists (Peterson 2012; Reagan 1997, 82-85: 90-98).

Gender, naturally, played a rather pressing role in understanding why the actions of the AMA were triumphant. It was, while it lacked contestation at the time, primarily the feeling of quickening felt by the woman that acted as the bar for abortions (Peterson 2012; Telzrow 2008, 38). Thus, the AMA, through proving that the quickening was nonsense, argued that the people who still believed quickening was the time in which women should no longer acquire abortion,

which were primarily women, were horribly ignorant and evil (Peterson 2012; Reagan 1997, 83–85). There was, past the AMA, another key actor in the fight for legislation against legal abortion: the social movements against abortion (Kastellec 2016, 7). By 1890, every state in the union effectively banned abortion nationally, with staunch punishments for both physicians and patients who went ahead with illegal abortions. Some physicians, however, continued to provide abortions after state legislation banned them, to save patients who would have died during regular childbirth and those who felt a pregnancy would ruin their future (Kastellec 2016, 6–8; Telzrow 2008, 38).

Though the first wave feminist movement did not support legalized abortion, the first major argument for legalized abortion came to fruition in the early 20<sup>th</sup> century, with clear evidence that illegal abortions were more dangerous than legal abortions (Bahoh 2009, 10; Telzrow 2008, 38). Proponents of legal abortion were primarily focused on the health of young women, who felt that an abortion was their only option in a country that neglects the needs of young, unmarried women in procurement of contraception or life-saving procedures if the pregnancy would come at great danger to the woman. This fact directly illuminates the greater use of illegal abortion by pregnant women with lower economic statuses (Ashcraft and Lang 2006, 193-194; Bahoh 2009, 9-10). The poorest women, in other words, felt the impact of illegal abortion far more than their wealthy counterparts. In response to this issue, the American Law Institute (ALI) began issuing requests in 1957 for exceptions in state legislation for cases in which the mother's health would be negatively affected if an abortion was not provided, as well as cases in which rape or incest were the reason for the pregnancy (Greenhouse and Siegel 2011, 2035–37; Telzrow 2008, 38). From the so-called “ALI-Style Law” of the original state (Colorado), for which their alternative law was proposed, came a widespread implementation

over the next 15 years in states, which have remained strong proponents of legal abortion (Kastellec 2016, 8–9; Roemer 1971, 500–504). Planned Parenthood paired with the ALI to attempt to, by bringing forth a plethora of legal challenges in states where ALI-style laws had not yet been signed into effect, widen one’s right to acquire birth control (Kastellec 2016, 8–9).

Though these two organizations tirelessly advocated for the rights of women nationally, only a few states, past the four which had already repealed their bans on abortion (Alaska, Hawaii, New York, and Washington), legalized abortion before the Supreme Court intervened on the matter. The National Right to Life Committee (NRLC) had effectively blocked reform for decades, making the process of reform somewhat difficult (Kastellec 2016, 9–13). A vital shift in this period came in the form of a platform shift for the organization, which had championed anti-abortion legislation for a century, the AMA. Doctors began to recognize, via statistical evidence proving the detriments of anti-abortion legislation on the lives of women in their child-bearing years, that supporting the legalization of abortion in necessary cases was ethically just (Telzrow 2008, 38). This shift was effective in bolstering the support of state representatives in lifting abortion bans and breaking down reform barriers. With the pro-choice movement gaining traction, lawsuits dealing with abortion grew exponentially, and, as cases of this gravity sometimes do, some rose the level of the Supreme Court. *Roe v. Wade* happened to be the first case in which the Supreme Court rendered a judgment for legal abortion. Some argue that while this safeguarded abortion for several decades, the Supreme Court's intervention on the matter altered the long-term direction of the political debate en masse (Kastellec 2016, 9–15). While support for legislation which legalized and protected a woman’s right to acquire an abortion grew in the great public, regardless of political party, the NRLC was beginning to lose its grasp on the public in many states (Kastellec 2016, 9). The proponents of this theory, which describes

*Roe v. Wade* as the catalyst for centralization in a movement against legal abortion, as the Republicans would form an alliance with the NRLC in their mission, have little evidence that this same alliance would not have been made without *Roe v. Wade* (Kastellec 2016, 10–13). Perhaps the most pressing step in understanding what *Roe* meant, and means alongside SCOTUS decisions since *Roe*, is simply moving forward with the understanding that *Roe v. Wade* did more in promoting and protecting access to abortion across the nation than the ALI or Planned Parenthood had done in years prior, while the work of these organizations was a vital background to the Supreme Court's decision in this case.

## Chapter Two: Access to Abortion post-*Roe v. Wade*

Post *Roe v. Wade*, proponents of the pro-life movement tirelessly fought against abortion in every way possible, though generally kept within the bounds of the law. Its membership, bipartisan in the period directly after *Roe v. Wade*, quickly shifted as the Republicans realized a new way to raise funding and grow the party: Evangelicals and Catholics (Greenhouse and Siegel 2011, 2077–85). Naturally, it was not such a linear progression, and the Republicans were not responsible for the formation of new coalitions against abortion.

At the time of *Roe*, rather, sixty-eight percent of Republicans, per a Gallup Poll taken just prior to *Roe*, agreed that “the decision to have an abortion should be made solely by a woman and her physician,” while only fifty-eight percent of Democrats agreed with the same statement (Greenhouse and Siegel 2011, 2068–69). Only six years after *Roe*, we began to see a major divergence between the two parties in conceiving of this issue (Greenhouse and Siegel 2011, 269). Separate from the two parties, a nonjudicial actor took great issue with ALI reform bills and formed perhaps the most substantial coalition against legal abortion: The NRLC



(Greenhouse and Siegel 2011, 2077). The Catholic Church had, over the past two decades, fought hard against petitions for legal abortions put forth by the ALI via well-financed PAC funding for politicians willing to fight against these laws (Greenhouse and Siegel 2011, 2077–79). While most of these politicians were Democrats at first, the Republican party realized the greater potential of this funding and, more importantly, the potential of the party in acquiring the support of millions of single-issue voters (Greenhouse and Siegel 2011, 2079–80). As the comingling of the NRLC and the Republican party grew, so did evangelical Protestants grow in discontent with the prevalence of what they termed “secular humanism,” which referred to many aspects of the Civil Rights Movement, as well as the direction of the Warren and Burger Courts (Greenhouse and Siegel 2011, 2064–65). Though the evangelicals had largely remained either out of the abortion debate or supportive of legal abortion, it was through the “broad-based attack on cultural developments,” like gay rights and the Equal Rights Amendment, that the evangelicals became anti-abortion. Through this shift, the Republicans were able to recruit the evangelical masses to their platform with the promise of the retention of the values they desperately wanted to maintain (Greenhouse and Siegel 2011, 2064–65). Through connecting the party’s platform to family and faith values, which the working class, which had primarily voted Democrat, cared for greatly, the Republicans were able to simultaneously rob the Democrats of a significant portion of their voter base, acquire immense funding from the religious right, and name itself the champion of American values for decades to come (Greenhouse and Siegel 2011, 2080–82). This was, thus, the formation of the movement against legal abortion, which we know today, as championed by the Republican Party.

With the formation of the opposition to legal abortion described, we may shift in focus to how the constitutional right to abortion for women has been maintained by the Supreme Court

thus far; the fight against legal abortion has remained one focused on restricting this access as vastly as is legal, until recently.

In understanding the protections provided by the Supreme Court for a woman's right to acquire an abortion without excessive governmental restriction, we must not consider *Roe v. Wade* the only guiding judgment. Rather, the *Planned Parenthood v. Casey* decision, a judgment where the Supreme Court decided to protect the fundamental protection of *Roe v. Wade*, but rejected the trimester framework, allowed greater governmental restriction due to its implementation of the viability standard (Halva-Neubauer and Zeigler 2010, 103–4). This decision, having overturned elements of *Roe v. Wade*, as well as *City of Akron v. Akron Center for Reproductive Health* (1983) and *Thornburgh v. American College of Obstetricians and Gynecologists* (1986), was a close decision, with only 5-4, which represented the first substantial success of the Republicans in their mission to repeal *Roe v. Wade* (Halva-Neubauer and Zeigler 2010, 106-107). Directly following *Casey*, the Rehnquist court upheld a Missouri law in *Webster v. Reproductive Health Services* (1989) which imposed extensive restrictions on clinics that provided abortions in a financial and institutional manner. This represented a green light for further restrictive legislation enacted by state governments (Abortion: U.S. Supreme Court Decisions 2018, 6–9). Though there had been notable wins for the Republicans in the form of the Hyde Amendment (1976), which cut federal funding to abortion services, and the judgment regarding *Connecticut v. Menillo* (1975), which allowed states to control who may perform abortions, it was *Webster v. Reproductive Health Services* which separated the period directly after *Roe* in which *Roe* was generally upheld and bolstered and the subsequent decades in which *Roe* has eroded exponentially more over time (Abortion: U.S. Supreme Court Decisions 2018, 4–10; Bentele, Sager, and Aykanian 2018, 492–94).

As the Supreme Court has played a crucial role in the abortion debate since *Roe*, we must consider how the population of the Supreme Court from 1973 to the present day may have affected the outcomes of the judgments during this period. Several socially liberal justices, like William Brennan and Thurgood Marshall, who acted as champions of the liberal wing of the Supreme Court, were replaced by justices like David Souter and Clarence Thomas during George H. W. Bush's presidency. Though these replacements were diametrically opposed to those they replaced, they were not the most significant replacements, considering the last twenty years. While each specific replacement has been vital, the pattern is far more telling. Prior to 1985, when the Republicans and the Democrats grew far more divided than the country had seen for longer than a century, Supreme Court nominations were less politically divisive in nature (Devins and Baum 2019, 60–64). It was during the mid-twentieth century that the court, as the Republicans and Democrats were both rather left in their political leanings, swayed left during the Warren and Burger court sessions, as several more conservative justices became more liberal in their decisions during this time (Devins and Baum 2019, 60–62). This alone signifies the newfound importance of the political leanings of the Court, as justices are far more politically divided than during the courts prior to the Rehnquist Court.

The Supreme Court has become far more politically divided, as the median justices appear to be Justices Kavanaugh, Gorsuch, and Barrett, who are far more conservative leaning than previous median justices. Beginning with Nixon's efforts to overturn the rulings of the Warren Court, the Republican party has been able to systematically take over the Supreme Court via strategic nominations of Justices partial to their causes. Nixon came to nomination several of the most vital actors regarding *Roe*, justices: Warren Burger, Harry Blackmun, Lewis Powell, and William Rehnquist. Ford was, also, interested in repealing the judgments of the Warren

Court with his nomination of Justice Stevens, though Stevens become crucial later on in the battle against abortion. Reagan was the first president to appoint justices in attempt to specifically target *Roe* and Bush's replacement of Justices Marshall and Brennan, with Justices Souter and Thomas, appear to have been the beginning of the end of *Roe*. While Reagan's appointments of Justices O'Connor, Kennedy, and Rehnquist were quite significant in altering the political median of the Supreme Court which did yield some judgments that undermine *Roe*, both Bush administrations and the Trump administration rendered nominations which went beyond simply shifting the median point of political sentiments within the court. Rather, these nominations, as executed by Trump and the then present Congress, altered the platform from one rather moderate in scope, as the Rehnquist Court was fairly mixed in membership (though it was certainly more politically conservative than the two courts prior), to one dominated by conservative justices which appear willing to roll back precedents reached by prior courts. Part of this success may be due to luck, as, despite the presidency swaying roughly equal between the parties since 1969, the Republicans have been able to put forward fifteen out of nineteen nominations for the Supreme Court within this same period. That said, this pattern is primarily due to the successes of the Republican party in delaying nominations to the Supreme Court during the presidencies of Democrats, or during periods in which the Senate holds a Democrat majority, in an effort to only allow Republican presidents, with Republican senates, to nominate and secure Supreme Court seats for those leaning conservative (Sarat 2016, 46–50).

Though notable successful nominations, and subsequent replacements of Supreme Court Justices, began during Reagan's presidency, with O'Connor, Rehnquist, Scalia, and Kennedy, the nominations during the Bush presidencies and the Trump presidency were transformative in the process by which the Republicans have annexed the court (Basinger and Mak 2020; Sarat

2016, 49). While most of the Supreme Court nominations during the 1980s and 1990s were bipartisan to varying degree, the Senate's voting has become far more partisan starting with the presidency of George W. Bush (Sarat 2016, 44, 49, 51-57). While Reagan had three unanimously Senate-approved Supreme Court nominations and several presidents prior had experienced these universal confirmations, the highest percentage of Senate votes in confirming one Supreme Court Justice in the last two decades was the nomination of Chief Justice Roberts under Bush II (Sarat 2016, 49). While close Senate confirmations of Supreme Court nominations had occurred prior, even as late as Bush's nomination of Alito, Supreme Court confirmations became far closer even after the Democrats invoked the "Nuclear option" just prior to a Republican takeover of the Senate in 2014 (Sarat 2016, 49, 70-72). This rendition of the nuclear option, as carried out by Harry Reid, essentially repealed the decision of the Senate in 1975 to require a three-fifths majority to acquire a vote to cloture for executive and judicial branch nominees (Wawro and Schickler 2018). Reid's version, however, only applied to district and appeals court level judges until it was extended, by the Republicans during Trump's presidency, to affect Supreme Court nominations (Wawro and Schickler 2018). The nuclear option, in either form, would have represented a major win had Hillary Clinton won as Reid expected, as Democrats have often struggled to surpass Republican filibustering in many aspects of governing (Wawro and Schickler 2018). Even still, the removal of the Senate filibuster will likely aid Democrats in future partisan battles wherein the Republicans now lack one of their greatest weapons (Wawro and Schickler 2018). This action, while both parties had desired it occasionally in the course of lengthy opposite party filibusters in the past, has proved crucial to the Republican takeover of the Supreme Court under Donald Trump, just as it would have proved vital in acting to dominate the Supreme Court had Hillary Clinton won (Wawro and Schickler 2018). While Clinton and Obama

confirmed two liberal leaning Supreme Court Justices each, the Republicans only needed to replace one liberal leaning Supreme Court Justice as Obama's presidency came to an end; Trump effectively, by replacing Justices Kennedy and Ginsburg with far more conservative leaning Justices Barrett and Kavanaugh, implemented the final shift necessary for *Roe* to go (Basinger and Mak 2020).

While strategic nominations for the Supreme Court and shifts in political leanings of the court are nothing new, the extent to which the Republicans currently dominate the Supreme Court is important. With six Republican Justices, all of whom have come out in support of rolling back *Roe v. Wade*, and only three Justices nominated by Democrats, which are unlikely to convince the swing votes to support the constitutionality of *Roe v. Wade*, the judgment of the *Dobbs v. Jackson Women's Health Organization* becomes much more predictable.

## Chapter Three: Trigger Laws, Constitutional Interpretations and Everlasting Debates

If *Roe v. Wade* is overturned, we may be certain that the current federal oversight will change. It is currently unclear how the Supreme Court will interact with abortion after their judgment is reached regarding *Dobbs v. Jackson Women's Health Organization*. Having dispensed judgment regarding several other cases related to abortion and access to abortion since *Roe v. Wade*, the Court will likely remain involved in matters related to abortion. If SCOTUS is to repeal the viability standard, many other decisions set upon the foundation of *Roe* will have to be reconsidered in their legitimacy as precedents in future cases. Naturally, also, there will be future cases which elevate to the level of the SCOTUS regarding abortion, which assures us that the court will remain a major actor in the abortion debate, though potentially less vital to day-to-

day access to abortion for women in the United States. The ways in which the states will respond to this repeal are much clearer than the executive and legislative branches of the federal government. Historically, the federal government has only contended with abortion to a limited degree until 1971 with *United States v. Vuitch* and did not rule in support of legal access to abortion until 1973 with *Roe v. Wade*.

With this in mind, the U.S. Congress has put forth some legislation to restrict access to abortion in the past, like the Hyde Amendment (1976) and the Partial-Birth Abortion Act (2003), which has acted to assure that those seeking to provide or acquire abortion do not receive federal tax dollars. The latter act, as affirmed by the SCOTUS in their judgment regarding the case of *Gonzalez v. Carhart* (2003), rendered intact dilation and extractions (D&X) abortions federally illegal. As anti-abortion sentiments were bipartisan in 1976, with Democratic control of the U.S. Congress, and Republicans held a majority in the Congress in 2003, the passage of these laws was expected at the time. Since then, both parties have enjoyed roughly equal time in partisan control of the Congress and the presidency, though the Democrats have, partially due to strategic filibustering by the Republicans, remained ineffectual in signing into law acts which would protect access to abortion in the case that *Roe* were overturned. A significant aspect of this failure to protect access to abortion is that, while abortion became partisan in the late 1990's, many Democrats-representatives were not pro-choice (few Democratic representatives currently serving remain anti-abortion). Even Democrats who claimed to be pro-choice, like Clinton or Obama, failed to ever bolster *Roe v. Wade* and roll back federal laws, which undermined the protections present within *Roe*. A superb example of this lackluster effort is Bill Clinton, as he claimed he would pass a piece of legislation further protecting one's right to acquire an abortion, entitled the "Freedom of Choice Act," though he never mentioned it again in his presidency

(Smith 2021). Though the bill in question was introduced a few times in the Senate and once in the House of Representatives, it never received grand support from either party.

That said, the Democrats have genuinely attempted to sign into law acts that would repeal the Hyde Amendment and bolster *Roe*. The Equal Access for Abortion Coverage in Health Insurance Act, as introduced in the House of Representatives in 2019 and 2021 (though similar acts have been introduced previously), would have repealed the Hyde Amendment and protected a woman's right to be covered by their insurance in acquiring an abortion. In these efforts, the House of Representatives has attempted to put forth legislation which protects one's right to abortion in the case that *Roe v. Wade* is overruled: The Women's Health Protection Act of 2021 (Donovan 2020, 3–4). While this piece of legislation did pass the House of Representatives with few amendments, it did not pass the Senate in any version. Of course, this failed vote was likely, as the Democrats, via two independent voters, which consistently caucus with the Democrats, and the tie-breaking vote of Vice President Kamala Harris, held only a thin majority in the Senate, not a majority enough to represent three-fifths of the Senate on the best of days (Donovan 2020, 3–4). This three-fifths majority would have been necessary to override a filibuster and move onto passage through the Senate, though a vote to cloture was not reached in the Senate. Perhaps the most shocking aspect of voting on H.R. 3755 in the Senate was the six, split three and three down party lines, Senators who did not vote, and the subsequent failure of the Democrats to acquire a majority vote in the Senate.

There are a few issues worth noting here. First off, Senator Manchin from West Virginia, the only remaining pro-life Democrat in the U.S Senate in the current session, was arguably the vote which caused the death of H.R. 3755 (as nearly each Republican member in the Senate ascribes to the Pro-Life movement). The few pro-choice Republican Senators who currently



serve in the Senate, Senators Collins and Murkowski, did not vote in favor of the version of H.R. 3755 which reached the Senate floor. The group of senators who did not vote would likely not have influenced the outcome of H.R. 3755, unless more Democrats in this subsection appeared than Republicans. Third, the language of this bill, while similar to *Roe v. Wade*, in the extent to which it would have protected one's right to acquire an abortion, was sufficiently protective of abortion rights to acquire not one bi-partisan vote in support of the proposed bill, other than the two independent votes (which, as they caucus for the Democrats and are independent rather than Republican, bi-partisan does not accurately convey their support on the matter). This bill would have, however, gone far beyond the protections to access abortion provided by *Roe*, as well as subsequent precedents and laws originating from the House and the Supreme Court, which have acted to discount the protections in *Roe* alone, via effectively banning laws which act to restrict access to abortion by a far greater standard (Israel 2021). Naturally, a vote to cloture would have been merely a delay in the process, which may have led to the passage of the bill. Even still, Democrats may attempt to write a new bill with language similar to H.R. 3755, and provided the Democrats maintain a majority in the House and acquire one more supportive member of the bill in the Senate, such a bill may pass. While true, we may well see a similar effort from the Republicans in the near future if they can gain substantial seats in the House, hold their figure in the Senate, and get a Republican president elected. This is merely a note, however, as such an effort would take at least two years, though likely longer due to the position of the House of Representatives currently.

Thus, as any assertions regarding the federal response to the repeal of *Roe v. Wade* would be highly speculative, the state response is far easier to accurately depict. The basis by which we can judge state response to the dissolution of federal protection for legal abortion is as follows:

State laws which remain in effect, as they have since before *Roe v. Wade*, statutes which states have signed into effect prior to the conclusion of *Dobbs v. Jackson Women's Health Organization*, and the trigger laws states have signed, which will go into effect if *Roe v. Wade* is overruled. The political leanings of state legislatures and gubernatorial positions within the states must be considered in tandem, as any of these pieces of legislation are subject to change if party control of government changes. Like the issue of contending with the political divisions in Congress, many state legislators may be up for election shortly thereafter, or prior, depending on when a repeal to *Roe v. Wade* goes into effect, and the position of a current legislature is subsequently uncertain, if the majority is toppled in the given state legislature. That said, there is no reason for us to believe that current legislatures will see substantial changes in their populations. These shifts are merely a singular, minor, aspect for which we should tame our expectations for legislative action in the distant future. Of course, we can expect even less change in membership and political divisions within state supreme courts. The highest courts in several states, including Maryland, California, and Montana, have ruled that abortion is constitutionally protected based on the language of their state constitutions regarding various clauses, though generally tethered to language protecting the right to privacy or protection of procreative autonomy.

That said, state level legislation regarding the legality of abortion if *Roe v. Wade* is overturned is a superb indicator of how access to abortion will change after June of this year. While we would ideally analyze the related legislation for each state, we may, through analysis of several states within each region of the United States, understand an extensive framework of access to abortion within the country, without going into detail over each state during this thesis. Through this section, we will cover, where relevant, the rulings of the highest courts within

states, as the rulings of these courts reign supreme over the legislatures. Even in the cases where the highest court of the state has ruled on abortion, state legislatures may continue to put forth legislation aimed at restricting abortion. In fact, state legislatures may amend portions of their state constitutions, often by simple majority, provided the voters approve it, as to surmount the highest court's interpretations of the state constitution regarding abortion (Marshfield 2019, 76–77). While every state allows legislative amendments, and only Delaware allows these amendments to go into effect without voter approval, several states allow constitutional amendments to originate from an initiative or constitutional commissions to decide on constitutional amendments, though these commissions are generally formed with popular approval (Marshfield 2019, 76–80). With enough political control and public support, even constitutional protections as interpreted by a state's highest court may be repealed; this is certainly an aspect worth consideration.

In states where the present highest court has ruled for protecting abortions rights, like Montana, Florida, and Iowa, the state legislatures have, while attempts have been made to do so, been largely unsuccessful in altering their state constitutions to allow for outright bans on abortion. One of the most prevalent methods by which state legislatures limit access to abortion is through Targeted Regulation of Abortion Providers laws (TRAP laws) (Medoff 2010). These laws, as they have grown in density over the years since *Roe v. Wade*, greatly damage access to abortion within the law post 1973 via limiting who, how, and why prospective abortion providers may provide abortions to their patients (Medoff 2010). As laws adjoined to TRAP laws often limit funding and specify strict procedures which must occur prior to an abortion, these laws assure that the process of acquiring an abortion is difficult for any prospective patient. If, say, a woman can prove that she has a valid reason for the abortion and is certain that an abortion is the

correct course of action through often lengthy, targeted waiting periods, then she must, prior to any sort of Last Menstrual Period bans (LMP bans) present in the state at hand, travel often long distances and wait in tremendous lines to acquire an abortion (Fuentes et al. 2020; Medoff 2010).

On that note, understanding these two subsections of laws, which the anti-abortion advocates have pursued since *Roe* was decided, will prove paramount to understanding the current political climate within the states prior to the *Dobbs* decision. TRAP laws, as their name may imply, limit access to abortion via limiting the practices of those willing to provide abortion procedures. These laws often target funding for abortion clinics and act to limit those who may perform abortions, as most states have come to restrict this group to only those medically trained. Procedure is another pressing aspect by which this legislation aims to restrict access to abortion, like the Partial-Birth Abortion Act (2003) and subsequent passage of similar legislation against D&X techniques. Clinics which provide abortions are often further restricted via requirements in TRAP laws, which require the clinics to be held to the same standards of ambulatory surgical centers, as to drive up the costs of the operations and exclude smaller practices (Austin and Harper 2019, 375–76). Essentially, TRAP laws encapsulate many ways in which anti-abortion representatives in state legislatures have been able to bypass the original protection against excessive governmental restriction on access to abortion present in *Roe*.

Though these TRAP laws are significant, they appear to have not had as staunch an effect on access to abortion as last menstrual period bans may soon. TRAP laws have acted to inconvenience those seeking abortions more than anything. Research suggests that while laws aimed at restricting abortion providers negatively affect access to abortion in states with them in effect, the effect of TRAP laws on abortion rates is not substantial (Austin and Harper 2019, 377–78). In stark contrast, “LMP bans” have, and will have, a far more significant effect on

one's ability to acquire an abortion (Foster, Gould, and Biggs 2021, 642–46). This form of laws target access to abortion via restricting when a woman can acquire an abortion. Rather than judging the timing of this access based on the viability standard as lined out in *Casey*, proponents of these bans opt for deciding when a woman can acquire an abortion based on how many weeks it has been since they last experienced a period (Donovan 2020, 1–2). While many proponents of bans on abortion prior to viability would prefer such bans to be based on weeks after conception (so-called twenty-week bans reflect this ideology), LMP bans have the same effect. These statutory restrictions greatly restrict access to abortion, especially for those who have never given birth and/or were taking hormonal birth control in the month of the conception (Foster, Gould, and Biggs 2021, 642–45). As we have previously delved into the impact of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, TRAP laws have exploded in Midwestern and Southern states, though they have also appeared in states outside these regions, as these laws are effective in lowering abortion rates while not an outright ban on abortion at any time (Bentele, Sager, and Aykanian 2018; Medoff 2010; Spitzer and Ellman 2021).

As I will rely on the information gathered by the following source several times, it must be mentioned that the extensive gathering of research on laws which expanded abortion rights and restricted abortion rights has proved extraordinarily helpful in understanding how access to abortion will look directly following the overruling of *Roe v. Wade*. Though for the purposes of this thesis, I will not delve into the specifics of each state's legislative efforts to either bolster or degrade access to abortion, the reader should feel implored to, if they should desire specifics on a state not covered in depth in this thesis, venture to the webpage of the Center for Productive Rights as a better culmination of research on the subject does not exist elsewhere.<sup>3</sup> With that

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<sup>3</sup> <https://reproductiverights.org/maps/what-if-roe-fell/>

noted, the following section will lay out specifics of several states within each region of the United States, and its territories, thereby giving the reader an in-depth understanding as to how access to abortion will look nationally after June this year.

### Section 3.1 – Access to Abortion on the West Coast

The West Coast, as it has grown into a progressive stronghold over the last several decades, is universal in its protection to legal abortion in the case that the protections of *Roe v. Wade* fall. Starting in the northern-most state, in 1991 Washington adopted a ballot measure which protects a woman’s fundamental right to acquire an abortion,<sup>4</sup> except as limited by the state’s post-viability ban on abortions,<sup>5</sup> without discrimination. Moreover, in 1992 the Washington legislature repealed its pre-Roe statutes, thereby removing any ban against abortion in their laws.<sup>6</sup> In the past two decades, starting in 2004, Washington has, by several statutes proposed and cemented into law, acted to protect access to abortion by: Authorizing trained health care providers to provide abortion care,<sup>7</sup> prohibiting interference in this abortion care,<sup>8</sup> providing public funding for abortions and abortion care,<sup>9</sup> requiring that insurance companies provide funding for abortions and abortion care for those who are insured under their plans (even the most basic renditions of their plans),<sup>10</sup> prohibiting interference of abortion clinics,<sup>11</sup> and

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<sup>4</sup> Wash. Admin. Code §§ 9.02.100, 9.02.110, 9.02.140, 9.02.160.

<sup>5</sup> Wash. Rev. Code § 9.02.110.

<sup>6</sup> Reproductive Privacy Act, 1992 Wash. Legis. Serv. Ch. 1 (*repealing* § 9.02.010 and § 9.02.060 through § 9.02.090).

<sup>7</sup> Wash. Rev. Code § 9.02.110; Wash. Att’y Gen. OP 2004 No. 1 (2004); Wash. Att’y Gen. OP 2019 No. 1 (2019); H.B. 1851, 67th Leg., Reg. Sess. (Wa. 2022), *codified at* Wash. Rev. Code §§ 9.02.100, 9.02.110, 9.02.130.

<sup>8</sup> Wash. Rev. Code §§ 43.70.619, 70.400.

<sup>9</sup> Wash. Admin. Code § 182-532-120(7)(b).

<sup>10</sup> Wash. Rev. Code § 48.43.073.

<sup>11</sup> *Id.* § 9A.50.020.

prohibiting prosecution of those who provide abortions as well as those who receive abortions.<sup>12</sup> This assures that Washington will certainly protect access to abortion in nearly all cases.

Washington is by all measures the most restrictive state in the matter of abortion within the West coast (by a small margin); California, while it has a similar viability standard which, if broken, could result in civil or criminal charges against those who were involved with the abortion,<sup>13</sup> and Oregon, though it does have a similar statute which requires reporting of abortions, have fewer restrictions to abortion than Washington.<sup>14</sup> Some have unsuccessfully attempted to interpret the Equal Rights Amendment (2014) in Oregon, as initiated by the voters of Oregon to protect one's fundamental right to abortion;<sup>15</sup> however, the clearest legislation which protects abortion in Oregon comes from the Oregon Health Authority, Oregon Legislature, and cases in which the Oregon Supreme Court has struck down administrative attempts to cut funding to clinics which provide abortion (Monthey 2019).<sup>16</sup> California is rather distinctive in comparison to Oregon and Washington. While all three provide extensive protections to access to abortion and limited restriction, the California Supreme Court, four years prior to *Roe*, recognized a right to procreative choice under the state's constitution.<sup>17</sup> This right was further developed via a constitutional amendment one's right to privacy and liberty protect their right to acquire an abortion.<sup>18</sup> Thus, any law which acts to restrict abortion, other than abortion after viability, is unconstitutional; one notable challenge to this constitutional right is the California

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<sup>12</sup> H.B. 1851, 67th Leg., Reg. Sess. (Wa. 2022), *codified at* Wash. Rev. Code § 9.02.120.

<sup>13</sup> Cal. Health & Safety Code § 123468. Cal. Bus. & Prof. Code § 2052; Cal. Penal Code § 1170.

<sup>14</sup> OR. Rev. Stat. § 435.496.

<sup>15</sup> OR. Const. Art. I, §46 (2014).

<sup>16</sup> OR. Admin. R. 410-130-0562; See relevant *Planned Parenthood Ass'n v. Dep't of Human Res.*, 663 P.2d 1247 (Or. Ct. App. 1983), *aff'd on other grounds*, 687 P.2d 785 (Or. 1984).

<sup>17</sup> *People v. Belous*, 458 P.2d 194, 199 (Cal. 1969).

<sup>18</sup> California Constitution Art. I, § 1 (Added 1974).

law which requires that minors seeking abortion must acquire the approval of a parent or guardian, though this law is known to be unconstitutional and, therefore, is unenforced.<sup>19</sup> In summary, the West Coast will likely see no change to access to abortion within its borders, other than likely higher incidents of abortion tourism, as Oregon has special provisions funding travelers seeking abortion and Planned Parenthood is especially active in the states of this region (Monthey 2019).

That said, prior to *Roe* Oregon was not an abortion destination partially due to geographical distance for those which desired abortion and will desire abortion when bans on abortion come into effect yet again. New York, which provided eighty-four-percent of known abortions acquired outside of one's state of residence, had the greatest access to abortion relative to distance from states where access was most limited prior to *Roe* (Joyce, Tan, and Zhang 2012, 10–12). Kansas, for those who reside in states which lacked access to abortion prior to *Roe* and as restrictive laws have evolved west of the Appalachian mountains, proved a far more viable option for those seeking abortion than states farther away with out-of-state abortion tourists acquiring sixty-four-percent of the known abortion procedures within the state (Joyce, Tan, and Zhang 2012, 8–10). Though flights for those seeking abortions which live in states where it will likely become far more difficult to acquire abortions after *Roe* falls have become less expensive than the late twentieth century, most seeking abortions will still likely, due to factors financial and temporal, opt for abortion-protected states closer in mileage; even with more than thirty states likely to ban abortion in most cases, the average female seeking abortion in states which will ban abortion will have to travel about one-hundred-fifty-seven more miles than the current

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<sup>19</sup> Cal. Health & Safety Code § 123450, invalidated by *Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307, 436-45, 940 P.2d 797, 883-89 (1997).



figure of around thirty miles (Joyce, Tan, and Zhang 2012, 22). This jump, while massive in considering those who will be most affected by bans on abortion are the most impoverished persons (who may lack access to an automobile or money for plane tickets), is not as major as one may assume, in the face of more than half of the states of the United States banning abortion, due to pocket states like New Mexico or Kansas (Joyce, Tan, and Zhang 2012, 22).

### Section 3.2 – Access to Abortion in the Southwest

Directly to the East lies the American Southwest, which has generally acted to restrict or prohibit abortion in the case that the Supreme Court revokes the protections of *Roe*, wherein bordering states with legislation in place to protect abortion will prove quite helpful to women in these states seeking access to abortion. Utah, dating back to 1973 with revisions to its criminal code which contained language banning abortion, has long fought abortion via restrictive legislation. In recent years, the Utah state legislature has signed into effect several bans on abortion during the last thirty years, from one at viability to a total ban. That said, only the viability ban has remained in effect,<sup>20</sup> as federal courts have enjoined bans earlier in the abortion timeline.<sup>21</sup> Notably, the Utah state legislature has, with no protections present in its constitution or statutory law, stated its policy preference as one aimed at protection of “unborn children.”<sup>22</sup> Thus, the following laws which Utah has passed to restrict access to abortion may come as no shock to the reader: A ban on abortions after eighteen weeks LMP,<sup>23</sup> an outright ban on abortion,<sup>24</sup> a ban on the use of D&X and saline abortion methods,<sup>25</sup> a ban on midwives as

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<sup>20</sup> Utah Code Ann. § 76-7-302

<sup>21</sup> *Planned Parenthood Ass’n of Utah v. Miner* (2019) and *Leavitt v. Jane I.* (1997).

<sup>22</sup> Utah Code Ann. § 76-7-301.1.

<sup>23</sup> *Id.* § 76-7-302.5.

<sup>24</sup> *Id.* § 76-7-302.

<sup>25</sup> *Id.* §§ 76-7-326, 76-7-310.5.

providers of abortion care,<sup>26</sup> and extensive TRAP laws.<sup>27</sup> These TRAP laws range from restrictions on who and which clinics may provide abortions, limit public funding and insurance coverage for abortion related care, and required reporting.<sup>28</sup> Given the already quite limited access to abortion, though federal district courts have fought to protect access to abortion in Utah thus far and having enacted a trigger ban in 2020 which will prohibit abortion in nearly every case if *Roe* is overturned, Utah will certainly act to ban or heavily restrict access to abortion within their territory.

Having never repealed its pre-*Roe* ban on abortion, Utah's southern neighbor is similar in this regard.<sup>29</sup> Arizona has passed similar bans on abortion to Utah, though not as far as a total ban since before *Roe*, at fifteen-weeks and twenty-weeks LMP.<sup>30</sup> The only temporally based ban which Arizona, as federal courts have intervened thus far, is currently allowed to maintain is one at viability.<sup>31</sup> Otherwise, Arizona has gone on to prohibit D&X abortions,<sup>32</sup> prohibit abortions sought for characteristics of the potential offspring (currently disability, due to a Ninth Circuit Court ruling, remains a valid reason enjoining that facet of the ban),<sup>33</sup> and institute many other laws aimed at restricting access to abortion. These efforts range from biased counseling and required viewing of the ultrasound for the prospective recipient of an abortion to limited public

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<sup>26</sup> *Id.* §§ 76-7-302 (2), 58-77-603.

<sup>27</sup> *Id.* § 26-21-2 (1), *id.* § 26-21-2(23)-(24); Utah Admin. Code r. R432-600-5.

<sup>28</sup> *Id.* § 76-7-313, 76-7-331. Utah Code Ann. § 31A-22-726. *Id.* § 26-21-2 (1), *id.* § 26-21-2(23)-(24); Utah Admin. Code r. R432-600-5.

<sup>29</sup> Ariz. Rev. Stat. §§ 13-3603, 13-3605 (formerly §§ 13-211, 13-213 (1956)), enjoined by *Nelson v. Planned Parenthood Center of Tucson* (1973).

<sup>30</sup> S.B. 1164, 55th Leg., 2nd Reg. Sess. (2022) codified at Ariz. Rev. Stat. § 36-232-36-2326. *Id.* § 36-2159; *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013).

<sup>31</sup> Ariz. Rev. Stat. § 36-2301.01.

<sup>32</sup> *Id.* § 13-3603.01.

<sup>33</sup> *Id.* § 13-3603.02(A). *Isaacson v. Brnovich* (2021).

funding and insurance coverage for abortion-related care.<sup>34</sup> Essentially, though the Arizona state legislature did repeal a ban which allowed for criminal penalties for those who opt to self-manage abortions in 2021 and does not currently have a trigger law set to go into effect when *Roe* is overturned,<sup>35</sup> we may expect that Arizona will act to severely limit access to abortion or ban it outright given the resultant judgment for the Mississippi decision.

While these two states are nearly certain to ban abortion when *Roe* is overturned, the fate of New Mexico is not as clear. Though New Mexico has banned D&X abortions,<sup>36</sup> retains various TRAP laws,<sup>37</sup> and maintains a reporting requirement for abortions to the state,<sup>38</sup> the New Mexican 55<sup>th</sup> legislature is repealing much of the legislation aimed at restricting access to abortion, namely its pre-*Roe* ban in 2021.<sup>39</sup> The highest court of New Mexico has, while the state legislature is acting against legislation aimed at restricting or banning abortion, not ruled in support of or against one's fundamental right to acquire an abortion within the state, while there lies an Equal Rights Amendment within their constitution which may be argued to protection this right.<sup>40</sup> Thus, while the New Mexican state legislature repeals laws like its age-based abortion reporting law and its law restricting who may provide abortion care,<sup>41</sup> the highest court of New Mexico has yet to produce a verdict in support of legal abortion. Abortion is in a state of limbo, then, as the court may come out against legal abortion after *Roe* is overturned; the language of

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<sup>34</sup> Ariz. Rev. Stat. § 36-2153; *id.* § 36-2156. *Id.* § 35-196.02. *Id.* § 20-121.

<sup>35</sup> *Id.* § 13-3604, *repealed by* 2021 Ariz. Sess. Laws Ch. 286, § 3.

<sup>36</sup> N.M. Stat. Ann. § 30-5A-3.

<sup>37</sup> *Id.* § 24-14-18.

<sup>38</sup> *Id.*

<sup>39</sup> N.M. Stat. Ann. § 30-5-1 through § 30-5-3; *repealed by* S.B. 10, 55th Leg., Reg. Sess. (N.M. 2021).

<sup>40</sup> New Mexico Constitution art. 2, § 18.

<sup>41</sup> N.M. Stat. Ann. § 30-5-1(c), *repealed by* S.B. 10, 55th Leg., Reg. Sess. (N.M. 2021). *Id.* § 30-5-1, *repealed by* S.B. 10, 55th Leg., Reg. Sess. (N.M. 2021).

the New Mexican constitution is generally more supportive of one's right to privacy and equal treatment. Even still, the court's decision on the matter will either render abortion protected by the constitution of New Mexico or simply not. Thus, as long as the legislature remains supportive of legal abortion and protecting access to abortion, abortion will remain legal within the state.

With only one state in the region left, we may shift focus to a state which will likely protect access to abortion within its territory: Nevada. Though this state retains a ban on abortions after twenty-four weeks post-fertilization (twenty-six weeks LMP),<sup>42</sup> its voters passed a 1990 referendum which provides statutory protection for abortion, which may only be repealed by another successful referendum.<sup>43</sup> The state legislature within Nevada, while it repealed unenforced pre-*Roe* bans left in Nevada state law since 1973 in 2019,<sup>44</sup> has recently passed legislation aimed at restricting access to abortion; These restrictions range from the aforementioned prohibition at viability,<sup>45</sup> limiting of public funding for abortion,<sup>46</sup> minor-abortion notification requirement (temporarily enjoined),<sup>47</sup> reporting requirements,<sup>48</sup> and a restriction of who may provide abortion care to those medically licensed.<sup>49</sup> Overall, restrictions to abortion are not immense in Nevada and access to abortion has remained relatively unfazed by these restrictions, as prospective recipients of abortion who should face risk of death in acquiring an abortion past viability have generally been allowed to do so within Nevada. As it would be

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<sup>42</sup> Nev. Rev. Stat. § 442.250(1)(b).

<sup>43</sup> Nevada Legislative Counsel Bureau, Nevada Ballot Questions 11.

<sup>44</sup> Nev. Rev. Stat. § 200.220, *amended* by 1973 Nev. Laws chp. 766, § 7; Nev. Rev. Stat. §§201.120, 2120 to 201.140, *repealed* by 2019 Nev. Laws chp. 265, § 6.

<sup>45</sup> Nev. Rev. Stat. § 442.250(1)(b).

<sup>46</sup> Division of Health Care and Financial Policy, Medicaid Services Manual, § 603.3 (2019).

<sup>47</sup> Nev. Rev. Stat. § 442.255, *Glick v. McKay*, 937 F.2d 434, 442 (9th Cir. 1991).

<sup>48</sup> *Id.* § 442.260(2); Nev. Admin. Code § 442.200; Nev. Rev. Stat. § 442.265.

<sup>49</sup> Nev. Rev. Stat. § 442.250(1).

quite difficult to reach a popular referendum against abortion and the population of Nevada would be generally opposed to this, abortion will remain legal with some protection within Nevada for the near future.

### Section 3.3 – Access to Abortion in the Rocky Mountains

In the Rocky Mountain region, the states are mixed in how they will respond to a repeal of SCOTUS' protected access to abortion nationally. While their legislative and executive branches have put forth legislation aimed at restricting access to abortion, Montana's highest court has opted to constitutionally protect one's right to procreative autonomy through language which protects an individual's right to privacy and right to procreative autonomy in the state Constitution of Montana.<sup>50</sup> The restrictions, of which several are enjoined, presently employed in Montana act to: prohibit abortion to a twenty-week standard (enjoined) as well as at viability,<sup>51</sup> prohibit intact D&X abortions,<sup>52</sup> require a twenty-four-hour waiting period (temporarily enjoined) as well as biased counseling (temporarily enjoined),<sup>53</sup> require that prospective recipients of abortion procedures be provided the opportunity to view an ultrasound (temporarily enjoined),<sup>54</sup> require that abortions for minors be disclosed to parents or legal guardians (though a judge may bypass this requirement),<sup>55</sup> and prohibits remote medical care involving abortion (temporarily enjoined).<sup>56</sup> Thus, if *Roe* is undermined or repealed in its entirety, we can expect that the Montana state legislature, along with gubernatorial support, will attempt to lift these injunctions and sign in new laws aimed at restricting access to abortion. Montana's Supreme

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<sup>50</sup> Montana Constitution, Article II, § 10.

<sup>51</sup> Mont. Code Ann. § 50-20-603, 50-20-109.

<sup>52</sup> *Id.* § 50-20-401.

<sup>53</sup> *Id.* §§ 50-20-707, 50-20-708.

<sup>54</sup> *Id.* § 50-20-113.

<sup>55</sup> *Id.* § 50-20-504, 50-20-509.

<sup>56</sup> Montana H.B. 171.

Court, however, will continue to block legislative action, protect public funding for abortion procedures and clinics which provide abortions, and ensure clinics are able to operate without obstruction.<sup>57</sup> The process by which the Supreme Court of Montana has enjoined abortion restrictive laws is judicial review and is the primary way in which state supreme courts have fought anti-abortion legislation. Though the state supreme courts have the power to determine the constitutionality of legislation within their given jurisdiction, legislatures may override such judicial interpretations or simply write new statutes, provided the circumstances allow. An override at this level often requires a two-thirds majority within both houses and that the judicial decision blocking the given law be deemed not rooted in the state's constitution. Otherwise, change in membership, of the highest court of Montana, would more easily facilitate such alterations to their judgment; with either option, we may be relatively sure that abortion will remain protected for some time.

Like Montana, Colorado will protect access to abortion, with some restrictions. Primarily, these restrictions are in public funding and in mandatory reporting of abortions to the state,<sup>58</sup> as well as parents and guardians (unless the judge approves a minor's petition against this notification);<sup>59</sup> there have been attempts, though unsuccessful thus far, through legislative ballot initiative to institute a twenty-two-week last menstrual period (LMP) ban on abortions (Freiburger 2020).<sup>60</sup> As this specific attempt, in 2020, was voted down by Colorado voters by a

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<sup>57</sup> *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364, 373-74 (Mont. 1999). Mont. Admin. R. 37.86.104, invalidated by *Jeannette R. v. Ellery*, No. BDV-94-811 (Mont. Dist. Ct. May 22, 1995). Mont. Code Ann. § 45-8-110.

<sup>58</sup> Colo. Rev. Stat. § 25.5-3-106; Colo. Rev. Stat. § 25.5-4-415; 10 Colo. Code Regs. § 2505-10:8.770.4. A.: Colo. Const. art. V, § 50, narrowed by *Hern v. Beye*, 57 F.3d 906, 913 (10th Cir. 1995). Colo. Code Regs. § 1006-1:10.

<sup>59</sup> Colo. Rev. Stat. § 13-22-704, 13-22-707.

<sup>60</sup> End Late Term Abortions in Colorado, Co. Sec'y of State.

seven percent margin, it is unclear as to how future ballot initiatives may play a role in restrictive legislation in Colorado (Freiburger 2020). While the highest court of Colorado has not acted to protect abortion via the constitution, the state legislature enacted a statute in 2022 which protects a woman's right to abortion and contraception as a fundamental right, thereby protecting their ability to make personal decisions related at any stage of the pregnancy.<sup>61</sup> Currently, Colorado has no legislation which restricts who may provide abortion care, though they must be a health care practitioner of some sort;<sup>62</sup> protections for abortion clinics, as affirmed by the highest court in Colorado in 2000, are present in Colorado, as well.<sup>63</sup>

Contrary to these two states, Idaho and Wyoming have both signed into law trigger bans which will effectively ban abortion in its entirety if *Roe v. Wade* is weakened or entirely overturned.<sup>64</sup> Moreover, both states require reporting of abortions amongst several other piece of legislation which are aimed at limiting a woman's access to abortion currently.<sup>65</sup> Wyoming does not currently restrict access to abortion as severely as Idaho, though it does so via prohibition of most abortions past viability,<sup>66</sup> required viewership of ultrasound,<sup>67</sup> required parental consent (unless the minor at hand acquires the approval of a petition from a judge),<sup>68</sup> procedures limited to licensed physicians, and certain criminal penalties for those who fail to act within these limitations.<sup>69</sup> Idaho, as it has mirrored much of its legislative efforts on Texas, has signed into

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<sup>61</sup> Colo. Rev. Stat. §§ 25-6-401 to 25-6-406.

<sup>62</sup> Colo. Rev. Stat. § 18-9-122; upheld in *Hill v. Colorado*, 530 U.S. 703 (2000).

<sup>63</sup> *Id.*

<sup>64</sup> H.B. 92, 66th Leg., Reg. Sess., (Wyo. 2022). Idaho Code § 18-622.

<sup>65</sup> Wyo. Stat. Ann. § 35-6-107. Idaho Code § 18-506.

<sup>66</sup> Wyo. Stat. Ann. § 35-6-102.

<sup>67</sup> *Id.* § 35-6-119.

<sup>68</sup> *Id.* § 35-6-118(a)-(b).

<sup>69</sup> *Id.* § 35-6-111.

law a six-week LMP ban on abortion,<sup>70</sup> alongside a private right to action which allows citizens to report persons who act outside of the realm of the law (temporarily enjoined),<sup>71</sup> and a twenty week post-fertilization ban (enjoined).<sup>72</sup> Prospective recipients of abortions must, after they request that they be allowed to acquire an abortion, wait twenty-four-hours and proceed through counseling aimed at changing their mind.<sup>73</sup> Clinics in Idaho are, distinctive from Wyoming, subject to many TRAP laws. From restrictions to who may provide abortions to a ban on telemedicine visits for any provider regarding abortion-related appointments, access to abortion in Idaho is rather limited currently as compared to its neighboring states.<sup>74</sup> Wyoming, though it does not share in TRAP laws to the extent of Idaho, does currently enjoy similar requirements for abortion providers and limits public funding for abortions.<sup>75</sup> In summary of the Rocky Mountain region, Idaho and Wyoming will likely ban abortion while Montana and Colorado will likely protect access to abortion. Montana's state legislature, however, has proven itself an enemy to abortion in recent years, starting in 2021, so we may see further TRAP laws and LMP bans passed in Montana; by legislative or popular innovative, there may potentially arise an amendment to the language in the state's constitution which protects one's procreative autonomy. Until then, access within these four states appears to be predictable.

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<sup>70</sup> S.B. 1309, 66th Leg., 2nd Reg. Sess. (Id. 2022) *to be codified at* IDAHO CODE §§ 18-8804, 18-8807.

<sup>71</sup> *Planned Parenthood Great Northwest, Hawaii, Alaska, Indiana, Kentucky v. Idaho*, No. 49615-2022 (Idaho Apr. 8, 2022) (order stays S.B 1309); *McCormack v. Hiedeman*, 900 F. Supp. 2d 1128 (D. Idaho 2013), *aff'd sub nom. McCormack v. Herzog*, 788 F.3d 1017 (9th Cir. 2015); Idaho Code § 18-505.

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

<sup>73</sup> Idaho Code § 18-609 (2), (4)-(5).

<sup>74</sup> Idaho Code § 18-506, 18-608A, and 18-617(2).

<sup>75</sup> Wyo. Stat. Ann. § 35-6-117; Wyo. Admin. Code 048.0037.26 § 5; Wyo. Stat. Ann. § 21-16-1801.



### Section 3.4 – Access to Abortion in the Midwest

Moving further east, the Midwest region has somewhat mixed legislation, largely due to the language of their state constitutions and the political leanings of their state legislatures in the last two decades. As a region which leans conservative, the debate has been rather intense regarding abortion of late. North Dakota, South Dakota, Nebraska, Missouri, Wisconsin, Indiana, and Ohio all represent states which will likely prohibit abortion; the only states in the Midwest wherein, by virtue of the highest courts of their lands, abortion will remain legal are as follows: Illinois, Minnesota, Iowa, and Kansas. One curious case in conceiving of the Midwestern states is Michigan, as a Michigan Court of Claims issued an injunction against the Michigan pre-*Roe* ban from 1931.<sup>76</sup> Prior to this action, the Michigan courts had not issued a verdict in support of legal abortion so this ruling may represent a notable change in how Michigan treats abortion post-*Roe*. The majority of the Michigan legislature is currently supportive of banning abortion as best it may, while the state's Governor, Gretchen Whitmer, appears to be pursuing anything in her power to retain legal abortion within the state post *Roe*, like issuing strategically filing the suit for which this judgment was rendered (McKenna 2022, 22–23). Look to the later commentary on Wisconsin for specifics as to how Michigan has legislated against abortion prior to this action as the two states, Michigan and Wisconsin, were to respond quite similarly to a repeal to *Roe*, prior to the repeal of Michigan's Pre-*Roe* abortion ban.

Though many of the Midwestern states which are likely to ban abortion have not enacted such laws yet, a few of these states have enacted trigger bans set to go into effect after *Roe v. Wade* is overturned. North Dakota and South Dakota, in 2007 and 2005 respectively, enacted

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<sup>76</sup> <https://www.michigan.gov/whitmer/news/press-releases/2022/05/17/governor-whitmer-welcomes-preliminary-injunction-against-michigan-1931-law-criminalizing-abortion>

trigger bans which would make abortion illegal in nearly all cases, with exception for the life of the mother;<sup>77</sup> Missouri, in 2019, passed a similar trigger ban, which would render abortion providers felons if they were to perform abortions after federal protections are no longer in place (Linton 2007; Sommers 2021).<sup>78</sup> Both North and South Dakota, as with nearly all of these states which will likely severely limit access to abortion or ban it altogether, have acted to hinder access to abortion prior to these trigger bans going into effect. With telemedicine bans,<sup>79</sup> reason bans,<sup>80</sup> method bans (dilation and extraction, like the Partial-Birth Abortion Ban),<sup>81</sup> twenty-two-week LMP bans,<sup>82</sup> and TRAP restrictive laws,<sup>83</sup> access to abortion has been quite limited within these two states for some time. As per statutory law which act to restrict abortion through TRAP laws, the Dakotas require counseling prior to one's ability to acquire an abortion,<sup>84</sup> required reporting,<sup>85</sup> and a waiting period prior to an abortion after initial consultation;<sup>86</sup> one may notice, in most states likely to act to ban abortion have, prior to any hints of a repeal to *Roe v. Wade*, signed into law several statutes which contain similar language.

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<sup>77</sup> N.D. Cent. Code § 14-02.1-05.2(1). S.D. Codified Laws § 22-17-5.1.

<sup>78</sup> Mo. Rev. Stat. § 188.017(4).

<sup>79</sup> N.D. Cent. Code § 14-02.1-03.5(5). S.D. Codified Laws § 34-23A-56; H.B. 1318, 97th Leg., Reg. Sess. (SD 2022).

<sup>80</sup> N.D. Cent. Code § 14-02.1-04.1(1)(b). S.D. Codified Laws § 34-23A-63 to 34-23A-64. *Id.* §§ 34-23A-89 to 34-23A-93.

<sup>81</sup> N.D. Cent. Code § 14-02.6-02(1), 14-02.1-04.2(2). S.D. Codified Laws §§ 34-23A-27 to 34-23A-33.

<sup>82</sup> N.D. Cent. Code § 14-02.1-05.3(3). S.D. Codified Laws § 34-23A-5.

<sup>83</sup> N.D. Cent. Code § 14-02.1-04(1-4 and 7), *invalidated by Miks v. Olson*, No. CIV. A3-82-78, 1983 WL 869578, at \*1 (D.N.D. Aug. 25, 1983). S.D. Codified Laws § 34-23A-51; S.D. Admin. R. art. 44:67.

<sup>84</sup> N.D. Cent. Code § 14-02.1-02(11)(a)(2); *id.* §14-02.1-02(11)(b)(5), *invalidated by Am. Med. Ass'n v. Stenehjem*, 412 F. Supp. 3d 1134 (D.N.D. 2019). S.D. Codified Laws § 34-23A-10.1; § 34-23A-56.

<sup>85</sup> N.D. Cent. Code § 14-02.1-07. S.D. Codified Laws §§ 34-23A-34 to 34-23A-42. *Id.* § 34-23A-19.

<sup>86</sup> N.D. Cent. Code §§ 14-02.1-03(1), 14-02.1-02(11)(a). S.D. Codified Laws § 34-23A-10.1; § 34-23A-56.

Ohio, for example, has numerous bans on abortion which aim to greatly limit one's ability to acquire an abortion within the state. Abortions past six-weeks LMP are banned in Ohio (preliminarily enjoined),<sup>87</sup> and abortions past twenty-weeks post fertilization are banned in the state.<sup>88</sup> Procedure bans, both D&E (enjoined) and D&X,<sup>89</sup> are in place in Ohio and abortions sought due to Down syndrome are banned.<sup>90</sup> Women seeking abortion within Ohio must undergo a twenty-four hour waiting period,<sup>91</sup> biased counseling,<sup>92</sup> and no insurance coverage,<sup>93</sup> or public funding, for acquiring an abortion. Minors seeking abortion within Ohio must acquire the approval of a judge or parent to do so and the state enforces several TRAP laws.<sup>94</sup> As with many states which are generally act against abortion, Ohio, in 2020, attempted to ban abortion care entirely via executive order in a purported attempt to suspend non-essential procedures during the COVID-19 Pandemic.<sup>95</sup> Though this action was quickly enjoined by the Southern District of Ohio Court, it is further evidence suggesting that Ohio will act to ban abortion as *Roe* is overturned.<sup>96</sup> Furthermore, the state's policy preference is one which aims to support crisis

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<sup>87</sup> Ohio Rev. Code Ann. § 2919.195(A). *Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796, 804 (S.D. Ohio 2019).

<sup>88</sup> Ohio Rev. Code § 2919.201.

<sup>89</sup> *Id.* § 2919.15. *Id.* § 2919.151.

<sup>90</sup> Ohio Rev. Code Ann. § 2919.10; *Preterm-Cleveland v. Himes*, 294 F. Supp. 3d 746 (S.D. Ohio 2018), *rev'd en banc*, 994 F.3d 512 (6th Cir. 2021).

<sup>91</sup> *Id.* § 2317.56(C).

<sup>92</sup> *Id.*

<sup>93</sup> Ohio Rev. Code Ann. § 3901.87, 5101.56.

<sup>94</sup> *Id.* § 2919.12(B)(1)(a)(iv), 2151.85.

<sup>95</sup> Amy Acton, Dir.'s Order for the Mgmt of Non-essential Surgeries and Procedures throughout Ohio (Mar. 17, 2020).

<sup>96</sup> *Preterm-Cleveland v. Attorney Gen. of Ohio*, 456 F.Supp.3d 917 (S.D. Ohio 2020), *appeal dismissed*, No. 20-3365 (6th Cir. Apr. 6, 2020).

pregnancy centers, buildings wherein prospective recipients of abortion are guilted into keeping an unwanted pregnancy under false pretenses, with public funding.<sup>97</sup>

One state within the region which has formally signed into law a trigger ban on abortion, which would ban abortion in nearly all situations if the protections of *Roe* were no longer in effect, is Missouri.<sup>98</sup> This state has passed a ban on abortions past eight-weeks LMP (temporarily enjoined),<sup>99</sup> a ban on abortions after viability,<sup>100</sup> and prohibits D&X abortions.<sup>101</sup> Women seeking abortion must not do so for reasons of sex, race, or Down syndrome present in the fetus and must wait a seventy-four-hour waiting period prior to acquiring an abortion.<sup>102</sup> Prospective recipients of abortion procedures must receive biased counseling,<sup>103</sup> be offered an ultrasound,<sup>104</sup> and, in the case of minors, acquire parental consent in order to acquire an abortion.<sup>105</sup> Abortion care is further limited via limits on public funding,<sup>106</sup> private insurance of coverage of abortion care,<sup>107</sup> and TRAP laws;<sup>108</sup> telemedicine bans and reporting requirements are present in Missouri law.<sup>109</sup> While Missouri will almost certainly act to ban abortion, in nearly all cases, after the *Roe*

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<sup>97</sup> *Id.* § 5101.804.

<sup>98</sup> Mo. Rev. Stat. § 188.017(4).

<sup>99</sup> Mo. Rev. Stat. § 188.056(1); *see Reproductive Health Services v. Parson*, 1 F.4th 552 (8th Cir. Jun. 9, 2021), *reh'g en banc granted, opinion vacated* (8th Cir. Jul. 13, 2021), *Reproductive Health Services v. Parson*, No. 19-2282 (8th Cir. argued Sep. 21, 2021), *cert. denied Schmitt v. Planned Parenthood* 2021 WL 4509073 (S. Ct. Oct. 4, 2021); Mo. Rev. Stat. § 188.030(1).

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

<sup>101</sup> Mo. Rev. Stat. § 565.300.3.

<sup>102</sup> *Id.* § 188.052(1); *see Reproductive Health Services*, *supra* note 1 at 1 F.4th 552, 561 (8th Cir. Jun. 9, 2021). Mo. Rev. Stat. § 188.027.

<sup>103</sup> Mo. Rev. Stat. § 188.027.

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

<sup>105</sup> *Id.* § 188.028(1)(1).

<sup>106</sup> Mo. Rev. Stat. *Id.* § 188.205.

<sup>107</sup> *Id.* § 376.805.

<sup>108</sup> Mo. Rev. Stat. § 197.200 et seq.

<sup>109</sup> *Id.* § 188.052. *Id.* § 188.021.

*v. Wade* is overruled, access to abortion will likely shift little after this legal change. As is this the case with many states which will act to ban abortion after *Roe* is overruled, access to abortion within the state is already quite limited via the expansive legislation restricting abortion.

Wisconsin and Nebraska are quite similar in this sense.

Wisconsin prohibits abortion at twenty-weeks post-fertilization,<sup>110</sup> after viability,<sup>111</sup> and when performed via D&X procedures, though this ban has been rendered unconstitutional.<sup>112</sup> Those who desire to acquire abortions must undergo the very same twenty-four-hour waiting period prior to abortion, biased counseling, and viewership of ultrasound, eminent throughout states of the south.<sup>113</sup> TRAP laws are, also, expansive within the state, from transfer agreements to mandatory reporting of abortions to the state.<sup>114</sup> Telemedicine is banned within Wisconsin, public funding or private insurance coverage for abortion-related services is limited, and minor's seeking abortion must do so with the consent of a parent, adult family member, or judge.<sup>115</sup> Though Wisconsin's gubernatorial position is currently held by governor supportive of abortion rights, the state is likely to ban abortion in nearly every case. This is clear through the plethora of laws which act to restrict abortion and the pre-*Roe* ban which remains present in the state's statutory law, a law which is interpreted to apply in charging those who commit "feticide."<sup>116</sup>

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<sup>110</sup> Wis. Stat. § 253.107(3); *id.* § 940. 15.

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

<sup>112</sup> *Id.* § 940.16; *see Hope Clinic v. Ryan*, 249 F.3d 603, 606 (7th Cir. 2001).

<sup>113</sup> Wis. Stat. § 253.10.

<sup>114</sup> Wis. Admin. Code, MED. § 11.04. Wis. Stat. § 253.095(2); *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908 (Nov. 23, 2015). Wis. Stat. § 69.186.

<sup>115</sup> *Id.* §§ 940.15(5), 253.105(2)(b), challenged by *Planned Parenthood of Wisconsin et al. v. Kaul et al.*, 3:19-cv00038-wmc, 19-1835. Wis. Stat. § 20.927, 48.375, 632.8985.

<sup>116</sup> *Id.* § 940.04. *State v. Black*, 188 Wis. 2d 639, 526 N.W.2d 132 (1994).

Though Nebraska has repealed its pre-*Roe* ban on abortion and has not signed into a law a trigger law which will act to ban abortion after the *Dobbs* decision, the state's restrictive legislation is immensely similar to Wisconsin and the populace appears to be generally supportive of banning abortion. Nebraska's ban on D&E procedures in 2020 supplemented an earlier unconstitutional ban, which the state has never amended, on D&X abortions.<sup>117</sup> Moreover, Nebraska has prohibited abortion at twenty-weeks post-fertilization and at viability.<sup>118</sup> Minors must acquire the consent of a parent or judge to acquire an abortion and telemedicine is not legal within the state when dealing with abortion-care.<sup>119</sup> Pregnant people seeking abortion must undergo a twenty-four-hour waiting period prior to acquiring an abortion, biased counseling, and viewership of an ultrasound longer than an hour prior to the abortion procedure.<sup>120</sup> This state, with limited public funding and private health insurance for abortion on the client-side,<sup>121</sup> has several TRAP laws in effect. Nebraska will likely act to prohibit abortion outright if *Roe* is overturned, though such a ban would not go into effect until the Nebraskan legislature signs it into law. Alongside Nebraska, Indiana holds primarily the same laws which act to restrict access to abortion. Notable differences between the two are Indiana's reason ban and the fact that Indiana's D&X ban is currently in effect,<sup>122</sup> while Nebraska's D&E ban is in effect and the

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<sup>117</sup> Neb. Rev. Stat. §§ 28-326, 28-328, 38-2021, 28-101; *Stenberg v. Carhart*, 530 U.S. 914 (2000).

<sup>118</sup> Neb. Rev. Stat. § 28-3,106; *id.* § 28-329.

<sup>119</sup> *Id.* § 28-335. *Id.* § 71-6902. *Id.* §§ 71-6903 to 71-6905.

<sup>120</sup> *Id.* § 28-327.

<sup>121</sup> 471 Neb. Admin. Code § 10-005.09; 471. Neb. Admin. Code § 10-005.01. Neb. Rev. Stat. § 44-8403.

<sup>122</sup> Ind. Code Ann. §§ 16-34-2-1.1(a)(1)(K), 16-34-4-4, 16-34-4-5, 16-34-4-6, 16-34-4-7, 16-34-4-8; see *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019).

opposites are enjoined in the according states.<sup>123</sup> Past these distinctions, there is little difference in the state law against abortion between these two states; Indiana will likely act to ban abortion after *Roe* is overturned, though the relevant legislation has not yet been signed into law as trigger law or otherwise.

Converse to the rest of the states within the Midwest, the following states will generally continue to protect one's right to acquire an abortion after *Roe* is overturned: Iowa, Minnesota, Kansas, and Illinois. I say "generally" because several of these states may alter their current standing after *Roe* is overturned. While all four states' Supreme Courts have ruled in favor of protecting one's right to acquire an abortion, Iowa and Kansas both retain excessive restriction to one's access to abortion. Iowa prohibits abortion at six-weeks LMP, eighteen-weeks LMP, and in the third trimester, though all of these bans were permanently enjoined by an Iowa District Court.<sup>124</sup> The Iowan legislature, along with gubernatorial approvement, has signed into law several TRAP laws, COVID-19 related bans on restrictions on abortion as a "non-essential" procedure, and limitations to public funding for abortions.<sup>125</sup> Kansas has signed into law similar bans on abortion, from those on D&X and D&E abortions to those on abortions sought for reasons of sex selection, as compared to state which will likely ban abortion after *Roe* is

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<sup>123</sup> Ind. Code Ann. § 16-34-2-1. Id. § 16-18-2-96.4; see *Bernard v. Individual Members of Indiana Med. Licensing Bd.*, 392 F. Supp. 3d 935 (S.D. Ind. 2019).

<sup>124</sup> Iowa Code §§ 146C.2, 146B.2, 707.7. See *Planned Parenthood of the Heartland, Inc. v. Reynolds*, No. EQCE83074, 2019 WL 312072 at \*5 (Iowa Dist. Jan. 22, 2019).

<sup>125</sup> *Planned Parenthood of the Heartland v. Reynolds*, No. CVCV081717 (Iowa Dist. April 1, 2020), Gov. Kimberly K. Reynolds, Public Health Proclamation (May 6, 2020). Iowa Code § 146B.2(3); Iowa Admin. Code r. 641-100.5(144). Id. r. 441-78.1(249A).

overturned.<sup>126</sup> As lawmakers within Iowa are likely to do, the Congress of Kansas has passed legislation which will put up to a popular vote a constitutional amendment which would affirm that the Kansas Constitution has no protection for one's right to acquire an abortion, which will go to a vote in August 2022.<sup>127</sup> Minnesota still retains laws which require women seeking abortion to undergo a twenty-four-hour waiting period prior to acquiring an abortion, as well as biased counseling.<sup>128</sup> Though the state does retain a viability ban and retain limited TRAP laws, these restrictions are certainly not excessive and the highest court of Minnesota has been enjoining laws which act to restrict one's access to abortion since 1995.<sup>129</sup> Illinois has very few restrictive laws against abortion and, in 2019 placed into law a statutory protection for abortion as a fundamental right to women within the state.<sup>130</sup> Prior this decision, the Illinois legislature has signed into law a trigger ban in 2017 which would have prohibited abortion in the case that *Roe* were overturned.<sup>131</sup> The Illinois Supreme Court, however, has ruled in favor of the later law which will protect one's right to acquire an abortion;<sup>132</sup> thus, Illinois will certainly continue to protect one's right to acquire an abortion after *Roe* is overturned. The same is likely true of Minnesota; in the short term, we may expect this to be true of Kansas and Iowa though their respective legislatures will actively fight the protections provided by their state constitutions.

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<sup>126</sup> Kan. Stat. Ann. § 65-6723(f); *id.* § 65-6724(a); *id.* § 65-6703. *Id.* § 65-6721. *Id.* § 65-6472(b); *id.* § 65-6743; *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461 (Kan. 2019); *Hodes & Nauser, MDs, P.A. v. Schmidt*, 2015-CV-490 (Kan. D. Ct. Apr. 7, 2021).

<sup>127</sup> Value Them Both Amendment, H.C.R. 5003 (adopted Jan. 28, 2021).

<sup>128</sup> Minn. Stat. § 145.412 subd. 3, *held unconstitutional* in *Hodgson v. Lawson*, 542 F.2d 1350, 1358 (8th Cir. 1976) (per curiam). *Id.* §§ 145.4242, 145.4243.

<sup>129</sup> *Id. Id.* §§ 145.4131 subd. 2, 145.4132, 145.413; Minn. R. 4615.3600.

<sup>130</sup> 775 Ill. Comp. Stat. 55/1-15.

<sup>131</sup> 720 ILL. Comp. Stat. Ann. 510/1, repealed by Pub. Act 100-0538, 2017 Ill. Legis. Serv. P.A. 100-538 (codified in of Ill. Comp. Stat.)

<sup>132</sup> *Hope Clinic for Women, Ltd. v. Flores*, 991 N.E.2d 745, 760 (Ill. 2013).



### Section 3.5 – Access to Abortion in the South

A region with less room for bipartisan debate of value, the South, has become the stronghold for legislation which bans abortion outright in nearly all occasions. From Texas to Georgia, these states have all signed legislation which aims to ban abortion outright if *Roe* is overturned, though several of these states have acted outside of the realm of the protections central to *Roe v. Wade* since the date of the original judgment. In this section, Texas and Florida, though they have generally remained outside of the description of “the South,” will be analyzed as they are both geographically Southern and have both generally fought against legal abortion. Texas, having largely developed novel legislation aimed at restricting access to abortion, and Florida, having instituted a fifteen-week LMP ban this year while the highest Floridian court has found abortion to be constitutionally protected, certainly represent distinctive states within the region when considering this political issue.

Alongside Florida, Virginia is the only state which will not likely act to outright ban abortion. Though there lie no state-level statutory or constitutionally interpreted protection for abortion within Virginia; both states very well may, as popular support is likely strong enough within Florida to amend the state’s constitution and the Virginian legislature faces no boundary in its potential to ban abortion if *Roe* is overturned, act to ban abortion though they have not yet done so. Considering these two states, what we may be more certain of is the fact that abortion is, and will be, restricted soon.

Virginia, though the state’s legislative branch is currently the most Democrat-dominated it has been since 1996, currently prohibits most abortions after the second trimester of a pregnancy unless three physicians agree that the abortion is entirely medically necessary to save

the life or health of the recipient of the abortion.<sup>133</sup> Currently, D&X abortions are prohibited and public funding for abortion services is limited within the state.<sup>134</sup> There also lies a mandate, though judge approval supersedes this if it is acquired, for parental or guardian notification prior to a minor’s abortion; Virginia had several TRAP laws in effect prior to their being enjoined by the U.S. District Court for the Eastern District of Virginia in 2019, which cited *Casey* and *Roe* in their judgment.<sup>135</sup> In 2017, Virginia House of Representatives stated its express policy preference as one set on banning abortion outright and held the anniversary of *Roe* as a “Day of Tears.”<sup>136</sup> While all of this infers Virginia will likely ban abortion, the Virginia legislature has passed several pieces of legislation repealing many of the state’s restrictions on access to abortion, namely its TRAP provisions, and protection for abortion clinics.<sup>137</sup> This is, again, due to the current Democratic majority in the legislative branch of Virginia’s state government, though it is worth noting that it appears as though a slim majority of the voters within Virginia are supportive of this legislative action. If only a gap of a few years led to complete platform change of the Virginia state legislature, we can only be sure that this legislative effort exists for the near foreseeable future.

While Virginia’s Supreme Court has not interpreted the Virginian state constitution to protect one’s right to acquire an abortion, the Floridian Supreme Court has done so.<sup>138</sup> This

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<sup>133</sup> Va. Code Ann. §§ 18.2-71, 18.2-74.

<sup>134</sup> *Id.* §§ 32.1-92.1-92.2.

<sup>135</sup> *Falls Church Med. Ctr. v. Oliver*, 412 F. Supp. 3d 668 (E.D. Va. 2019).

<sup>136</sup> H.R. 268, 2017 Gen. Assemb., Reg. Sess. (Va. 2017).

<sup>137</sup> *Id.* S.B. 733, H.B. 980, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (codified as amended at Va. Code Ann. §§ 18.2-72, 18.2-76). S.B. 1276, H.B. 1896, 2021 Gen. Assemb., Spec. Sess. (Va. 2021) (to be codified as amended at Va. Code Ann. § 38.2-3451). *Id.* § 18.2-119; *see also Nat’l Org. for Women v. Operation Rescue*, 726 F. Supp. 1483, 1495–96 (E.D. Va. 1989), *rev’d in part sub nom. Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263 (1993).

<sup>138</sup> Fla. Const. art. I, § 23. *See Gainesville Woman Care v. State*, 210 So. 3d 1243, 1254 (Fla. 2017) (“Florida’s constitutional right of privacy encompasses a woman’s right to choose to end

protection, though partially based upon the “undue burden” test provided by *Casey*, is primarily derived from language within the Florida State Constitution, specifically its right to privacy clause.<sup>139</sup> Even still, the highest court of Florida has not utilized judicial review to enjoin most of the state legislature’s statutory abortion restrictive legislation. One instance of their highest court responding to the state legislature was their judgment regarding the legislature’s ban of the following procedures, as this ban clearly constituted undue burden: Dilation and evacuation (D&E), D&X, and labor induction procedures.<sup>140</sup> Restrictive laws which remain intact, however, are numerous. The state of Florida will prohibit abortion at fifteen-week-LMP<sup>141</sup> in July this year and viability currently, while many states which have attempted such bans have seen their laws enjoined.<sup>142</sup> Those who seek abortion within Florida must wait twenty-four-hours prior to acquiring an abortion, must acquire biased counseling, and must view an ultrasound.<sup>143</sup> Moreover, they may not acquire an abortion through health insurance,<sup>144</sup> they may not acquire an abortion via public funding,<sup>145</sup> and minors seeking abortion must, by supporting language in their state constitution, deal with mandatory parental notification (unless they acquire a judge’s approval to forgo this aspect)<sup>146</sup>; the clinics providing abortion are, also, quite restricted by

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her pregnancy.”); *N. Fla. Women’s Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 634-36 (Fla. 2003) (rejecting application of “undue burden” test, as established in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 874 (1992) in favor of strict scrutiny); *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989).

<sup>139</sup> *Id.*

<sup>140</sup> *See A Choice for Women v. Butterworth*, 54 F. Supp. 2d 1148, 1154-55 (S.D. Fla. 1998

<sup>141</sup> H.B. 5, 2022 Leg., Reg. Sess. (Fl. 2022), *to be codified at* Fla. Stat. § 390.0111.

<sup>142</sup> Fla. Stat. § 390.01112; *see also, id.* § 390.0111.

<sup>143</sup> Fla. Stat. § 390.0111(3)(a); *see Gainesville Woman Care v. Florida*, No. 2015 CA 001323, SC16-381, 1D15-3048 (Fla. Cir. Ct. Apr. 8, 2022.

<sup>144</sup> Fla. Stat. § 627.64995.

<sup>145</sup> Fla. Admin. Code r. § 59G-4.001; Florida Agency for Health Care Admin., Florida Medicaid Provider Reimbursement Handbook, CMS-1500, 3-53 (2008); *Renee B. v. Fla. Agency for Health Care Admin.*, 790 So. 2d 1036, 1038-40 (Fla. 2001).

<sup>146</sup> Fla. Const. art. X, § 22.

numerous TRAP laws, from admitting privileges to those who may provide abortion services in the various stages of pregnancy.<sup>147</sup> Abortion is quite restricted in Florida and, as the fifteen-week LMP ban was signed in this year, current lawmakers within the state are supportive of banning abortion to the fullest extent that they may. Republicans and pro-life Democrats represent a majority, nearly two-thirds in both their House and their Senate, in the state legislature and the majority voters of Florida support banning abortion. Either by ballot or legislature initiative and popular approval, Florida may go on to navigate around the protection of abortion provided by the Florida Supreme Court, though this may take time. For the foreseeable future, Florida and Virginia will remain the only states in the South to keep abortion legal, though heavily restricted.

As for the other states of the South, nearly total bans on abortion are on the books for when the protections of *Roe* are amended. Texas and Oklahoma, consistent with the abortion-restrictive law in Idaho, are nearly identical in their restrictive legislation against abortion, with fewer laws enjoined in Texas than Oklahoma. Both states prohibit abortion in nearly every case at six weeks LMP with enforcement via private right to action.<sup>148</sup> The S.B. 8 Texas law which I mentioned earlier in speaking of Idaho's private right to action (though it remains enjoined currently),<sup>149</sup> relies upon private citizens reporting those who acquire or provide abortions past

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<sup>147</sup> Fla. Admin. Code r. 59A-9.022-9.023. Fla. Stat. § 390.01112. Fla. Stat. § 390.0111(2); Fla. Admin. Code r. 59A-9.023. Fla. Stat. § 390.0111(10)-(11).

<sup>148</sup> S.B. 1503, 58th Leg., 2nd Reg. Sess. (Ok. 2022), *to be codified at* Okla. Stat. tit. 63, § 1-745.31. *Okla. Call for Reprod. Just. v. Cooper*, No. 120, 376 (Okla. May 3, 2022).  
Tex. Health & Safety Code §§ 171.204-12

<sup>149</sup> S.B. 1309, 66th Leg., 2nd Reg. Sess. (Id. 2022) *to be codified at* Idaho Code §§ 18-8804, 18-8807.

the given six-week LMP deadline, known commonly as Heartbeat abortion bans. Texas, also, has a ban on abortion at twenty-week post-fertilization, or twenty-two-weeks-LMP.<sup>150</sup>

Notably, the Supreme Court of the United States, in its judgment regarding *Whole Woman's Health v. Jackson* (2021), did not strike down the Texas S.B. 8 law, though it allowed the pre-enforcement challenge to Texas' Senate Bill 8 to proceed against certain defendants.<sup>151</sup> Notably, *U.S. v. Texas* (2021), a secondary case filed by the Biden administration and petitioners to maintain the injunction brought forth by a US District Court judge within Texas, was dismissed as the writ of certiorari was improvidently granted (Cohen, Adashi, and Gostin 2021, 1474). From these two cases, the essential takeaway is that petitioners of the law may not sue judges of the state's courts, nor clerks, as the state is protected from lawsuits under the Eleventh Amendment and these persons are not adverse litigants.<sup>152</sup> The Supreme Court's judgment regarding *Whole Woman's Health v. Jackson* is particularly vital in understanding how other states have been able to pass bans on abortion earlier than viability, undermining *Roe* and *Casey*; rather than striking down a bill which clearly undermines the rulings of the U.S. Supreme Court, the SCOTUS majority ignored this aspect of the bill as it was brought forth in both aforementioned cases. Chief Justice Roberts and Justice Sotomayor (seconded by Justices Breyer and Kagan) both wrote opinions commenting on the fact that S.B. 8 effectively nullifies the court's rulings and, as Sotomayor expanded upon this point, invites other states to follow in Texas' lead in undermining the rulings of the Supreme Court.<sup>153</sup> Thus, *Whole Woman's Health v.*

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<sup>150</sup> Tex. Health & Safety Code §§ 171.044; *id.* § 170.002(a).

<sup>151</sup> 595 US (2021).

<sup>152</sup> *Id.*

<sup>153</sup> 595 US \_ (2021)..

*Jackson* may represent, partially anyway, the beginning of the end to *Roe* (Cohen, Adashi, and Gostin 2021).

Past Texas and Oklahoma, a few other states in the south have passed six-week-LMP abortion bans, though none of these bans are active until *Dobbs v. Jackson Women’s Health* is concluded, as enjoined by their courts. Louisiana,<sup>154</sup> Georgia,<sup>155</sup> South Carolina,<sup>156</sup> Tennessee,<sup>157</sup> Mississippi,<sup>158</sup> and Kentucky have all passed bans at six-weeks.<sup>159</sup> All six of these states differ slightly in the status of their courts on the matter and on the specific restrictive statutes they have signed into law. Some states, though, have gone a bit further in their efforts to restrict access to abortion; Louisiana,<sup>160</sup> Arkansas,<sup>161</sup> Alabama,<sup>162</sup> and Oklahoma<sup>163</sup> have all signed into law bans abortion outright, though enjoined currently. Nearly each one of these states, as well as North Carolina with a ban on abortions after twenty-weeks LMP,<sup>164</sup> ban abortion for several other reasons and maintain bans at varying ranges in law. Overall, the ten states that I mentioned

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<sup>154</sup> S.B. 184, 45th Gen. Assemb., Reg. Session (La. 2019); LA. STAT. ANN. § 14:87.

<sup>155</sup> GA. Code Ann. § 16-12-141(b); *SisterSong Women of Color Reproductive Justice Collective v. Kemp*, No. 1:19-CV-02973-SCJ, 2020 WL 3958227 (N.D. Ga. July 13, 2020).

<sup>156</sup> The South Carolina Fetal Heartbeat and Protection from Abortion Act, S.1, R-2, Act. No 1 of 2021 (“S. 1” or “the Act”), § 3 (adding S.C. CODE ANN. §§ 44-41-610 et seq.); *Planned Parenthood S. Atl. v. Wilson*, 527 F.Supp.3d 801 (D.S.C. Mar. 19, 2021), (granting preliminary injunction), appeal docketed, No. 21-1369 (4th Cir. Apr. 5, 2021), (stayed pending resolution of *Dobbs v. Jackson Women’s Health Org.* 141 S. Ct. 2619).

<sup>157</sup> Tenn. Code Ann. § 39-15-216; *id.* § 39-15-212; *id.* § 39-15-211(b)(1)– (2).

<sup>158</sup> Miss. Code Ann. §§ 41-41-34.1, 41-41-191, 41-41-137.

<sup>159</sup> KY. Rev. Stat. § 311.7705; 2022 Leg., Reg. Sess. (Ky. 2022), *amending* KY. Rev. Stat. §§ 311.781-783; KY. Rev. Stat. § 311.780.

<sup>160</sup> *Connick v. Sojourner T.*, 507 U.S. 972, 113 S. Ct. 1414, 122 L. Ed. 2d 785 (1993).

<sup>161</sup> Ark. Code Ann. § 5-61-404. *Little Rock Fam. Plan. Servs. v. Jegley*, No. 4:21-CV-00453-KGB, 2021 WL 3073849 (E.D. Ark. July 20, 2021).

<sup>162</sup> ALA. Code § 26-23H-4.

<sup>163</sup> Okla. Stat. tit. 59, §§ 509, 637.

<sup>164</sup> N.C. Gen. Stat. § 14-45.1(a), invalidated by *Bryant v. Woodall*, 363 F. Supp. 3d 611 (M.D.N.C. 2019), *aff’d*, 1 F.4th 280, 2021 WL 2446942 (4th Cir. June 23, 2021).

within this paragraph are quite similar in legislation against abortion. Most of these laws, due to the fact that S.B 8 was not struck down by the Supreme Court of the United States in *Whole Woman's Health v. Jackson* (amongst other previously mentioned challenges to *Roe* after 2003), were signed into law in the past five years. Most of these states employ vast TRAP laws, laws restricting telemedicine, laws which police the process by which women acquire abortions and bans on various procedures by which abortions are performed. Most pressing is the fact that these ten states will almost certainly act to ban abortion outright after *Roe* is repealed, via pre-*Roe* bans on abortion, trigger laws, and by future legislation not yet signed into law by legislators. Citizens of these states who desire to acquire abortions will need to travel to states which will provide legal abortions or risk their health in acquiring illegal abortions nearby. Primarily, the lowest economic class of women within this region, as well as in any state which will act to prohibit abortion post-*Roe*, will experience the brunt of the effects of *Dobbs v. Whole Woman's Health Organization*.

### Section 3.6 – Access to Abortion in the Northeast

To the northeast, we may look upon the Mid-Atlantic and New England regions which, except for one state which was the first to put forth legislation banning abortion and the state which was the last to sign in such legislation, have aligned nearly universally in their actions to protect legal abortion without federally mandated protection. Pennsylvania and New Hampshire, the members of this region which make it “nearly universal,” do not currently have legislation in place which will act to ban abortion though, as both states have enacted several laws restricting access to abortion in recent years, will likely restrict access to abortion further. In the case of Pennsylvania, a ban to abortion outright may occur, as much of the Pennsylvanian legislature is currently supportive of this action. If Governor Tom Wolf is replaced with a governor less

supportive of legal abortion we can expect anti-abortion legislation to prevail (Gallagher 2018). Otherwise, per the language of several Pennsylvania constitutional statutes as put forth by the Pennsylvanian state legislature less than a decade after *Roe v. Wade*, it is the express legislative agenda within the state of Pennsylvania to protect the “health of the child subject to abortion” as well as the “health of the woman subject to abortion” to the highest extent of the law.<sup>165</sup> This mission, though stated decades ago, remains evident through abortion-related restrictive legislation in Pennsylvania; notable examples include: A twenty-four week LMP ban on abortion,<sup>166</sup> a ban on abortions for the reason of sex,<sup>167</sup> a mandatory day waiting period prior after inquiry of abortion,<sup>168</sup> a mandate for prospective recipients of abortion to undergo counseling prior to acquiring an abortion,<sup>169</sup> a limit on public funding and insurance coverage for abortion,<sup>170</sup> a mandate which requires consent from a parental entity for a minor to acquire an abortion, and various TRAP laws.<sup>171</sup>

As for the other state which will act against meaningful access to abortion after *Roe* is overturned, New Hampshire has quite similar legislation to Pennsylvania, though not to the degree of Pennsylvania. Primarily through House Bills and alterations to their revenue statues, the New Hampshire’s current legislative population has signed into law several pieces of legislation restrictive to access to abortion. This wave of legislation appears to have gained

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<sup>165</sup> 18 Pa. C.S. § 3202 1982.

<sup>166</sup> 18 Pa. Cons. Stat. § 3211(a); *id.* § 3203.

<sup>167</sup> *Id.* § 3204(c).

<sup>168</sup> 28 PA. Code § 29.37 (b); 18 PA. Cons. Stat. § 3205 (a) (1)-(2).

<sup>169</sup> *Id.*

<sup>170</sup> 18 PA. Cons. Stat. § 3215(c, e).

<sup>171</sup> 18 PA. Cons. Stat. § 3206 (a). *Id.* 3214 (a) (1). 35 Pa. Cons. Stat. § 448.806 (h); 28 PA. Code § 29.43 (a).



traction after the elections of 2020, when the population shifted drastically from a state congress dominated by pro-choice Democrats to pro-life Republicans and continued to this day. The state prohibits abortions at and after twenty-four weeks LMP,<sup>172</sup> prohibits D&X abortions,<sup>173</sup> and requires that illegal D&X procedures, or abortions after twenty-four weeks LMP, are reported to the state.<sup>174</sup> New Hampshire limits public funding,<sup>175</sup> requires that the parents of minors acquiring abortions are notified unless the minor has acquired judge approval to forgo this notification and restricts those who are permitted to provide abortions and relevant aftercare.<sup>176</sup> All of this anti-abortion legislation notwithstanding, voters passed into effect an amendment which expressly states one's right to privacy within the state in 2018,<sup>177</sup> though the state's Supreme Court has not rendered an opinion as to if this amendment protects one's right to acquire an abortion, this was the intention behind voters and legislators like in passing this amendment to the Constitution of New Hampshire. Thus, it is unclear as to how the issue of abortion will develop in the following months. While Pennsylvania will likely ban abortion after *Roe* is overturned by the *Dobbs* decision, abortion will remain legal, though not directly legally protected, within the state of New Hampshire.

Past New Hampshire and Pennsylvania, each other state of the region, as well as Washington D.C., will act to protect access to abortion post *Roe*. Though only a few of these

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<sup>172</sup> H.B. 2, 2021 Reg. Sess. §§ 38-39 (N.H. 2021) (eff. Jan. 1, 2022).

<sup>173</sup> N.H. Rev. Stat. § 329:34.

<sup>174</sup> *Id.* § 329:35; H.B. 2, 2021 Reg. Sess. § 39 (N.H. 2021) (eff. Jan. 1, 2022).

<sup>175</sup> NH Dept. of Health and Human Servs., Office of Medicaid & Business Policy, *Medicaid State Plan Attachment 3.1-A: Amount, Duration and Scope of Medical and Remedial Care and Services Provided to the Categorically Needy* 6 (April 25, 2019); *id.* *Medicaid State Plan Attachment 3.1-B: Amount, Duration and Scope of Services Provided Medically Needy Groups* 7 (April 25, 2019).

<sup>176</sup> N.H. Rev. Stat. § 132:33-34. N.H. Code Admin. R. Ann. He-W 538.05.

<sup>177</sup> N.H. Cons. Pt. 1, Art. 2-b (effective December 5, 2018).

states' Supreme Courts, Massachusetts and New Jersey, have found that one's right to acquire an abortion is protected per language present in their state constitutions, northeastern states have primarily acted to protect legal abortion via statutory law. The significance of this discrepancy, while not vital in the short term, is that these laws would be far less difficult to repeal by future sessions of state legislatures, than say constitutional interpretations provided by state supreme courts or constitutional amendments initiated or confirmed by popular vote. Moreover, this is simply an aspect which researchers of the subject must consider in gauging how substantial a state's access to abortion will be without the current framework of *Roe*.

On this same note, a few of the northeastern states which will act to protect access to abortion post *Roe* are distinctive as compared to the others. Maryland, Delaware, Massachusetts, Rhode Island, and Maine will retain greater abortion-restrictive legislation as compared to New York, New Jersey, Connecticut and Vermont. Maryland, for example, will still require parental notification of a minor's abortion, unless their physician waives this notice upon their request, and various TRAP laws.<sup>178</sup> As extended by a Maryland House Bill in 2022, the state does protect abortion via both express statutory protection of one's right to acquire an abortion and by requiring funding for abortion.<sup>179</sup> This funding will continue to be implemented after *Roe* via state mandated public funding programs and requirement of private insurers to cover abortions, as well as the relevant aftercare should they cover childbirth.<sup>180</sup> In the face of protestors outside of abortion clinics, Maryland has signed into law protections for the safety of abortion clinics from outside interference with special attention paid to the safety of the entrances of these

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<sup>178</sup> MD. Code., Health-Gen. § 20-103(a). *Id.* § 20-103(c)(1). MD. Code, Health-Gen. § 20-209; MD. Code Regs. 10.12.01.01-20.

<sup>179</sup> MD. Code, Health-Gen. § 20-209. H.B. 937, 444th Leg., Reg. Sess. (Ma. 2022).

<sup>180</sup> *Id.*

clinics.<sup>181</sup> Delaware will continue to prohibit abortion at and after viability,<sup>182</sup> restrict public funding for abortion procedures and aftercare,<sup>183</sup> and generally require parental notification of a minor's abortion.<sup>184</sup> All abortions must be reported to the state by abortion providers within Delaware as well.<sup>185</sup> With those restrictions noted, Delaware has signed into law statutory protection for one's right to acquire an abortion within the state and, quite recently, repealed the remainder of its pre-*Roe* bans on abortions.<sup>186</sup>

Massachusetts will continue to hold this same reporting requirement and prohibit abortion at or past twenty-four weeks LMP, except where the health of the mother or fetus are at risk in the case of pregnancy.<sup>187</sup> In most cases, Massachusetts will continue to require that a parental figure of some sort consenting to a minor's abortion, if the minor is under the age of sixteen.<sup>188</sup> Conversely, Massachusetts protects one's right to acquire an abortion both via state law and constitutional interpretation of the state's constitution. This constitutional protection was based in due process protections within the state's constitution in a Massachusetts case involving a class action lawsuit launched in part by the American Civil Liberties Union (ACLU) in 1981.<sup>189</sup> What is rather intriguing about this timeline is the fact that the state law and the state's

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<sup>181</sup> MD. Code, Crim. Law § 10-204.

<sup>182</sup> Delaware Code Ann. tit. 24, § 1790 (b).

<sup>183</sup> 16 Delaware Admin. Code §§ 1.15, 1.2, 2.2.

<sup>184</sup> Delaware Code Ann. tit. 24, § 1783 (1).

<sup>185</sup> *Id.* 16, § 3133.

<sup>186</sup> Del. Code Ann. § 1790. *Id.* tit. 24 §§ 1793, 1794 *repealed by* 81 Del. Laws ch.35, § 4 (2017); 24 DEL. CODE ANN. § 1790 *amended by* 81 Del. Laws ch.35, § 4 (2017); Del. Code Ann. tit. 11, §§ 651, 652, 653, 654 *repealed by* 83 Del. Laws ch. 200, § 1 (2021).

<sup>187</sup> Mass. Gen. Laws Ch. 112, § 12M. *Id.* § 12Q. *Id.* § 12N.

<sup>188</sup> *Id.* § 12R.

<sup>189</sup> *Moe v. Sec'y of Admin. & Fin.*, 382 Mass. 629, 645-648, 417 N.E.2d 387, 397-99 (Mass. 1981); *Planned Parenthood League of Mass. v. Attorney General*, 677 N.E.2d 101, 103-04, 107-08 (Mass. 1997).

repeal to its pre-*Roe* ban on abortion occurred much later in 2017 and 2018 respectively.<sup>190</sup>

Recently, Massachusetts has passed further legislation protecting one's right to acquire an abortion within the state; the state has recently passed legislation to expressly loosen restrictions on who may provide abortions and new benchmarks for public funding for abortion, as well as the relevant aftercare.<sup>191</sup> Similar to Maryland, Massachusetts has passed a law which protects abortion clinics from criminal acts, as well as those who interact with these clinics.<sup>192</sup> Rhode Island holds a similar parental consent law to Massachusetts and prohibits abortion past viability.<sup>193</sup> TRAP laws involving reporting requirements are, also, present within this state.<sup>194</sup> Prior to 2019, Rhode Island lacked legislation protecting one's right to acquire an abortion. As the state passed new statutory protections for legal and protected access to abortion in 2019, Rhode Island repealed several of its unconstitutional bans on abortion and the procedures involved.<sup>195</sup> Prior limitations to private insurance coverage of care related to abortion were repealed due to this new legislative agenda, as well.<sup>196</sup>

Furthermore, Maine will continue to prohibit abortion after viability and will generally require parental consent for a minor's abortion, though the minor's physician may waive this

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<sup>190</sup> Mass. Gen. Laws ch. 112, § 12L. Mass. Gen. Laws ch. 272, § 19, repealed by S.B. 2260, 190th Gen. Assemb., Reg. Sess. (Ma 2018).

<sup>191</sup> Mass. Gen. Laws ch. 112, § 12M. Moe, 382 Mass. at 629.

<sup>192</sup> Mass. Gen. Laws ch. 266, §§ 120E, 120E 1/2.

<sup>193</sup> 23 R.I. Gen. Laws § 23-4.7-6. *Id.* § 23-4.13-2(d).

<sup>194</sup> *Id.* § 23-3-17.

<sup>195</sup> 23 R.I. Gen. Laws § 23-4.13-2(a) (repealed R.I. Gen. Laws § 11-3 et seq.).

11 R.I. Gen. Laws § 11-23-5, repealed by 2019 R.I. Pub. Laws, ch. 27, § 4. 23 R.I. Gen. Laws §§ 23-4.12-1—23-4.12-6, *repealed by* 2019 R.I. Pub. Laws, ch. 27, § 6; *Rhode Island Med. Soc'y v. Whitehouse*, 239 F.3d 104, 106 (1st Cir. 2001).

<sup>196</sup> 27 R.I. Gen. Laws § 27-18-28, repealed by 2019 R.I. Pub. Laws, ch. 27, §7; *Nat'l Educ. Ass'n of R.I. v. Garrahy*, 598 F. Supp. 1374, 1384 (D.R.I. 1984), *aff'd*, 779 F.2d 790 (1st Cir. 1986).

aspect on an as needed basis.<sup>197</sup> Providers must, however, report abortions to the state.<sup>198</sup> While these restrictions will remain in effect after *Roe* is overturned, the state has, via statutory law, signed into law protections for abortion since 1993 with revisions to its revenue statutes on the matter.<sup>199</sup> Since 2019, access to abortion has been expanded within the state via new public funding for abortion and requirements on private insurers to provide coverage for abortion, in cases wherein the plan covers maternity care.<sup>200</sup> As of 2022, though a similar was recently before, the state passed a law which created medical safety zones around clinics, as to protect persons acquiring and providing abortions from criminal acts meant to deter them from these centers.<sup>201</sup> The District of Columbia is worth noting here, though currently limits within D.C. are pitted on public funding and who may provide surgical abortions, as it is subject to plenary congressional power.<sup>202</sup> Thus, if the U.S. Congress, though legislation to the opposite effect is far more likely given the current political leanings of the Congress, decides to restrict abortion or prohibit abortion with D.C., then its citizens will have little recourse. Even still, D.C. has passed legislation, beginning in 2020, which expressly recognizes one's right to acquire an abortion and one's right to self-manage abortions, amending the Human Rights Act of 1977 (which allowed persecution of those who acquire abortion so long as it was in effect).<sup>203</sup>

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<sup>197</sup> ME. Rev. Stat. Ann. tit. 22, § 1598. *Id.* §§ 1597-A (2), 1597-A(1)(C), 1597-A(2)(B), 1597-A (6).

<sup>198</sup> *Id.* § 1596(2).

<sup>199</sup> *Id.* § 1598(1).

<sup>200</sup> *Id.* § 3196; ME. Rev. Stat. tit. 24-A, § 4320-M.

<sup>201</sup> ME. Rev. Stat. Ann. tit. 5, § 4684-B. L.D. 1899, 130th Leg., 2nd Reg. Sess. (Ma. 2022), to be codified: Me. Rev. Stat. Ann. tit. 5, § 4684-B.

<sup>202</sup> Pub. L. 111-117 § 814 (2009); Pub. L. 112-10 § 1572 (2011). D.C. Mun. Regs. tit. 17 § 5808.5.

<sup>203</sup> D.C. Code § 2-1401.06.

Last but not least are the states of the northeast which will act to expand access to abortion after *Roe* is overturned: New Jersey, New York, Connecticut, and Vermont. While two abortion-restrictive laws remain present in New Jersey (a prohibition on D&X abortions and a parental notification requirement), these two laws were deemed unconstitutional by the New Jersey Supreme Court, under an equal protection clause present in the New Jersey Constitution.<sup>204</sup> Thus, these two laws are not in effect within New Jersey. While the highest court of the state has contended that the right to privacy evident in the state's constitution merits a woman's fundamental right to control her own body since 1982, New Jersey enacted a statutory protection this same effect in 2022.<sup>205</sup> Moreover, the state provides, as it will continue post *Roe*, public funding for abortion care and for advance practice clinicians (APCs) to provide care related to abortion up to fourteen-weeks LMP.<sup>206</sup>

Though New York and Vermont lack constitutional protections for abortion, both states signed into effect statutory protections for a woman's right to choose to obtain an abortion, amongst other reproductive rights, in 2019.<sup>207</sup> While New York prohibits abortion after twenty-four weeks post-fertilization (twenty-two weeks LMP) unless said pregnancy is not viable or proves a health risk to the mother,<sup>208</sup> Vermont requires abortion providers to report to the state.<sup>209</sup> New York, as the first state to have legalized abortion three years prior to *Roe*, provides

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<sup>204</sup> N.J. Stat. Ann. § 2A:65A-6. *Planned Parenthood v. Farmer*, 220 F.3d 127 (3d Cir. 2000). N.J. Stat. Ann. §§ 9:17A-1.1 to 9:17A-1.12. 165 N.J. 609, 641-42, 762 A.2d 620, 638-39 (N.J. 2000).

<sup>205</sup> S.B. 49, 2022 Leg., 279th Sess. (N.J. 2022). *Right to Choose v. Byrne*, 91 N.J. 287, 306, 301, 450 A.2d 925, 934-37 (1982).

<sup>206</sup> N.J. Admin. Code § 13:35-4A.19. 53 N.J.R. 2013(a) (Dec. 6, 2021). N.J. Stat. Ann. § 30:4D-6.1, *invalidated by Byrne*, 91 N.J. at 308.

<sup>207</sup> N.Y. Pub. Health Law §§ 2599-aa to 2599-bb. VT. Stat. Ann. tit. 18, § 9493 et seq.

<sup>208</sup> N.Y. Pub. Health Law §§ 2599-aa to 2599-bb.

<sup>209</sup> VT. Stat. Ann. tit. 18, § 5222.

public funding for abortion and requires that private insurers cover abortion care.<sup>210</sup> Both Vermont and Connecticut provide funding for medically necessary abortions,<sup>211</sup> and do not greatly restrict who may provide abortion care.<sup>212</sup> While New York does restrict who may provide abortion care to a lesser degree as even APCs are allowed to provide abortion care,<sup>213</sup> New York and Connecticut act to protect abortion clinics from criminal acts.<sup>214</sup> It is worth noting that Connecticut prohibits abortion post-viability, as well as during the third trimester generally, and retains few TRAP laws relating to reporting and the way in which abortion clinics operate.<sup>215</sup> It does appear as though, given Connecticut's recent trend in legislation supportive of greater access to abortion, these laws represent how Connecticut will treat abortion in the near future. In fact, all four of the presently described states will certainly act to bolster greater access to abortion post *Roe*.

### Section 3.7 – Access to Abortion in the Outliers

The outliers, from Alaska to Puerto Rico, have remained mixed in their decisions regarding protection to one's right to acquire an abortion, as they all respond to quite distinctive geopolitical issues. Alaska, through interpretation of the highest Alaskan court via language within the Alaskan constitution,<sup>216</sup> and Hawaii, through state legislation dating back to 1970

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<sup>210</sup> Dep't of Health, Medicaid Family Planning Services; N.Y. Ins. Law § 3217-c; N.Y. Comp. Codes R. & Regs. tit. 11, § 52.16 (c) and (o); A.B. 9007, 2022 Leg., Reg. Sess. (Ny. 2022), *amending* N.Y. Ins. Law §§ 3216, 3221, 4303.

<sup>211</sup> *Doe v. Celani*, No. S81-84CnC at 5 (Vt. Super. Ct. May 23, 1986). *Doe v. Maher*, 40 Conn. Supp. 394, 515 A.2d 134 (Conn. Super. Ct. 1986); Conn. Op. Att'y Gen. No. 1998-022 (Nov. 16, 1998).

<sup>212</sup> S.H.B. 5414, 2022 Leg., Reg. Sess. (Co. 2022), *amending* Conn. Gen. Stat. Ann. § 19a-602.

<sup>213</sup> N.Y. Pub. Health Law § 2599-bb; N.Y. Educ. Law § 6500 et seq.

<sup>214</sup> N.Y. Penal Law § 240.70 (1)(a) – (b), (d). S.H.B. 5414, 2022 Leg., Reg. Sess. (Co. 2022).

<sup>215</sup> Conn. Gen. Stat. Ann. § 19a-602(b); Conn. Agencies Regs. § 19-13-D54(h). Conn. Agencies Regs. § 19-13-D54(c)-(d); *id.* § 19a-116-1. *Id.* § 19-13-D54(b).

<sup>216</sup> *Planned Parenthood of The Great Nw.*, 375 P.3d at 1129 (Alaska 2016).

which has acted to bolster protection of access to abortion within the state, are likely to maintain legal abortion with some restrictive law surrounding access to abortion.<sup>217</sup> Governor Dunleavy and the legislature of Alaska have attempted to restrict access to abortion in recent years, from voting to prohibit D&E abortions (permanently enjoined) to an executive order aimed at banning abortions, and relevant aftercare as “non-essential or elective” procedures unnecessary to be provided during the COVID-19 pandemic.<sup>218</sup> As with many states which have signed in statutory protection or constitutionally interpreted protections for abortion, the Alaskan legislature, over the last decade, has focused in expanding upon targeted restrictions on abortion providers (TRAP laws).<sup>219</sup> The Alaska Supreme Court, through striking down reporting requirements for minors and a law which required parental involvement in the abortion process, may reasonably be expected to continue to act in support of protection of access to abortion while new legislation is proposed and enacted in Alaska which acts to restrict abortion.<sup>220</sup> Naturally, Dunleavy met plenty of scrutiny and rolled back this executive order only a week later. As the Alaskan Supreme Court and greater Alaskan population are supportive of legal abortion, we may be relatively certain that abortion will remain legal after *Roe* is overturned.

As previously mentioned, Hawaii legalized abortion prior to *Roe* and has since acted to greater bolster access to abortion for women within the state. Though the state has placed into

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<sup>217</sup> 1970 Haw. Sess. Laws, ch. 1, § 2. Haw. Rev. Stat. § 453-16 (Supp. 1971).

<sup>218</sup> Gov. Mike Dunleavy, Amended Health Mandate 5.1 (Apr. 7, 2020), Amended COVID-19 Health Mandate; Gov. Mike Dunleavy, COVID-19 Health Mandate 005, Attachment C (April 7, 2020), Non-Urgent or Elective Procedures and Surgeries. See Joint Statement on Abortion Access During the COVID-19 Outbreak, *Am. Coll. Obstetrics & Gynecology* (Mar. 18, 2020);

<sup>219</sup> Alaska Stat. § 18.16.010(a)(2); Alaska Admin. Code tit. 7, § 12.370. Alaska Stat. § 18.50.245(b).

<sup>220</sup> *Planned Parenthood of The Great Nw.*, 375 P.3d at 1145 (striking down as unconstitutional Alaska Stat. § 18.16.040).



law the viability standard and limits those who may provide abortions to those medically trained,<sup>221</sup> Hawaii has statutory protection in place for one's right to acquire an abortion and provides public funding for abortion-related services.<sup>222</sup> The state's constitution, though it has not been extended by judgments of the state's Supreme Court, contains a right to privacy clause which may be used to greater protect one's fundamental right to acquire an abortion.<sup>223</sup> Hawaii will certainly continue to protect one's access to abortion after *Roe* is overturned, and will likely act to expand this access.

Past the outlier states, not of the American territories will act to legalize abortion nor protect access to abortion for their local populations. Puerto Rico and the Virgin Islands, however, currently hold no legislation which will outright ban abortion, though both heavily restrict when a woman may procure an abortion. Puerto currently prohibits abortion unless the procedure would prove positively "therapeutic" or protect the life of the pregnant person and retains a law which requires abortion providers to report their services to the government.<sup>224</sup> APCs, and other providers of abortion with less medical training, are not permitted to provide abortions within the territory and the Puerto Rican governor recently signed into effect a civil code which names fetuses as people, thereby requiring their treatment of fetuses to favorable to the fetus at hand.<sup>225</sup> Though this strange law remains in effect, the Puerto Rican Constitution contains an explicit right to privacy clause which may come to protect access to abortion if the

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<sup>221</sup> Haw. Rev. Stat. § 453-16 (b). *Id.* § 453-16 (a)(1); H.B. 576, 31st Leg., 1st Reg. Sess. (Haw. 2021).

<sup>222</sup> Haw. Rev. Stat. § 453-16 (c). State of Hawaii. Medicaid Provider Manual, ch. 6 (Oct. 2002, revised Jan. 2011).

<sup>223</sup> Haw. Con. art. I, § 6.

<sup>224</sup> 33 L.P.R.A. § 4739; *id.* §§ 5147-5149. 24 L.P.R.A. § 232.

<sup>225</sup> 33 L.P.R.A. § 4739. Sustitutivo de la Cámara al P. de la C. 1654 (2020).

state's Supreme Court provides a judgment to that effect.<sup>226</sup> Thus, as no outright ban is in effect, or set go into effect after *Dobbs*, and there is no protection present for one's right to acquire an abortion without *Roe* within the territory, it is rather unclear how the law will progress, though the current trend of government within the territory is moving toward banning abortion. Notably, this territory repealed its pre-*Roe* ban in 201, while the only protection that the territory has signed into effect protects woman's ability to acquire family leave after an abortion.<sup>227</sup>

Perhaps more confusing is the legal status of the United States Virgin Islands (USVI), as this territory does not have a constitution despite several constitutional conventions having occurred within the territory.<sup>228</sup> Thus, this territory is largely governed by the Organic Act of 1964,<sup>229</sup> as expanded upon by the Mink Amendment of 1968,<sup>230</sup> which provides the Congress plenary power over governing the territory. The Virgin Islands have come to, many of the restrictive legislation enacted within the territory has been placed into effect in the past few years, generally prohibit abortion at twenty-four weeks "post-commencement" and only allow abortions to be performed within hospitals from weeks twelve through to twenty-four in this framework.<sup>231</sup> Furthermore, the territory holds restrictions on who may provide abortions and maintains a parental notification law, which does not hold similar exceptions to parental notification laws in several states which I have described previously.<sup>232</sup> As with Puerto Rico, it is

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<sup>226</sup> *Figueroa Ferrer v. Commonwealth*, 107 D.P.R. 250 (1978).

<sup>227</sup> 21 L.P.R.A. § 4567 (f).

<sup>228</sup> 48 U.S.C. § 1541 *et seq.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* § 1561.

<sup>231</sup> 14 V.I.C. §§ 151, 152. *Id.* § 151 (b)(2).

<sup>232</sup> *Id.* § 151(b). 19 V.I.C. §§ 291 (a), 292 (c).

already quite difficult for women within the territory to acquire abortions and this difficulty will likely increase after *Roe* is overturned.

Past these two territories, the remaining American territories will likely outright ban abortion in most cases. Guam, which is governed similarly to the USVI by the U.S. Congress via the Organic Act, currently generally prohibits abortion at thirteen-weeks LMP and prohibits D&X procedures.<sup>233</sup> Similar to many states of the south and Midwest regions of the United States, Guam has many TRAP restrictions in effect and restrictions as to public funding.<sup>234</sup> Women seeking abortion must go through a twenty-four-hour waiting period,<sup>235</sup> biased counseling,<sup>236</sup> and must acquire either parental or judicial consent to acquire an abortion, if the woman at hand is a minor.<sup>237</sup> The woman at hand must, often, spend hours waiting to acquire an abortion, after all other restrictions have been traversed, at the singular abortion clinic on the island which is allowed to operate within the scope of the TRAP laws within the territory.<sup>238</sup> Though the Congress established for Guam a personalized Bill of Rights, modeled on the Bill of Rights, Guam will certainly not retain language protecting one's fundamental right to acquire an abortion via constitutional interpretation, or otherwise, after *Roe* is overturned.<sup>239</sup> Rather, a

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<sup>233</sup> Guam Code Ann. tit. 9 § 31.21 (b)(3)(A). *Id.* § 31.20(b)(3)(B)-(C). Guam Code Ann. tit. 10 § 91A104.

<sup>234</sup> Kaiser Fam. Found, *Medicaid in the Territories: Program Features, Challenges, and Changes 2* (Jan. 2019); Guam Code Ann. tit. 10 § 2913(a). Guam Code Ann. tit. 10 §§ 3217, 3218; Guam Code Ann. tit. 19 § 4A106.

<sup>235</sup> Guam Code Ann. tit. 10 § 3218.1; Guam Dep't of Public Health and Social Services, *Enforcement of "The Women's Reproductive Health Information Act" Will Commence on June 2, 2014* (Apr. 1, 2014).

<sup>236</sup> *Id.*

<sup>237</sup> Guam Code Ann. tit. 19 § 4A102. *Id.* §§ 4A104, 4A107.

<sup>238</sup> *Id.* 10 § 3218.1 (g)(3); Guam Code Ann. tit. 9 § 31.21; *id.* § 91.05(a).

<sup>239</sup> 48 U.S.C. § 1421b.

majority of the restrictive laws aforementioned were placed into effect in the last five years, meaning the trend is not towards legal abortion.

Further on this trend, it appears to be present in the following two territories as well. American Samoa, though it is generally governed by the Secretary of the Interior and its citizens are U.S. nationals, has already generally banned abortion pre-*Dobbs*.<sup>240</sup> Prior to American Samoa's use of the COVID-19 pandemic to effectively ban abortion, the territory had generally banned abortion, with only few exceptions generally related to the health of the mother.<sup>241</sup> Notably, American Samoa, along with the Northern Mariana Islands, does not have an abortion clinic present in its territory.<sup>242</sup> In the case of the Northern Mariana Islands, the territory's constitution specifically names abortion as illegal unless provided by law and the territory only holds relationship to the United States via the 1976 Covenant between the two.<sup>243</sup> Though, in 1995, the Attorney General of the CNMI stated that the territory would provide legal access to abortion just as fifty states had done, the CNMI certainly does not protect this access today.<sup>244</sup> Thus, it is not far-fetched to say that American Samoa, as previously described, and the Northern Mariana Islands will act to ban abortion after *Roe*, just as they had prior.

## Conclusion:

Through the course of thesis, I have established a timeline of how the laws and sentiments surrounding one's right to acquire an abortion from the mid-late 19<sup>th</sup> century to now. In Chapter One, I focused on how abortion became illegal throughout each state of the United

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<sup>240</sup> Gov. David Ige, Order for Self-Quarantine (March 21, 2020).

<sup>241</sup> Am. Samoa Code Ann. § 46.3901 et seq. *Id.* § 46.3902.

<sup>242</sup> *Id.* §§ 46.3902 (c), 46.3905, 46.3906.

<sup>243</sup> N. Mar. I. Const. Art. I, § 12. Covenant §§ 103, 105.

<sup>244</sup> Att'y Gen. Op., Commonwealth Register Vol. 17, No. 3 at 13,082 (March 15, 1995).

States as well as how illegal abortions became commonplace nationally, as well as the clear issues this legislative agenda brought to the women of the United States. In this section, through analysis of the formation of coalitions for legal abortion and legislative action intended to roll back laws against abortion, I highlighted the fundamentals of the Pro-Choice movement, and the reason *Roe v. Wade* came when it did. In the following chapter, I explored precisely how, and to what extent, *Roe v. Wade*, and following Supreme Court judgments like *Planned Parenthood of Southeastern Pennsylvania v. Casey*, protected one's constitutional right to acquire an abortion within the United States, as well as how the vague language of these decisions allowed for ever-developing legislation intended to restrict access to abortion at the state level. It was in this period that the Pro-Life movement sought to undermine the protections provided in *Roe v. Wade*. Though these attempts appeared limited at first, in the last two decades, as outlined in Chapter Three, there have been monumental changes in the legislative direction of many states within the Union, namely in the Midwestern and Southern regions, and significant changes to membership of the Supreme Court, which have given substantial ground to states in their ability to apply restrictions well outside of "excessive governmental restriction."

With this background established and detailed, I then focused on precisely how access to abortion will shift in the following months given state legislation set to take effect sans federal protection of one's right to acquire an abortion. It through the analysis of Chapters 3 and 4 that we may reach certain conclusions as to access to abortion within the United States after the Mississippi decision is reached.

Midwestern, Southern, and Southwestern states, as well as all territories of the United States will experience the most substantial shifts to access to abortion after this judgment is reached lifting the protections of *Roe*. Most states in these regions will, in the short term (as we

may only confidently describe the political climate for a limited period of time), act to greatly restrict access to abortion, past what is currently normal in these regions, or ban abortion outright, thereby forcing female residents to either carry their unwanted, or unsafe, pregnancies to term or migrate to states which allow for legal abortions.

The current political climate, though this is certainly subject to change prior to and directly after the *Dobbs* judgment is released and in effect, is such that twenty-five states will almost certainly ban abortion in nearly all cases; each one of our five regions will ban or heavily restrict abortion in nearly all cases as well. Beyond total bans, eighteen states will likely act to restrict access to abortion, or potentially come to ban (in cases wherein the state's highest court has not yet ruled on the matter or where political support against abortion is great enough), via LMP bans and TRAP restrictive statutes. Of these eighteen states, three currently have no statutes or constitutional interpretations which directly name abortion as legal; fifteen of these states do, in fact, enjoy either constitutional or statutory protection for abortion, though each one of these states have, while most state legislatures have done so quite recently, restrictive laws in effect. Only eight states will act to protect greater access to abortion, via assuring abortion clinics

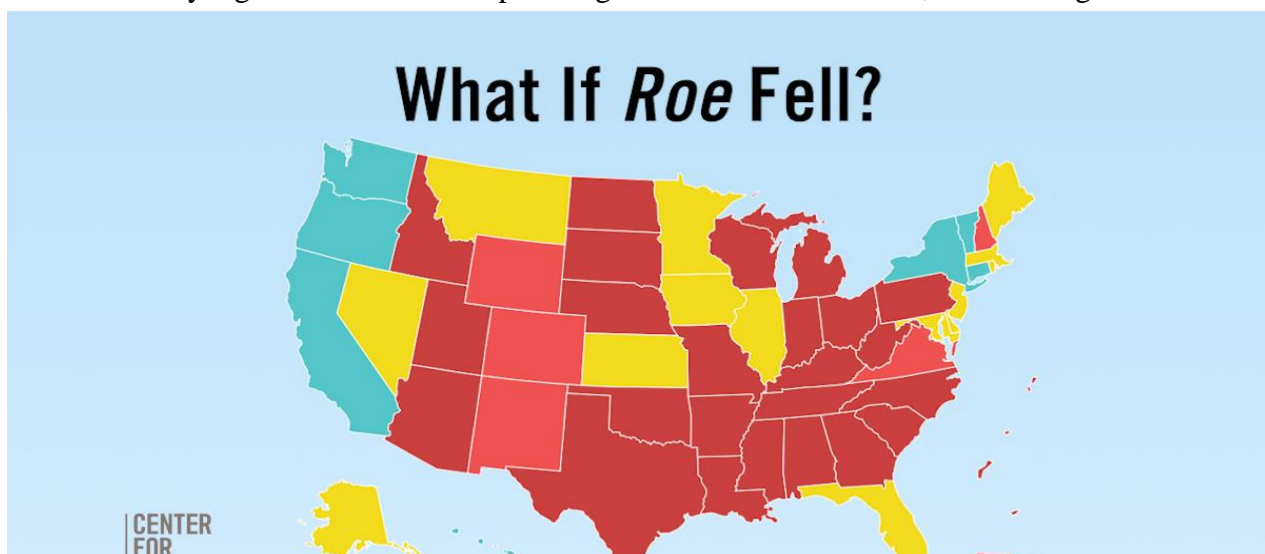


Figure 1 -- Blue is expanded access, yellow is abortion-protected, light red is not-protected, and red are states which will likely ban abortion after *Dobbs*.

are plentiful, assuring that abortion is covered by insurance, et cetera. Perhaps a beneficial tool in portraying this access is by a map (directly above); the Center for Reproductive Rights, as I have mentioned them prior, has a superb map of the United States, as well as its territories, which depicts how states will act to either protect or restrict abortion.

How many will it impact? Millions of women, which under current restrictions likely need to travel a significantly shorter distance, will have to travel to acquire abortions and abortion aftercare. The most impoverished women will suffer the most, as they will be unable to take off work or pay for travel to abortion-protected states. Even if *Roe* is not overturned, considering the precedents set in judgment like *Casey* and *Whole Woman's Health v. Jackson*, we will see access to abortion disintegrate in several regions generating essentially abortion deserts. There will, as we saw in the period in which abortion was illegal in the United States, be higher incidents of illegal abortions in cases wherein young women cannot travel from states which ban or heavily restrict abortion and, thus, death due to the challenges related to illegal abortions, and poor aftercare. We will likely see higher incidents of injury or death related to miscarriages, or otherwise non-viable pregnancies, within states which act to greatly restrict or ban abortion. There will also, consistent with the goals of the pro-life movement, be fewer abortions performed in the United States.

Even if the judgment reached by the Supreme Court in dealing with the *Dobbs v. Jackson Women's Health Organization* miraculously ends with *Roe v. Wade* intact, this shift is likely inevitable, as decisions like *Planned Parenthood of Southeastern Pennsylvania v. Casey* and *Whole Woman's Health v. Jackson* proved to undermine the fundamental holdings of *Roe*, in states which name it their mission to restrict or ban abortion. While this reality may seem bleak for those who describe themselves as pro-choice, there are certain methods by which pro-choice

advocates may combat. As I have discussed, a revival to the Women's Health Protection Act and the EACH Woman Act, or like legislation at the federal level, would be a viable for pro-choice legislators moving forward. Where this movement has reigned victorious in the past, namely just prior to *Roe v. Wade*, was, and is, at the state level in legal advocacy. As the Supreme Court population shifts, we may very well see a return to protection to abortion federally, though focusing on this possibility is illogical currently. Rather, the efforts of the ALI and Planned Parenthood in the past have been the most clearly successful attempts of the pro-choice movement in acquiring legal abortion. Most pressing in the success of the actions of these two organizations is civic engagement, which has been extraordinary in the issue of abortion as compared to other issues less important to voters. So, these efforts may be revitalized. In order to achieve these goals, further abortion restrictive legislation would need to be blocked at the state and federal levels, funding acquired for coverage campaigns, state legislators acting to repeal bans on abortion as well as abortion restrictive, and a repeal to the Hyde Amendment, as well as other federal legislation which acts to restrict abortion (Partial-Abortion Birth Act), by legislators representing states at the federal level. These aspects would all have to be sought to the fullest extent possible if women within these abortion deserts are to have any chance at acquiring a legal and safe abortion without great strain or at all.

### Areas for Further Research:

Though I feel as though my research aids in gaining a more complete sense of how access to legal and safe abortion will shift after *Roe v. Wade* is overturned, this topic could always be better understood by more holistic research and analysis. If I had more time to continue this work, I would have spent far more time researching into each and every state within the United States, as well as its territories, as to understand precisely how their legislation has evolved over



the last hundred years. Looking to why certain states have had far more civic participation in amending state constitutions or in proposing new statutes to their state governments would prove helpful in understanding subtle differences in state laws.

Further research into how access to safe abortions and how prevalent abortions remain in countries which currently ban abortion would aid us in understanding precisely how dangerous it might, or might not, be for women within abortion deserts today, rather than in the early twentieth century United States. One international aspect worth further consideration is how other nations may interact with the United States after *Roe* is pulled; International human rights, as described by the United Nations in various articles of the International Covenant on Economic, Social and Cultural Rights, hold abortion to be a fundamental human right, so a significant portion of the United States banning abortion may come to the attention of the U.N. and cause issues in foreign policy. This aspect alone would merit research and, if the backlash were to be great enough, may yield the sort of conclusion which pressures some bipartisan agreement in the federal government.

Another significant aspect of the *Dobbs* decision is the precedent which it sets for this Court moving forward. Though it was not sensible to delve into this aspect during this thesis, this aspect is perhaps the most significant of the judgment entirely. While the Supreme Court does occasionally roll-back its judgments, its likely decision to roll back one of its most significant and controversial judgments in the last century is not typical of a court which operates at that magnitude. This would be a superb area to pit further research upon in the course of another project.

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