

REPRODUCTIVE RIGHTS AND THE RULE OF LAW IN PERIL: THE FRUITS OF A DECADES-LONG EFFORT TO RESHAPE THE JUDICIARY

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This *Harvard Law & Policy Review* (HLPR) and American Constitution Society (ACS) retrospective on “The Constitution in 2020” project comes at a momentous time in American law and politics. Those of us who participated—over several years, including through meetings and publications—looked ahead and considered what the law of the U.S. Constitution *should* be at a time that has now arrived. Much has occurred in the intervening years. Our conversations began (among other notable events and issues) in the wake of the Bush Administration’s post-9/11 rule-of-law violations involving torture and surveillance contrary to federal statutes, and excessive assertions of presidential “unitary executive” authority.¹ Even still, we did not foresee a President Donald Trump or his unprecedented assaults on the rule of law and other vital U.S. constitutional norms.

Perhaps the year 2020 will mark, along with Trump’s impeachment and acquittal, the culmination of those assaults on the rule of law. That is, 2020 likely will serve as a high-water mark *unless* the upcoming November elections return to office an empowered and emboldened second-term President Trump and Republican leaders. Trump frequently fans those fears. In one notorious example, shortly after the Senate’s decision not to remove him from office, Trump prompted his own federal prosecutors to resign in protest when he intervened to oppose the length of their criminal sentence recommendation for Roger Stone, his former campaign official and longtime friend.² And in mid-March of this year, at the outset of America’s COVID-19 crisis, Trump tweeted that he is considering pardoning his former National Security Advisor Michael Flynn for his conviction, following his guilty plea, of lying to the FBI about his communications with the ambassador to Russia during investigations into Russian interference in the 2016 election.³

In addition to the rule of law, the issue of women’s reproductive rights remains an area of particular concern to me and was the subject of my contribution to *The Constitution in 2020*

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¹ For a discussion of these issues see, for example, Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007) (discussing the Bush Administration’s post-9/11 rule-of-law abuses and one response I helped to lead: “Principles to Guide the Office of Legal Counsel” issued by former officials at the Office of Legal Counsel, U.S. Department of Justice).

² Katie Benner, Sharon LaFraniere & Adam Goldman, *Prosecutors Quit Roger Stone Case After Justice Dept. Intervenes on Sentencing*, N.Y. TIMES (Feb. 20, 2020), <https://www.nytimes.com/2020/02/11/us/politics/roger-stone-sentencing.html>.

³ Annie Karni & Adam Goldman, *Trump Says He’s ‘Strongly Considering’ Pardoning Flynn*, N.Y. TIMES (Mar. 15, 2020), <https://www.nytimes.com/2020/03/15/us/politics/trump-flynn-pardon.html>.

book published in 2009 and edited by Yale Law School Professors Jack Balkin and Reva Siegel.⁴ The tone and even the title of my chapter—*A Progressive Reproductive Rights Agenda for 2020*—reflected more hope for expanding protections than can be mustered now, amid extraordinary and escalating threats, at least for the short run and especially in the courts. Even worse, although a Trump victory in November would substantially deepen and extend the harms, his defeat probably would not be enough to avoid serious constitutional setbacks.

Trump’s appointments of nearly 200 life-tenured federal judges, including Justices Neil Gorsuch and Brett Kavanaugh, very likely will extend harms far after Trump leaves office. Those appointments should be recognized as part and parcel of a highly successful, decades-long effort by the Republican Party to reshape the course of U.S. constitutional law via judicial appointments. For an astonishing fifty-plus years (1969 to the present), a majority of the sitting Justices on the Court were appointed by Republican presidents—and selected according to increasingly strict ideological measures aimed at ensuring they would rule as those presidents desired. Many use the term “conservative” to describe those Justices as well as Republicans’ broader aims to move the law to the ideological right. I believe “conservative” is a misnomer given the radical nature of the agenda and the chosen means, which include overturning longstanding precedent and discarding fundamental doctrine through remaking the federal courts.⁵

Current threats to reproductive rights will most immediately and directly harm individuals who face the risk of unintended pregnancy or unanticipated complications of pregnancies and secondarily anyone close to those individuals—i.e., potentially everyone. These assaults also threaten substantial, if less direct and apparent, harm to constitutional norms essential to maintaining the rule of law.

These varied threats are evident in *June Medical Services L.L.C. v. Russo*, argued before the U.S. Supreme Court on March 4, 2020, with a decision expected at the end of this Term.⁶ Apart from the abortion context, this would be an easy case—indeed, the case would not exist in its current form. The Court is reviewing a decision in which a divided panel of the U.S. Court of Appeals for the Fifth Circuit violated the core command that the lower federal courts must follow Supreme Court decisions, a rule that is foundational to uniformity and predictability in the law.⁷ Specifically, in upholding a Louisiana abortion restriction and reversing a district court ruling holding it unconstitutional, the Fifth Circuit failed to adhere to the Court’s 2016 decision in *Whole Woman’s Health*,⁸ in which the Court held unconstitutional a Texas abortion restriction that in all relevant respects is indistinguishable from the Louisiana law. The Fifth Circuit also

⁴ Dawn E. Johnsen, *A Progressive Reproductive Rights Agenda for 2020*, in *THE CONSTITUTION IN 2020* (Jack M. Balkin & Reva B. Siegel eds., 2009).

⁵ I want to acknowledge that the political and often partisan focus of this piece is somewhat unusual for an academic journal (HLPR) as part of a project sponsored by a nonpartisan nonprofit organization (ACS). But given the unfortunate current political realities, it is difficult and even misleading to talk meaningfully about these vital issues—the rule of law, judicial appointments, reproductive rights and health—in nonpartisan terms.

⁶ *June Med. Servs. L.L.C. v. Russo*, Nos.18-1323, 18-1460 (U.S. argued Mar. 4, 2020).

⁷ *See June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787 (5th Cir. 2018).

⁸ *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2299 (2016).

failed to respect the district court’s primary role in weighing evidence and making findings of fact.⁹ Absent Trump’s appointments of either Justice Gorsuch or Justice Kavanaugh, the Fifth Circuit almost surely would not have taken these missteps.

The Court’s appropriate response is a unanimous summary reversal or reprimand of the Fifth Circuit. Instead, the *realpolitik* expectation among Court observers is that the decision will be five Justices to four, one way or the other, and the Court might affirm the extraordinary Fifth Circuit ruling—again because of Trump’s appointments of Justices Gorsuch and Kavanaugh, made for the proclaimed purpose of depriving women of the constitutional right to choose whether to have an abortion or to continue a pregnancy.¹⁰ If the Court instead respects precedent and reverses the Circuit decision, Chief Justice John Roberts, who dissented in *Whole Woman’s Health*, is widely expected to be the source of the necessary fifth vote.¹¹ Regardless of the outcome in *June Medical*, dozens of cases involving various other abortion restrictions are in the lower federal courts and working their way toward the newly constituted Supreme Court.¹²

An understanding of legal and political events of the last half century related to constitutional change informs an appreciation of current threats to reproductive rights and, more generally, to the very legitimacy of the federal judiciary. That vital history is too little known, including the great extent to which the existence of these threats results directly from decades of intentional Republican focus on judicial nominations, not matched by Democrats. One piece of that history is particularly relevant to this retrospective: a 1988 U.S. Department of Justice publication entitled *The Constitution in 2000*, which served as an inspiration for *The Constitution in 2020*.¹³

The Constitution in 2000

The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation was written in 1988 by President Ronald Reagan’s Department of Justice under the direction of his Attorney General, Edwin Meese. This 199-page report and several other official government documents prepared during the last years of the Reagan Administration detailed a comprehensive

⁹ *June Med.*, 905 F.3d at 816, 819 (Higginbotham, J., dissenting); *June Med. Servs., L.L.C. v. Gee*, 913 F.3d 573, 576–577 (5th Cir. 2019) (Dennis, J., dissenting from the denial of rehearing en banc); Brief for Former Federal Judges and Department of Justice Officials as Amici Curiae Supporting Petitioners, *June Med. Servs. L.L.C. v. Gee*, 140 S. Ct. 35 (2019) (No. 18-1323).

¹⁰ See, e.g., Michael Dorf, *Symposium: In the Louisiana Abortion Case, Maybe the Best Defense is a Good Offense*, SCOTUSBLOG (Mar. 6, 2019, 10:18 AM), <https://www.scotusblog.com/2019/03/symposium-in-the-louisiana-abortion-case-maybe-the-best-defense-is-a-good-offense/>; Michael Barbaro, *The Daily: Why Chief Justice Roberts Just Protected Abortion Rights*, N.Y. TIMES (Feb. 12, 2019), <https://www.nytimes.com/2019/02/12/podcasts/the-daily/john-roberts-supreme-court-abortion-louisiana.html>.

¹¹ See Dorf, *supra* note 10.

¹² See Alice Ollstein & Beatrice Jin, *After Alabama: How 12 Court Cases could Challenge Abortion Access under Roe vs. Wade*, POLITICO (Mar. 27, 2019, 3:40 PM), <https://www.politico.com/interactives/2019/abortion-cases-up-for-supreme-court-review/>.

¹³ OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION (1988) [hereinafter CONSTITUTION IN 2000].

vision of how the Constitution should be interpreted.¹⁴ The agenda called for radical constitutional change and chose a point in time a dozen years out: How should constitutional law look in the year 2000?

The Constitution in 2000 addressed not only substance but also strategy: the means by which the Reagan Administration would try to change constitutional law. The report's introduction called for the appointment of federal judges who share the Reagan/Meese constitutional vision for change: "There are few factors that are more critical to determining the course of the Nation . . . than the values and philosophies of the men and women who populate . . . the federal judiciary."¹⁵ The introduction specifically called upon Congress also to consider judicial nominees' views: "[I]t is hoped that this report will allow Members of Congress of both parties, pursuant to their constitutional responsibilities, to assess judicial nominees in the most thorough and informed manner possible."¹⁶ A second, 153-page report, *Guidelines on Constitutional Litigation*, directed lawyers litigating cases on behalf of the federal government to use litigation to advance that vision, including to seek the overruling of specified cases and generally to advance an approach to judicial interpretation focused on original meaning in the narrowest sense, or as it is known, "originalism."¹⁷

The Reagan/Meese documents addressed great issues of the day: congressional power, federalism, racial and gender equality, abortion, contraception, sexuality, affirmative action, access to courts, criminal law, government regulation, and the Administration's overarching originalism—their drive to limit constitutional meaning today to the very specific expectations of the Framers. They called generally for dramatically diminishing both judicial protection of rights and the power of Congress to enact legislation to safeguard rights and advance the public good.¹⁸

At the time, apart from these documents, the Reagan Administration publicly communicated many controversial constitutional positions in litigation, speeches, and via judicial nominations. Reagan's controversial Attorney General, Edwin Meese, was well known and often in the news.¹⁹ I recall well the tenor of the Administration, during which I was in law school (involved, for example, in "Students Against Reaganism," a PAC organized by students at Yale Law School) and later working at the ACLU and NARAL Pro-Choice America.

¹⁴ See generally *id.*

¹⁵ *Id.* at v.

¹⁶ *Id.*

¹⁷ OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION (1988) [hereinafter GUIDELINES].

¹⁸ Other reports in the series included: OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE (1986); OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK (1987); OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: WRONG TURNS ON THE ROAD TO JUDICIAL ACTIVISM: THE NINTH AMENDMENT AND PRIVILEGES OR IMMUNITIES CLAUSE (1987); OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: REDEFINING DISCRIMINATION: DISPARATE IMPACT AND THE INSTITUTIONALIZATION OF AFFIRMATIVE ACTION (1987); OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: JUSTICE WITHOUT LAW: A RECONSIDERATION OF THE "BROAD EQUITABLE POWERS" OF THE FEDERAL COURTS (1988).

¹⁹ See, e.g., Stuart Taylor Jr., *Meese, In Bar Group Speech, Criticizes High Court*, N.Y. TIMES (July 10, 1985), <https://www.nytimes.com/1985/07/10/us/meese-in-bar-groug-speech-criticizes-high-court.html>.

The Reagan/Meese reports, however, remained largely unknown outside of the Department of Justice until soon after the year 2000. Even while I served at the Department of Justice's Office of Legal Counsel during the Clinton Administration, I was unaware of them. It was not until after I began teaching and researching in the area of constitutional law that I came across this remarkable series. They were public in the sense that they were in libraries that served as repositories of government documents. But after I found them (sitting quietly on the shelves in the Indiana University Maurer School of Law library), I spoke with leading Supreme Court and political reporters, Senate staffers, and legal advocates who, like me, all were unaware of and surprised by their existence. We agreed that knowing of these detailed, radical game plans would have been highly relevant and informative, for example, during the contested Supreme Court confirmation hearings and civil rights battles of the Reagan and Bush Administrations.²⁰

For example, it was one thing to know that President Reagan publicly opposed legal abortion and *Roe v. Wade*.²¹ It was quite another to read government litigators directed in *Guidelines on Constitutional Litigation* to seek the overruling of the entire line of cases protecting the fundamental right to liberty at stake in *Roe*: not only the right to choose abortion in *Roe v. Wade*, but also the right to use contraception in *Griswold v. Connecticut*²² and the right not to be forcibly sterilized in *Skinner v. Oklahoma*.²³ This report ended the various substantive sections with lists upon lists of Supreme Court decisions the Reagan Administration had targeted for overruling: *Miranda v. Arizona*,²⁴ *Sherbert v. Verner*,²⁵ *United States v. SCRAP*,²⁶ *Fay v. Noia*,²⁷ *Mathews v. Eldridge*,²⁸ *Wickard v. Filburn*,²⁹ *Katzenbach v. Morgan*,³⁰ *Oregon v. Mitchell*,³¹ *City of Rome v. United States*,³² *Fullilove v. Klutznick*,³³ *Board of Education v. Pico*,³⁴ and more.³⁵

²⁰ I was told by a former Bush Administration official that the documents were kept quiet in part because they were completed late in the Reagan Administration and, when George H.W. Bush soon thereafter took office, the Bush Administration determined that it did not wish to continue the Reagan Administration's strategy of publicly pursuing radical legal change, including via these documents.

²¹ 410 U.S. 113 (1973).

²² 381 U.S. 479 (1965).

²³ 316 U.S. 535 (1942).

²⁴ 384 U.S. 436, 444–45 (1966) (requiring law enforcement officers to ensure defendants know their rights against self-incrimination before custodial interrogation).

²⁵ 374 U.S. 398, 402–03 (1963) (holding that generally applicable laws that substantially burden an individual's free exercise of religion must be justified by a "compelling state interest"), *limited by* *Emp't Div. v. Smith*, 494 U.S. 872 (1990), *superseded in part by statute*, 42 U.S.C. § 2000bb-1(a)–(c) (2018).

²⁶ 412 U.S. 669, 687–89 (1973) (holding that environmental groups that alleged specific harms to their members had standing to challenge an agency action).

²⁷ 372 U.S. 391, 398–99 (1963) (expanding federal habeas rights).

²⁸ 424 U.S. 319, 332 (1976) (establishing that government benefits establish a property interest).

²⁹ 317 U.S. 111, 123–24 (1942) (upholding Congress's power under the Commerce Clause to regulate many instances of intrastate commerce).

³⁰ 384 U.S. 641, 658 (1966) (upholding section 4(e) of the Voting Rights Act as a valid exercise of the Fourteenth Amendment's section 5 enforcement powers).

³¹ 400 U.S. 112, 117–18 (1970) (holding that the Fourteenth and Fifteenth Amendments' enforcement powers allow Congress to "fix the age of voters in national elections") (Harlan, J., principal opinion), *superseded in part by constitutional amendment*, U.S. CONST. amend. XXVI.

This 2020 retrospective raises the question: to what extent was the Reagan/Meese effort to remake the law successful? Clearly, it is an evolving work in progress, carried on now by President Trump, among other powerful forces that include the Federalist Society, a group founded during the Reagan Administration³⁶ and now closely advising Trump on judicial selection.³⁷

The Reagan administration set for itself the year 2000 as a marker. Coincidentally, that very year, former Attorney General Meese was interviewed for the publication *Green Bag* about what he viewed as the Reagan Administration's greatest originalist successes and failures in the courts.³⁸ Meese cited as a great success the Court's changes in "the allocation of power and authority between the national government on the one hand and the States on the other."³⁹ And he certainly was correct, given the Rehnquist Court's decisions limiting Congress's commerce⁴⁰ and section 5 authorities,⁴¹ expanding state sovereign immunity,⁴² and inventing state protection from federal "commandeering."⁴³ When I first wrote about the Reagan/Meese reports, I focused on these and other "successes" regarding congressional power and federalism, including for a 2003 *Indiana Law Journal* symposium on the subject.⁴⁴ This "progress" in diminishing congressional power in the name of federalism slowed around then, perhaps in light of post-9/11 reminders of the need for national powers, but resumed a decade later, notably with the Court's 2012 recognition of new limits on Congress's commerce and spending powers in the context of

³² 446 U.S. 156, 175 (1980) (holding that Congress's Fifteenth Amendment enforcement power is as broad as the Necessary and Proper Clause).

³³ 448 U.S. 448, 490–91 (1980) (upholding the limited use of racial and ethnic criteria in dispensing federal grants) (Burger, C.J., plurality opinion).

³⁴ 457 U.S. 853, 870 (1982) (holding that the discretion of school boards in removing books "may not be exercised in a narrowly partisan or political manner") (Brennan, J., plurality opinion).

³⁵ GUIDELINES, *supra* note 17.

³⁶ *Our Background*, THE FEDERALIST SOC'Y, <https://fedsoc.org/our-background> (last visited Mar. 7, 2020).

³⁷ Robert O'Harrow Jr. & Shawn Boburg, *A Conservative Activist's Behind-the-Scenes Campaign to Remake the Nation's Courts*, WASH. POST (May 21, 2019), <https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/>.

³⁸ Edwin Meese III, *Reagan's Legal Revolutionary*, 3 GREEN BAG 2D 193 (2000).

³⁹ *Id.* at 199.

⁴⁰ *See, e.g.*, *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).

⁴¹ *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁴² *See, e.g.*, *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

⁴³ *See, e.g.*, *Printz v. United States*, 521 U.S. 898 (1997).

⁴⁴ Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363 (2003) [hereinafter Johnsen, *Presidential Influences*]; *see also* Dawn Johnsen, *Tipping the Scale*, WASH. MONTHLY (July 1, 2001), <https://washingtonmonthly.com/2001/07/01/tipping-the-scale/>.

the Affordable Care Act⁴⁵ and the Court’s 2013 invalidation of a core provision of the Voting Rights Act in *Shelby County*.⁴⁶

Meese also cited as a success “returning to constitutional principles” in rendering unconstitutional the governmental use of race to the benefit of minorities.⁴⁷ The Reagan/Meese publications—including an entire publication on *Redefining Discrimination*—described what the Administration saw as the harms of affirmative action and the consideration of disparate racial impacts to establish unlawful discrimination under civil rights statutes.⁴⁸ Republicans, in fact, have achieved remarkable “success” in promoting a new definition of discrimination that rests on a bizarre, counterfactual claim, notably unsupported by originalism: that taking race into account in what they branded “reverse discrimination” against a white person is equally unconstitutional as discrimination against African Americans, even where the aim of voluntary governmental efforts is to remedy centuries of ongoing harms of our country’s “original sin” of slavery, followed by Jim Crow segregation and continuing discrimination. The most notable “success” of this color-blind approach after the Meese *Green Bag* interview came in the Court’s 2007 decision holding unconstitutional voluntary desegregation efforts by the Louisville and Seattle school districts.⁴⁹

Most of us who went to law school in the years just before the Reagan/Meese reports were written never imagined then that the Court would change the law in these dramatic ways. But the Reagan Administration’s Department of Justice did imagine, develop, and promote these changes. The Republican Party and others, including the Federalist Society, continue working to advance them, over time, through various means, such as litigation, politics, and law review articles—and most successfully through appointments to the federal judiciary.

Turning now to *The Constitution in 2020*, I first will focus on the impact of federal judicial appointments and then conclude with my book chapter’s subject, which also was Edwin Meese’s choice in his 2000 *Green Bag* interview as the “most disappointing loss” of the Reagan Administration: “The failure to persuade the Court to date to overrule *Roe v. Wade*.”⁵⁰

⁴⁵ Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 561 (2012) (holding that “[j]ust as the individual mandate cannot be sustained as a law regulating the substantial effects of the failure to purchase health insurance, neither can it be upheld as a ‘necessary and proper’ component of the insurance reforms”); see also Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC (June 4, 2012), <https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/>.

⁴⁶ *Shelby County v. Holder*, 570 U.S. 529, 537, 557 (2013) (holding unconstitutional section 4(b) of the Voting Rights Act).

⁴⁷ Meese, *supra* note 38, at 199.

⁴⁸ See generally OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: REDEFINING DISCRIMINATION: DISPARATE IMPACT AND THE INSTITUTIONALIZATION OF AFFIRMATIVE ACTION (1987).

⁴⁹ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747–48 (2007). See also Walter Dellinger, *Everything Conservatives Should Abhor*, SLATE (June 29, 2007), <https://slate.com/news-and-politics/2007/06/a-supreme-court-conversation-everything-conservatives-should-abhor.html>.

⁵⁰ Meese, *supra* note 38, at 199.

The Constitution in 2020

In June 2003, Yale Law School students Chad Golder and Seth Grossman approached me at the annual ACS convention in Washington, D.C. with the germ of the idea that would become “The Constitution in 2020.” Their professor Reva Siegel, leading constitutional law scholar and Yale ACS chapter faculty advisor, had assigned my article on the Reagan/Meese documents, which concluded with a call for competing visions to inform and spur constitutional change.⁵¹ Golder and Grossman proposed working together on a conference on “the liberal version of the Meese memos.” Conversations began immediately and Yale hosted the first public “Constitution in 2020” conference in 2005, at which time now-University of Texas at Austin professor Joey Fishkin served as the Yale ACS chapter’s student president helping to organize the conference. With Professor Siegel’s invaluable leadership, the “Constitution in 2020” developed into a multi-year project with a series of conferences and events at locations across the country, involving numerous students, professors, and others in thoughtful, long-range consideration of how we as a nation should interpret our founding document.

Other contributors to this HLPR retrospective will evaluate the status of particular constitutional issues, and I will offer some thoughts on reproductive rights in this essay’s final section. But I first share here a more general assessment, indeed, a grave concern: The potential success of “The Constitution in 2020” across a host of vital issues has run directly against the obstacle that is the ongoing success of *The Constitution in 2000*.

Justice Brett Kavanaugh’s 2018 confirmation process highlighted the expected dramatic impact of his appointment by Trump to replace Justice Anthony Kennedy. Although Justice Kennedy was appointed by President Ronald Reagan and typically voted with other Republican-appointed Justices on the ideological right of the Court, Kennedy proved unpredictable on some important issues.⁵² Particularly during his final years on the Court, Justice Kennedy was the deciding Justice-in-the-middle on some sharply contested issues, especially those involving fundamental constitutional liberties, as in the protection of LGBT rights and some aspects of reproductive rights.⁵³ Kennedy differed dramatically on these issues from President Reagan’s first choice for that seat, Judge Robert Bork, whom the Senate declined to confirm after widely

⁵¹ Johnsen, *Presidential Influences*, *supra* note 44, at 412.

⁵² See, e.g., Amelia Thomson-DeVeaux, *Justice Kennedy Wasn’t A Moderate*, FIVETHIRTYEIGHT (July 3, 2018, 5:58 AM), <https://fivethirtyeight.com/features/justice-kennedy-wasnt-a-moderate/>.

⁵³ See, e.g., *id.*; *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2318 (2016) (“[T]he surgical-center requirement, like the admitting privileges requirement, provides few, if any, health benefits for women, poses a substantial obstacle to women seeking abortions, and constitutes an ‘undue burden’ on their constitutional right to do so.”); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (“The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.”); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (“[T]he essential holding of *Roe v. Wade* should be retained and once again reaffirmed.”); see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787–78 (2007) (Kennedy, J., concurring in part) (“The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race.”).

viewed confirmation hearings in which Bork took many positions that were identical to those set forth at that same time in the Reagan/Meese documents.⁵⁴

The Supreme Court's shift to the ideological right, however, reflects far more than the shift from Kennedy to Kavanaugh. Less appreciated, but at least as momentous, was Trump's first Court appointment: Neil Gorsuch. Gorsuch's confirmation process garnered far less public attention because he replaced a Justice also on the ideological far right, Justice Antonin Scalia. Gorsuch, however, was appointed to the seat that the Republicans essentially stole from President Obama and the American people who elected him. Republican Senate Majority Leader Mitch McConnell, without legitimate justification, refused even to allow Senate consideration of Obama's eminently qualified nominee, Chief Judge Merrick Garland of the U.S. Court of Appeals for the D.C. Circuit.⁵⁵

The effect of what should be recognized as the Republican theft of that seat was enormous. It also revealed the depths to which Republicans would go in their decades-long focus on moving the federal judiciary to the ideological right—a focus unmatched by Democrats, as many have noted.⁵⁶ One indication of the importance of judicial nominations to the Republican electorate is that candidate Trump repeatedly sought to reassure a worried electoral base by reminding them the federal judiciary was at stake, and he strategically released a Federalist Society-approved list of people he would consider appointing to the Supreme Court.⁵⁷

It bears repeating: 2019 marked half a century of a Republican majority on the Court. For fifty consecutive years, a majority of the serving Supreme Court Justices had been appointed by Republican presidents. Had the Senate confirmed Merrick Garland—or any Obama nominee—it would have produced a Court with a majority of Justices appointed by a Democratic President for the first time since 1969. And it should have happened.

The current Republican dominance of the judiciary thus does not represent the democratically expressed will of the people.⁵⁸ Today, it reflects most directly the Republican theft of the seat that was President Obama's to fill. More generally, during this fifty-year period,

⁵⁴ See generally MARK GITENSTEIN, *MATTERS OF PRINCIPLE: AN INSIDER'S ACCOUNT OF AMERICA'S REJECTION OF ROBERT BORK'S NOMINATION TO THE SUPREME COURT* (1992); MICHAEL J. GRAETZ & LINDA GREENHOUSE, *THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT* (2016).

⁵⁵ Dawn Johnsen, *Seat Merrick: Trump's Nominee Shouldn't Get a Hearing Until Merrick Garland Is Seated*, SLATE (Jan. 31, 2017, 2:07 PM), <https://slate.com/news-and-politics/2017/01/dear-congress-dont-seat-donald-trumps-nominee-until-merrick-garland-is-on-the-bench.html>.

⁵⁶ See, e.g., Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018); Dawn Johnsen, *The Supreme Court's Legitimacy Crisis and Constitutional Democracy's Future*, in DEMOCRACY UNCHAINED: HOW TO REBUILD GOVERNMENT FOR THE PEOPLE (David W. Orr et al. eds., 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3547693; Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004).

⁵⁷ Alan Rappeport & Charlie Savage, *Donald Trump Releases List of Possible Supreme Court Picks*, N.Y. TIMES (May 18, 2016), <https://www.nytimes.com/2016/05/19/us/politics/donald-trump-supreme-court-nominees.html>.

⁵⁸ The analysis in this paragraph and the next draw heavily on Professor Marty Lederman's insightful post: Martin Lederman, *The Vicious Entrenchment Cycle: Thoughts on a Lifetime with a Republican-Controlled Court*, BALKINIZATION (Oct. 6, 2018, 4:31 PM), <https://balkin.blogspot.com/2018/10/the-vicious-entrenchment-circle.html>.

Democrats won federal elections with relatively balanced results. Democratic presidents were elected five—and won the popular vote seven—of the last twelve terms. And Democrats controlled the Senate during more than half of that time. One factor behind this electoral mismatch is chance. In an irony of history, Jimmy Carter remains the only U.S. President in history to serve a full term with no Supreme Court vacancy to fill, while Richard Nixon appointed four Justices in fewer than six years, before resigning in disgrace. This allowed Republican presidents an astounding string of ten consecutive appointments from 1969 to 1992.

Our constitutional structure is an additional factor: the role of the Electoral College in presidential elections, and uniform state representation in the Senate notwithstanding huge variations in state population. The unusual presidential elections of 2000 and 2016 led to the striking fact that four of the five current Republican-appointed Justices were appointed by presidents who were first elected despite having lost the national popular vote. One must also recognize the extraordinary, unprecedented, and improper intervention of the Supreme Court in the 2000 election with its highly partisan five-four decision in *Bush v. Gore*.⁵⁹ Gorsuch and Kavanaugh were also both confirmed by Senators who represented a minority of the country's population.

A final, overarching factor is the great asymmetry in priority attached to the federal judiciary by the political parties. The existence of the Reagan/Meese agenda attests to that. As preeminent Supreme Court analyst Linda Greenhouse put it, “[w]hat we’re seeing now . . . are the fruits of decades of laserlike focus on the courts by one party, and a kind of laissez-faire attitude by the other—an asymmetry of intentionality, you might say, that’s brought us to where we are today.”⁶⁰

The fact of the current continued Republican majority on the Court—of Trump’s appointment of Justice Gorsuch instead of Obama’s appointment of Merrick Garland—almost surely will dramatically alter the law of the U.S. Constitution on many vital issues for years to come: racial justice, women’s reproductive rights, economic justice, criminal justice, the environment, and the authority of Congress to enact legislation to protect these and other individual rights and public interests. Particularly insidious to democracy are the impacts of altered judicial rulings that support partisan entrenchment—that is, keeping Republicans in power beyond their public support, as in the Roberts Court’s refusal to guard against gerrymandering and uphold Voting Rights Act provisions designed to protect minority voters and the integrity of elections.⁶¹

One final example: In a 2014 essay I predicted “the demise of originalism” in the form advocated by the Reagan/Meese documents—a search for narrow original meaning that is

⁵⁹ 531 U.S. 98 (2000).

⁶⁰ Linda Greenhouse, Opinion, *Abortion Cases: A Conservative Judicial Agenda?*, N.Y. TIMES (Apr. 1, 2019), <https://www.nytimes.com/2019/04/01/opinion/abortion-supreme-court-judges.html>; see also Rebecca R. Ruiz et al., *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 14, 2020), <https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html>.

⁶¹ For a more detailed analysis of the implications of the current Supreme Court’s composition, see Johnsen, *supra* note 56.

incompatible with how the Court interprets the Constitution, including landmark decisions back to *McCulloch v. Maryland*⁶² in 1819 and, in the modern era, *Brown v. Board of Education*,⁶³ *Griswold v. Connecticut*,⁶⁴ *Loving v. Virginia*,⁶⁵ and more.⁶⁶ My prediction was in keeping with the mainstream of the Court’s interpretive methodology, even after the last half century of a Republican-controlled Court. As Professors Robert Post and Reva Siegel noted earlier, the originalism crafted in the 1980s was far more successful as a political ideology than an interpretive methodology.⁶⁷ In her confirmation hearings, Justice Elena Kagan cleverly and correctly declared “we are all originalists,” though making clear she meant an originalism in keeping with that history.⁶⁸ As Justice Kennedy eloquently wrote for the Court in *Lawrence v. Texas*:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.⁶⁹

Justice Antonin Scalia was alone on the Court as a well-known advocate of narrow originalism from 1986 until Justice Clarence Thomas joined the Court in 1991, and they did not have a potential third vote until Justice Alito joined in 2006. With Trump’s appointments of Justices Gorsuch and Kavanaugh, the threat of the Meese/Bork/Scalia form of originalism is alive and back, indeed featured recently on the cover of the *New York Times Sunday Magazine*.⁷⁰

⁶² 17 U.S. 316 (1819).

⁶³ 347 U.S. 483 (1954).

⁶⁴ 381 U.S. 479 (1965).

⁶⁵ 388 U.S. 1 (1967).

⁶⁶ Dawn Johnsen, Windsor, Shelby County, and *The Demise of Originalism: A Personal Account*, 89 IND. L.J. 3, 8–12 (2014).

⁶⁷ Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 549 (2006).

⁶⁸ *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) (statement of Elena Kagan).

⁶⁹ 539 U.S. 558, 578–79 (2003).

⁷⁰ Emily Bazelon, *How Will Trump’s Supreme Court Remake America?*, N.Y. TIMES (Feb. 27, 2020), <https://www.nytimes.com/2020/02/27/magazine/how-will-trumps-supreme-court-remake-america.html> (“The Trump vision of the judiciary can be summed up in two words: “originalism” and “textualism,”” Donald F. McGahn II, the former White House counsel, who was instrumental in Gorsuch’s and Kavanaugh’s appointments, said in 2017 at an event for the Federalist Society, a group that has been a juggernaut for propelling the courts to the right. Placing judges on the courts is ‘the most important thing we’ve done for the country,’ Senator Mitch McConnell, the majority leader, said last spring.”).

Reproductive Rights in 2020

The law and politics of abortion occupy a special place in Republican efforts to remake constitutional law. *Roe v. Wade* long has been a primary Republican target, as revealed in the Reagan/Meese documents and Meese's regret expressed in 2000.⁷¹ Not, however, for as long as is widely assumed. In fact, in 1973, five of the seven Justices in the *Roe* majority (including the author Justice Harry Blackmun) were appointed by Republicans,⁷² polling showed Republicans were more supportive of legal abortion than were Democrats,⁷³ and abortion was not the partisan issue the Republican Party later would make it.

Differences in personal views about abortion, of course, are often deeply held and felt, and dependent upon individual circumstances. That, in a sense, is the point of protecting the right of individual decision. Political postures regarding abortion are a different beast. As Professor Reva Siegel and others have detailed, for strategic political reasons, the Republican Party decided to adopt an anti-*Roe* position and politicize the issue in order to attract voters, particularly Democratic Catholic voters, and to encourage single-issue voting against economic and other interests.⁷⁴ In 1980, the Republican Party began including in its political platform its now-familiar call to overrule *Roe* through judicial appointments, which President Reagan advanced in earnest.⁷⁵

In many ways, the threats to reproductive health and rights flowing from Trump's Supreme Court appointments closely mirror those in the years ahead of the Court's 1992 decision in *Planned Parenthood v. Casey*.⁷⁶ With each appointment by Presidents Reagan and Bush (I), the *Roe* seven-to-two margin steadily narrowed. Along the way, a five-to-four majority of the Court deprived low-income women dependent on Medicaid for their health care of equal access to funding for abortions even when they faced serious health threats from continuing a pregnancy.⁷⁷ By 1992, as now, it seemed we could count five votes on the Court that would eviscerate constitutional protection for legal abortion services. The Court's unexpected five-four ruling in *Casey* reaffirming what it characterized as *Roe*'s "core" (with Justice Kennedy a critical vote in the majority) came in a presidential election year. The Court in *June Medical* also may reflect a special incentive not to issue a controversial abortion ruling in an election year.

The stare decisis arguments today are even greater than in 1992, when *Casey*'s controlling joint opinion of three Republican-appointed Justices observed: "An entire generation

⁷¹ See Meese, *supra* note 38, at 199.

⁷² See Linda Greenhouse, *Misconceptions*, N.Y. TIMES: OPINIONATOR (Jan. 23, 2013, 9:00 PM), <https://opinionator.blogs.nytimes.com/2013/01/23/misconceptions/>.

⁷³ Linda Greenhouse & Reva B. Siegel, *Before (and after) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2067–71 (2011).

⁷⁴ See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 420–24 (2007); see also Greenhouse & Siegel, *supra* note 73; Reva B. Siegel, *Abortion and the "Woman Question": Forty Years of Debate*, 89 IND. L.J. 3, 1369–74 (2014).

⁷⁵ See REPUBLICAN NAT'L CONVENTION, REPUBLICAN PARTY PLATFORM OF 1980, <https://www.presidency.ucsb.edu/documents/republican-party-platform-1980>.

⁷⁶ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

⁷⁷ *Harris v. McRae*, 448 U.S. 297, 316–17 (1980).

has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions."⁷⁸ We can easily forget just how tenuous *Casey*'s reaffirmation of *Roe*'s "core" was. Had Robert Bork been confirmed instead of Anthony Kennedy, Bork surely would have provided the fifth vote to overrule *Roe*.⁷⁹ And now, Justice Kavanaugh has replaced Justice Kennedy.

Given the dire expectations at the time, what *Casey* preserved of *Roe* completely overshadowed the extent to which the Court in fact did overrule *Roe*. It is important to remember what was lost. The Court opened the door to many restrictions previously held unconstitutional,⁸⁰ which required overruling its 1983 *Akron*⁸¹ and 1986 *Thornburgh*⁸² decisions, and it replaced the strict scrutiny standard of review that typically safeguarded fundamental rights with the less protective, newly crafted undue burden test.⁸³ Only two Justices would have fully upheld *Roe* and reaffirmed the Court's decisions of the 1980s invalidating burdensome restrictions.⁸⁴ In dissent in *Casey*, Chief Justice Rehnquist, one of the two original *Roe* dissenters, observed: "The joint opinion . . . retains the outer shell of *Roe v. Wade*, but beats a wholesale retreat from the substance of that case."⁸⁵

In 2016 the Court in *Whole Woman's Health* drew an important line, not where it was pre-*Casey* and not where it should be, but nonetheless making clear that the undue burden test does provide some genuine, vital protections against restrictions that would diminish abortion services without providing health benefits.⁸⁶ As I have described, *June Medical* presents the identical question regarding the same restriction. Only the Court's changed composition puts the outcome in doubt. Under just those circumstances, the controlling joint opinion in *Casey* cited a special need for adherence to stare decisis, to uphold the Court's legitimacy and the rule of law: "A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law."⁸⁷ Already today, expressions of grave concerns about the Court's legitimacy given its politicization are far more prevalent and generalized, giving rise even to radical suggestions for restructuring.⁸⁸

As I review my 2009 chapter in light of stark 2020 realities, I am struck by these and other similarities, and by the continued urgency of my chapter's recommendations. I highlighted

⁷⁸ *Casey*, 505 U.S. at 860.

⁷⁹ See E.J. Dionne, Jr., *Abortion, Bork and the '88 Campaign*, N.Y. TIMES (July 8, 1987), <https://www.nytimes.com/1987/07/08/us/abortion-bork-and-the-88-campaign.html>.

⁸⁰ *Casey*, 505 U.S. at 870.

⁸¹ *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983).

⁸² *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

⁸³ *Id.* at 929–30 (Blackmun, J., concurring in part and dissenting in part).

⁸⁴ *Id.* at 917 (Stevens, J., concurring in part and dissenting in part); *id.* at 923 (Blackmun, J., concurring in part and dissenting in part).

⁸⁵ *Id.* at 944 (Rehnquist, J. concurring in the judgment in part and dissenting in part).

⁸⁶ See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2299 (2016).

⁸⁷ *Casey*, 505 U.S. at 869 (plurality opinion).

⁸⁸ See, e.g., Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 182–205 (2019).

three priorities for progressives seeking to advance women’s reproductive health and rights, all of which remain paramount.

First priority: Even while we work to retain all possible continued protections from the courts, we must not rely upon them.⁸⁹ We must work more effectively outside the courts and elect to every level of government representatives who will respect and safeguard women’s reproductive health and liberty. We also must not accept that the availability of abortion services should vary dramatically state by state and region by region. We must work for federal legislation that protects access to abortion services for all by prohibiting senseless restrictions designed to deny access to health services. Finally, we must directly counter the culture of shame that abortion opponents promote to stigmatize women who have abortions. A few basic facts about the status of abortion in 2020:⁹⁰ An estimated one in four women will have an abortion in her lifetime. Most women who have abortions already have children and are poor or low-income. Most pay for the procedure out of pocket, at a cost averaging more than \$500 in the first ten weeks of pregnancy, at a time when four out of ten American adults do not have \$400 cash on hand to pay for unanticipated expenses.⁹¹ Almost ninety percent of abortions occur in the first twelve weeks of pregnancy. The percentage of abortions that are by medication, compared to surgery, has steadily increased, but on average they are *more* expensive. Most women used contraception in the month they became pregnant, most commonly condoms (which are far less effective, but far cheaper and more available, than long-acting reversible contraceptives). Their most common religious affiliation reported is Catholic (24%), mainline Protestant (17%), and evangelical Protestant (13%), with 38% of women reporting no affiliation.

Second priority: We must shift attention from the question that still dominates public discourse—“will the Court overrule *Roe*”—and to the immediate dangers of incremental abortion restrictions. Focusing on *Roe*’s overruling obfuscates the terrible harms underway, as *Roe*’s opponents work to make abortion services more expensive and difficult to obtain through restrictions designed to appear reasonable, but which have the effect of making abortion services just as unavailable as would a ban. As I wrote then, these laws combine with other antiabortion tactics, including diminished medical training in the performance of abortions as well as violence and intimidation at clinics and the homes of health care providers. The women most harmed by these restrictions are those whose life circumstances make it difficult to travel possibly hundreds

⁸⁹ A number of state courts have interpreted their state constitutions as providing independent, sometimes greater, protections for reproductive rights than have the federal courts, and we should pursue all such opportunities to realize those rights. However, most states have not, in part due to comparable efforts to influence judicial selection at the state level. *See generally* Dawn E. Johnsen, *State Court Protection of Reproductive Rights: The Past, the Perils, and the Promise*, 29 COLUM. J. GENDER & L. 41 (2015) (analyzing the current status and future potential of state constitutional protection for reproductive rights).

⁹⁰ Except where separately indicated, these facts are supported in *Fact Sheet: Induced Abortion in the United States*, GUTTMACHER INST. (Sep. 2019), https://www.guttmacher.org/sites/default/files/factsheet/fb_induced_abortion.pdf. The Guttmacher Institute’s website is an excellent source of data and analysis regarding sexuality and reproductive health.

⁹¹ BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2017, at 2 (May 2018), <https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf>.

of miles and pay increased costs, which means most women in our nation of terrible economic inequality. States have enacted literally more than one thousand restrictions since *Roe*, and the rate of new restrictions is accelerating.⁹² Louisiana, at issue in *June Medical*, leads the nation with eighty-nine abortion restrictions; my own state of Indiana is second.⁹³ In the decade since *The Constitution in 2020*'s publication, the number of states down to a single abortion clinic in the entire state has doubled from three to six.⁹⁴ If the Supreme Court in *June Medical* were to uphold the admitting privileges requirement, Louisiana would become the seventh state on that list and other states soon would follow.

Third priority: We must advance a comprehensive reproductive rights agenda for all, which includes funded access to pregnancy prevention and the genuine ability to deliver and raise healthy children. Government and social policy should support women in all of their reproductive decisions. That means a range of progressive policies, among them: universal health care that covers pregnancy prevention and abortion services as well as childbearing costs, comprehensive sexuality education, paid family leave, quality affordable childcare, a raised minimum wage, affordable housing, financial support for college and job training, and progressive tax policy. The states with the most onerous abortion restrictions tend also to fare among the worst in women's health outcomes and economic status, and in issues of work and family.⁹⁵ Poor government policy is particularly devastating for women of color, who, for example, suffer up to three to four times the negative maternal health outcomes of white women.⁹⁶

I am struck by one major shift since the publication of *The Constitution in 2020*: I would not have predicted the success of Trump-era assaults on access to contraception. The Affordable Care Act's coverage of contraception has improved women's lives by empowering them to avoid unintended pregnancy, with one result that should have universal appeal: a decrease in the abortion rate to the nation's lowest levels since *Roe*.⁹⁷ And yet, rather than representing sensible

⁹² See *Last Five Years Account for More Than One-Quarter of All Abortion Restrictions Enacted Since Roe*, GUTTMACHER INST. (Jan. 13, 2016), <https://www.guttmacher.org/article/2016/01/last-five-years-account-more-one-quarter-all-abortion-restrictions-enacted-roe>.

⁹³ Elizabeth Nash, *Louisiana Has Passed 89 Abortion Restrictions Since Roe: It's About Control, Not Health*, GUTTMACHER INST. (Feb. 11, 2020), <https://www.guttmacher.org/article/2020/02/louisiana-has-passed-89-abortion-restrictions-roe-its-about-control-not-health>.

⁹⁴ Editorial, *A Dark Milestone for Women's Rights: A State With No Abortion Clinics*, N.Y. TIMES (May 31, 2019), <https://www.nytimes.com/2019/05/28/opinion/missouri-abortion-clinic.html>.

⁹⁵ Louisiana, for example, ranks 49th among the states with an "F" for women's health and well-being. *Health & Well-Being*, STATUS OF WOMEN IN THE STATES, <https://statusofwomendata.org/explore-the-data/health-well-being/> (last visited Mar. 7, 2020). Indiana ranks last, 51st in the nation, for work and family policies. *Work & Family*, STATUS OF WOMEN IN THE STATES, <https://statusofwomendata.org/explore-the-data/work-family/> (last visited Mar. 7, 2020).

⁹⁶ THERESA CHALHOUB & KELLY RI, CTR. FOR AM. PROGRESS, *THE HEALTH CARE SYSTEM AND RACIAL DISPARITIES IN MATERNAL MORTALITY I* (2018). <https://cdn.americanprogress.org/content/uploads/2018/05/09121820/HealthSystemDisparitiesInMaternalMortality-Brief.pdf>.

⁹⁷ Press Release, Guttmacher Inst., U.S. Abortion Rate Continues to Decline, Reaching Historic Low in 2017 (Sept. 18, 2019), <https://www.guttmacher.org/news-release/2019/us-abortion-rate-continues-decline-reaching-historic-low-2017>; RACHEL K. JONES ET AL., GUTTMACHER INST., *ABORTION INCIDENCE AND SERVICE*

common ground policy, opposition to coverage for contraception has been fierce. The Supreme Court already has upheld the religious objections of some employers, under the Religious Freedom Restoration Act, to complying with federal requirements that contraception coverage be included in their employee health care insurance plans.⁹⁸ The Trump Administration is seeking to expand greatly the permissible scope of such exemptions, and it also has dramatically diminished federal funding to international family planning organizations in a terrible expansion of President Reagan's Mexico City Policy, known as the international gag rule.⁹⁹ And the Administration has excluded from the federal Title X family planning program Planned Parenthood, a nonprofit organization that has done more than any other to decrease the need for abortion by decreasing unintended pregnancy.¹⁰⁰ These and other policies that diminish women's (and men's) access to contraception are the most shocking of the repressive and abusive assaults on reproductive liberty and health care in the year 2020.

AVAILABILITY IN THE UNITED STATES, 2017, at 3 (2019), <https://www.guttmacher.org/report/abortion-incidence-service-availability-us-2017>.

⁹⁸ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 690–91 (2014).

⁹⁹ Molly Redden, *Trump expands policy that bans US aid for overseas abortion providers*, THE GUARDIAN (May 15, 2017), <https://www.theguardian.com/world/2017/may/15/trump-abortion-rule-mexico-city-policy>.

¹⁰⁰ Pam Belluck, *Trump Administration Blocks Funds for Planned Parenthood and Others Over Abortion Referrals*, N.Y. TIMES (Feb. 23, 2019), <https://www.nytimes.com/2019/02/22/health/trump-defunds-planned-parenthood.html>.