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United States Domestic and Foreign Policy

Danielle Doud

I. INTRODUCTION

The Supreme Court of the United States guaranteed the right to abortion in 1973¹; yet the legality and access to domestic abortion care continues to be a hotly debated topic.² Since *Roe v. Wade*, state abortion restrictions continue to climb, with over 1,800 sexual and reproductive health provisions introduced this year alone.³ Combined with the Supreme Court's decision to hear oral arguments in *Dobbs v. Jackson Women's Health Organization*, and the ongoing discussion surrounding Texas's newest abortion ban, women's rights in the United States are increasingly up in the air.⁴ The potentially seminal case once again calls upon the highest Court in the land to determine if "all pre-viability prohibitions on elective abortions are unconstitutional."⁵ This ongoing onslaught of abortion care cases and legislation fragility of abortion rights in the United States.

Domestically, abortion care has been described by the Guttmacher Institute as a "lattice work" of law varying widely from state to state, with laws regulating or limiting physician and hospital requirements, public funding, refusal, counseling, waiting periods, and parental involvement.⁶ Such patchwork of law highlights the "anti-abortion movement's efforts to legislate

¹ *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973).

² Blazina et al., *Key Facts About the Abortion Debate in America*, Pew Research Ctr., (June 17, 2021) <https://www.pewresearch.org/fact-tank/2021/06/17/key-facts-about-the-abortion-debate-in-america/>.

³ Guttmacher Inst., *United States Abortion*, <https://www.guttmacher.org/united-states/abortion> (emphasis added).

⁴ Alison Durkee, *Supreme Court to Consider Mississippi's Abortion Ban in Move That Could Challenge Roe V. Wade*, May 17, 2021, <https://www.forbes.com/sites/alisondurkee/2021/05/17/supreme-court-to-consider-mississippi-abortion-ban-in-move-that-could-challenge-roe-v-wade/?sh=47c9ab264e40>

⁵ *Id.*

⁶ Guttmacher Inst., *An Overview of Abortion Laws*, <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws> [hereinafter "Guttmacher, *Overview*"].

and litigate abortion access out of existence.”⁷ Such limitations on access “contribute to unintended pregnancy and, when access is limited, unsafe abortion.”⁸ Unsafe abortions and forced pregnancy against contribute to physical and psychological consequences.⁹

Comparatively, at the international level, laws which criminalize abortion access have been recognized as human rights violations.¹⁰ The Council on Foreign Relations critiques that “the past fifty years have been characterized by an unmistakable trend toward the liberalization of abortion laws particularly in the industrialized world.”¹¹ With such concern, 189 countries, unanimously adopted the Beijing Declaration and Platform for Action at the United Nations Fourth World Conference on Women, hoping to “[p]romote and protect the human rights of women, through the full implementation of all human rights instruments, especially the Convention on the Elimination of All Forms of Discrimination against Women” (“CEDAW” or “the Convention”).¹² Undisputedly, CEDAW is a major legal treaty for women’s human rights.¹³ Furthermore,

⁷ Elyssa Spitzer & Nora Ellmann, *State Abortion Legislation in 2021: A Review of Positive and Negative Actions*, Ctr. for Am. Progress (Sept. 21, 2021), <https://www.americanprogress.org/issues/women/reports/2021/09/21/503999/state-abortion-legislation-2021/> [hereinafter “*State Abortion Legislation in 2021*”].

⁸ Jonathan Bearak et al., *Unintended Pregnancy and Abortion by Income, Region, and the Legal Status of Abortion: Estimates from a Comprehensive Model for 1990-2019*, 8 THE LANCET GLOBAL HEALTH e1152, e1159 (July 22, 2020), [https://www.thelancet.com/pdfs/journals/langlo/PIIS2214-109X\(20\)30315-6.pdf](https://www.thelancet.com/pdfs/journals/langlo/PIIS2214-109X(20)30315-6.pdf) [hereinafter Bearak, *Unintended Pregnancy*] (citing Ganatra et al., *Global, Regional, and Subregional Classification of Abortions by Safety, 2010–14: Estimates from A Bayesian Hierarchical Model*, 390 LANCET 2372 (2017)).

⁹ Human Rights Council, *Report on the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, Juan E. Mendez, at 12, U.N. Doc A/HRC/31/57 (Jan. 5, 2016) [hereinafter “*Human Rights Council Report*”].

¹⁰ *Id.*

¹¹ Rachel B. Vogelstein & Rebecca Turkington, *Abortion Law: Global Comparisons*, Council on Foreign Relations (Oct. 28, 2019) <https://www.cfr.org/article/abortion-law-global-comparisons> [hereinafter *Abortion Law: Global Comparisons*].

¹² Fourth World Conference on Women, Beijing, China, Sept. 4-15, 1995, *Beijing Declaration and Platform for Action*, 89, 93, U.N. Doc. A/CONF.177/20/Rev.1 (1996) [hereinafter *Beijing Declaration*].

¹³ Marilou McPhedran, *Compliments of CEDAW: U.S. Foreign Policy Coherence on Women’s Human Rights and Human Security*, 2014 MICH. ST. L. REV. 281, 287 (2014) [hereinafter McPhedran, *Compliments of CEDAW*] (citing United Nations Dev. Fund For Women, CEDAW and Security Council Resolution 1325: A Quick Guide (2006), http://www.unrol.org/files/CEDAWandUNSCR1325_eng.pdf). Notably, with the adoption of Security Council Resolution 1325, literature on the Convention has evolved to include commentary on what impacts the two would have on each other. It is argued that “SC resolution 1325 helps to broaden the scope of CEDAW’s application by clarifying its relevance to all parties in conflict and in peace. CEDAW, in turn, provides concrete strategic

CEDAW's monitoring body, the Committee on the Elimination of Discrimination against Women ("the Committee"),¹⁴ notes "it is discriminatory for a State party to refuse to legally provide for the performance of certain reproductive health services for Women."¹⁵

Yet, the United States remains the only established industrialized democracy who has yet to ratify CEDAW,¹⁶ while ratification "is presented as an integral component to reinforcing the substantial U.S. leadership."¹⁷ Scholars suggest that United States failure to ratify CEDAW has hindered the country's global standing and diplomatic relations¹⁸ and that U.S. ratification of CEDAW would add cohesion to United States domestic and foreign policy, especially in the arena of women's human rights.¹⁹

Against this backdrop, this Paper looks to international human rights framing to analyze how the United States should approach reproductive rights domestically and abroad by addressing first the United States' domestic approach to women's rights, examined with reference to ongoing state legislative efforts on abortion (Part II). Next, it looks at abortion on the international level generally (Part III), before diving into the impacts and goals envisioned by CEDAW, with an emphasis on key provisions that highlight what the convention is, what it hopes to accomplish, and

guidance for actions to be taken on the broad commitments outlined in SC resolution 1325. Drawing on these instruments together will enable advocates to maximize the impact of norms and standards for gender equality in all conflict and post interventions." *Id.*

¹⁴ The Committee is described as a "body of independent experts" charged with monitoring implementation of the Convention, consisting of 23 experts from around the world. United Nations Human Rights Office of the High Commissioner, *Committee on the Elimination of Discrimination against Women*, <https://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>.

¹⁵ See Comm. on the Elimination of Discrimination against Women, *General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, P 11, U.N. Doc. A/54/38/Rev.1 (20 April 1999). [hereinafter *General Recommendation No. 24*].

¹⁶ Harold Hongju Koh, *Why America Should Ratify the Women's Rights Treaty (CEDAW)*, 34 CASE W. RES. J. INT'L L. 263, 265 (2002) [hereinafter Koh, *Why America Should Ratify*]. Comparatively, only one other country has signed but not yet ratified CEDAW: Palau. United Nations Human Rights Treaty Bodies, *UN Treaty Body Database*, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=132&Lang=EN

¹⁷ McPhedran, *Compliments of CEDAW* *supra* note 13, at 282-95.

¹⁸ Koh, *Why America Should Ratify*, *supra* note 16 at 269.

¹⁹ See generally THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY (Marsha A Freeman, Christine Chinkin and Beate Rudolf eds., Oxford University Press, 2012) [hereinafter "*Freeman Commentary*"], See Koh, *Why America Should Ratify*, *supra* note 16 at 263.

how it plans to do so (Part IV). In recognition that ratification is unlikely, this Paper presents arguments for what President Biden should do (Part V), before addressing what U.S. ratification of CEDAW would look like (Part VI). In that same vein, this Paper further postulates as to why President Biden should advocate for ratification of CEDAW (Part VII).

II. UNITED STATES' DOMESTIC APPROACH TO REPRODUCTIVE RIGHTS

Studies show that one in four U.S. women have an abortion during their lifetime.²⁰ Yet, as of September 2021, twenty-one states have further restricted access to care by enacting abortion-restrictive laws, while only seven have enacted abortion-supportive legislation in that same timeframe.²¹ Enaction of such provisions leads to an inverse relationship between the distance to nearest facility and county abortion rate: as distance increased, abortion rate decreased.²² However, access to abortion care remains unavailable for large portions of the U.S. population: 90 percent of counties do not have an abortion care provider,²³ creating ‘abortion deserts’— cities where women have to travel at least one hundred miles for abortion care.²⁴

This shows that legislation severely restricts access to care. However, this is nothing new: in the five-year period between 2011 and 2017, state legislatures enacted over 400 laws regulating

²⁰ Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008-2014*, 107 AM. J. PUB. HEALTH 1904, 1904-06 (2017).

²¹ See *State Abortion Legislation in 2021*, *supra* note 6, at 9.

²² Increased travel distance is worrisome: longer distance equates to longer travel time, increased costs, more lost wages, need to miss work, or even preventing women from obtaining a wanted abortion due to gestational limits. Alice F. Cartwright et al., *Identifying National Availability of Abortion Care and Distance From Major US Cities: Systematic Online Search*, 20 J MED INTERNET RES 5, 2 (2018). [hereinafter Cartwright, *Identifying National Availability of Abortion Care*].

²³ *Id.* at 2.

²⁴ *Id.* at 7. This study was performed in early 2017, based upon cities whose populations were over 50,000 based upon the 2010 census. Accordingly, the analysis may differ post-2020 census results. Additionally, the Cartwright study defined reproductive age as 15-49 years, consistent with the aforementioned Lancet Article & United Nations guidelines. *Id.*, see generally Bearak, *Unintended Pregnancy*, *supra* note 7, United Nations Dep’t of Econ. and Soc. Affairs, Population Div, *World Fertility and Family Planning 2020: Highlights* ST/ESA/SER.A/440 (2020). This differs from previous studies in the area, which utilized a narrower definition of 15-44 years. See generally Gilda Sedgh et al. *Intended and Unintended Pregnancies Worldwide in 2012 and Recent Trends*. 45 Stud. In Fam. Planning 3 301 (Sept. 2014).

abortion care.²⁵ As a result, six states had only a single abortion provider in 2017.²⁶ Abortion legislation does not end at the state level. Rather on the federal level, the United States House of Representatives recently voted to approve the Women’s Health Protection Act of 2021, a bill designed to protect person’s access to abortion.²⁷ Even if the bill makes its way to the floor, it has only a 2 percent chance of passing.²⁸

Such lack of federal protections results in varying abortion regulations and limitations amongst states. For example, while a vast majority of states require abortions be performed by licensed physicians, while minority of states and the District of Columbia have no such requirement.²⁹ Meanwhile, one state explicitly rejects federal requirements by limiting public funding to cases of life endangerment.³⁰ States also vary widely in what information be relayed to individuals seeking care. Some require women receive information on the purported link between abortion and breast cancer.³¹ Other states require women be informed about the ability of fetuses to feel pain, or mental health consequences that may result from undergoing an abortion.³²

²⁵ *Id.* at 2.

²⁶ Kentucky, Mississippi, Missouri, North Dakota, South Dakota, and West Virginia. *Id.* at 3.

²⁷ Women’s Health Protection Act of 2021, H.R. 3755, 117th Cong. (2021), <https://www.govtrack.us/congress/bills/117/hr3755>. Such legislation stands in contrast to other, anti-abortion initiatives at the federal level, such as S. Res. 12, a resolution requesting flags be lowered to half-staff to mourn the unborn children “who have lost their lives to abortion.” A resolution memorializing the unborn by lowering the United States flag to half-staff on January 22, 2021, S.Res. 12, 117th Cong. (2021) <https://www.govtrack.us/congress/bills/117/sres12>.

²⁸ *Id.*

²⁹ Thirty-eight states require licensed physicians, while twelve states plus D.C. do not have the restriction. Another example worth noting is that nineteen states require abortions be performed at a hospital only after specified points, and seventeen require a second physician at specified points. Guttmacher, *Overview supra* note 5.

³⁰ South Dakota is the outlier here. Sixteen use state public funding to pay for all or most medically necessary abortions for Medicaid recipients. Thirty-three states plus the District of Columbia limit public funds except in cases where federal funds are available, namely where the mother’s life is in danger or in cases of rape or incest. *Id.*

³¹ Five states: Alaska, Kansas, Mississippi, Oklahoma, and Texas. *Id.*

³² Thirteen states require information on fetal pain: Alaska, Arizona, Georgia, Indiana, Kansas, Louisiana, Minnesota, Missouri, Oklahoma, South Dakota, Texas, Utah, Wisconsin. While eight states require information on mental health post-abortion: Kansas, Louisiana, Michigan, Nebraska, North Carolina, South Dakota, Texas, and West Virginia. *Id.*

Such legislative efforts contributed to 2021 being deemed “the worst legislative year ever for U.S. abortion rights,” with legislative efforts this year being distinct for two reasons.³³ First, sheer quantity: 2021 saw the highest number of abortion-restricting legislation.³⁴ States enacting even more restrictive standards: of ninety-seven new abortion-restrictive statutes, more than eighty were in states that already had restrictions in place.³⁵ For example, Arkansas has enacted ten abortion-restrictive bills this year alone.³⁶ Comparably, Arizona went so far as to introduce a bill allowing for prosecution of “homicide by abortion,” amending the definitions of negligent homicide, manslaughter, second-degree murder and first-degree murder to include offenses “to an unborn child in the womb at *any* stage of the unborn child’s development.”³⁷ The ___ states that have enacted abortion restricting legislation vastly outnumbers the mere 7 states that have enacted abortion-supportive laws that work to protect and expand access to reproductive care.³⁸

³³ Elizabeth Nash & Sophia Naide, *State Policy Trends at Midyear 2021: Already the Worst Legislative Year Ever for U.S. Abortion Rights*, Guttmacher Inst., (July 1, 2021) <https://www.guttmacher.org/article/2021/07/state-policy-trends-midyear-2021-already-worst-legislative-year-ever-us-abortion>.

³⁴ *Id.*

³⁵ *State Abortion Legislation in 2021*, *supra* note 6, at 3.

³⁶ *Id.* at 4.

³⁷ Abortion prohibition; licensure repealed, H.R. 2650, 55th Cong. (2021) (failed) (emphasis added). Three states—Kansas, Kentucky and Iowa—have gone so far as to add language to their state constitutions “stating that the state does not recognize or provide a right to abortion.” *State Abortion Legislation in 2021*, *supra* note 6 (noting that “[a]lthough they have a limited immediate effect, they reflect the legislatures’ opposition to the right to abortion”).

³⁸ Those seven states are California, Colorado, Connecticut, Hawaii, New Mexico, Virginia and Washington. *Id.* at 6-7. These increased restrictions on access and legality of care lead to an increase in the number of people traveling from abortion-hostile states to more supportive states, leading to providers being overwhelmed and impeding availability of appointments: A clinic in Oklahoma reported that the latest Texas abortion ban resulted in calls increase 11-fold: averaging 5 calls per day pre-enactment, to approximately 55 per day. *See State Abortion Legislation in 2021*, *supra* note 6, at 2, 7. Likewise, these restrictions compound already existing barriers to care and disproportionately impact minorities, lower income individuals, LGBTQ individuals, and people living in rural areas. *Id.* *See also Human Rights Council Report*, *supra* note 8. (noting that when access to abortion is restricted, maternal mortality increases, marginalized and disadvantaged women are disproportionately impacted, and that “[r]estrictive access to voluntary abortion results in the unnecessary deaths of women”).

Second, the surrounding legal context has changed: newly enacted legislation will be operating under a conservative super-majority Supreme Court.³⁹ These recently developed laws outlaw previously established tactics while creating new methods to achieve the same goals: gestational bans, method bans, parental involvement requirements, and “born alive laws” now operate alongside laws with broader scope, such as Texas’s ‘bounty hunter’ abortion ban that allows *any* person—not just state officials—to sue abortion providers.⁴⁰ The Texas law alone highlights how women’s rights continue to be uncertain: in the few weeks since its inaction, the Texas law has continually bounced between courts.⁴¹ In this broader legal context, the Supreme Court has twice refused to block Texas’ 6-week ban, while other states looking to follow Texas’s lead.⁴²

Currently, the instability of domestic abortion rights is guided by the Supreme Court’s understanding of domestic law, absent broader international law.

III. ABORTION ON THE INTERNATIONAL LEVEL

Despite individual states’ approach to family planning, the United States remains “the largest global donor of international family planning and reproductive health (FP/RH) assistance,”

³⁹ *State Abortion Legislation in 2021*, *supra* note 6. New York University Professor of International Law Jose E. Alvarez presents an interesting perspective on the impact such super-majority would have on the implementation of treaties, noting that “[t]he new 6-3 Supreme Court conservative majority may even be activist enough to revive the long discredited idea of subject-matter limits on the scope of the treaty power, consistent with Justice Thomas’s concurring opinion in *Bond v. United States*.” Jose E. Alvarez, *Biden’s International Law Restoration*, 53 N.Y.U. J. INT’L L. & POL 523, 569 (2021) [hereinafter Alvarez, *Biden’s International Law Restoration*]. In *Bond*, Justice Thomas urged the Court “to consider drawing a clear line between ‘matters of international discourse’ that can be subject to treaty-making and ‘matters of purely domestic regulation’ that cannot.” *Id.* at 569 n.151.

⁴⁰ *See State Abortion Legislation in 2021*, *supra* note 6, at 3-4.

⁴¹ *See generally* Amy Howe, *Court Won’t Block Texas Abortion Ban But Fast-Tracks Cases For Argument On Nov. 1*, SCOTUSblog, Oct 22, 2021 <https://www.scotusblog.com/2021/10/court-wont-block-texas-abortion-ban-but-fast-tracks-cases-for-argument-on-nov-1/>

⁴² *See generally* Samira Sadeque, *Republicans in six states rush to mimic Texas anti-abortion law*, The Guardian, Sept. 3, 2021, <https://www.theguardian.com/world/2021/sep/03/texas-abortion-republicans-six-states-arkansas-florida-indiana-mississippi-north-south-dakota>.

with Congress appropriating \$575 million annually.⁴³ For the upcoming fiscal year, President Biden has requested \$550 million for bilateral FP/RH programs, a 132 percent increase from the administration’s 2021 request.⁴⁴ The United States utilizes such funding under bilateral FP/RH assistance, via the United States Agency for International Development (“USAID”), and multilateral FP/RH assistance, via contributions to the United Nations Population Fund (“UNFPA”).⁴⁵ USAID, alongside the Department of State, plays a key role in coordinating efforts to address women’s issues,⁴⁶ by distributing contraceptives⁴⁷ and related care through agreements with nongovernmental organizations.⁴⁸ Similarly, UNFPA “calls for the realization of reproductive rights for all” with a focus on sexual and reproductive health programs to ensure individuals have the opportunity to exercise their human rights.⁴⁹

These bilateral and multilateral agreements highlight that abortion goes beyond just a domestic issue.⁵⁰ Worldwide, there were sixty-four unintended pregnancies per one thousand

⁴³ In regard to FP/RH funding amounts, advocates of increased funding argue that “while the U.S. government is currently the largest donor in absolute terms, it would need to invest \$1.5 billion to meet its proportional share of the burden for foreign assistance for FP/RH funding.” Sara M. Tharakan, Cong. Research Serv., IF11013, *U.S. Global Family Planning and Reproductive Health Programs: Funding Trends and Issues for Congress* (2021) [hereinafter *Global Family Planning and Reproductive Health Programs*]. This is because despite the large dollar amount, the percent of GDP going to such foreign aid is smaller than most industrialized nations. Liam Pisan, *How the United States Uses Foreign Policy to Control and Adversely Impact Foreign Women*, 35 WIS. J. L. GENDER & SOC’Y 69, 75 (2020) [hereinafter Pisan, *How the United States Uses Foreign Policy*] (citing Curt Tarnoff & Larry Nowels, Cong. Research Serv., R40213, *Foreign Assistance: An Introduction to U.S. Programs and Policy* (2005)). Notably, there are limits on what U.S. can be used for, including limitations on abortion-related counseling and services. For commentary on how the United States utilizes foreign policy to restrict the bodily autonomy of women abroad, see Pisan, *How the United States Uses Foreign Policy*, *supra* note 39.

⁴⁴ Global Family Planning and Reproductive Health Programs, *supra* note 39 at 1.

⁴⁵ *Id.*

⁴⁶ Luisa Blanchfield, et al., Cong. Research Serv., IF11804, *Global Women’s Issues: Background and Selected U.S. Efforts* (2021) [hereinafter Blanchfield, *Global Women’s Issues*].

⁴⁷ Post-Roe, the controversy over abortion rights spread to foreign assistance, leading to the introduction of abortion and family planning restrictions in foreign aid authorizations and appropriations. Luisa Blanchfield, Cong. Research Serv., R41360, *Abortion and Family Planning-Related Provisions in U.S. Foreign Assistance Law and Policy* (2021).

⁴⁸ Global Family Planning and Reproductive Health Programs, *supra* note 39 at 1-2.

⁴⁹ United Nations Population Fund, *About Us*, <https://www.unfpa.org/about-us>.

⁵⁰ See generally Pisan, *How the United States Uses Foreign Policy*, *supra* note 43.

women of reproductive age.⁵¹ Of these, 61 percent ended in abortion, totaling a wide-reaching 73.3 million annually.⁵² During that same time, the proportion of unintended pregnancies resulting in abortion increased, including in countries where abortion was legally restricted.⁵³ Conversely, in countries where abortion is legal, 70 percent of unintended pregnancies ended in abortion⁵⁴. Significantly, when countries where abortion is legally restricted are taken into consideration, that number drops to 50 percent worldwide.⁵⁵ The impact of such foreign aid is of note: the \$607.5 million appropriated for fiscal year 2021 is estimated to avert 12 million unintended pregnancies, 4.5 million unplanned births and 4 million unsafe abortions.⁵⁶

Such data illustrates that women in countries where abortion is legally restricted continue to take legal and physical risks to seek abortion services.⁵⁷ In fact, the “proportion of unintended pregnancies ending in abortion *increased* in countries where abortion was legally restricted.”⁵⁸ However evidence suggests that “the safety of the procedure diverges widely: almost 90 percent of abortions in countries with liberal abortion laws are considered safe, compared with only 25 percent of those in countries in which abortion is banned.”⁵⁹

IV. THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

⁵¹ Based upon the years 2015-2019. Bearak, *Unintended Pregnancy*, *supra* note 7, at e1158. However, something worth noting is that the Lancet authors opted to *exclude* China and India from data sets because the high populations in those countries skewed data set results. *Id.*

⁵² Bearak, *Unintended Pregnancy*, *supra* note 7, at e1157.

⁵³ Where abortion is restricted, the abortion rate was 36, compared to 26 in countries where abortion is broadly legal. *Id.* at e1158.

⁵⁴ *Id.*

⁵⁵ “Restricted” is used to identify countries “where abortion is prohibited altogether, permitted only to save a woman’s life or to preserve physical or mental health.” While “legal” or “broadly legal” includes countries where “[a]bortion is available on request or on broad socioeconomic grounds.” *Id.*

⁵⁶ *Just the Numbers: The Impact of U.S. International Family Planning Assistance, 2021*, Guttmacher Inst. (June 28, 2021), <https://www.guttmacher.org/just-numbers-impact-us-international-family-planning-assistance-2021>.

⁵⁷ *Id.* At 1159.

⁵⁸ *Id.* At 1159.

⁵⁹ *Abortion Law: Global Comparisons*, *supra* note 10.

The connection between abortion rights and international human rights law is undeniable. United Nations bodies repeatedly agree that laws that criminalize abortion such as those seen domestically are discriminatory violations of international human rights law that impair women's right to reproductive autonomy, violate rights to bodily integrity, and "in the most extreme cases, to life itself."⁶⁰

The Convention on the Elimination of All Forms of Discrimination Against Women⁶¹ is a comprehensive international human rights treaty directed at eliminating discrimination against women to ensure equal recognition, enjoyment and exercise of human rights.⁶² The Convention strengthens international women human rights standards by setting out principles by which to achieve equal rights for women.⁶³ This includes principles and policies that codify rights to family planning and reproductive rights.⁶⁴ In ratifying CEDAW,

States parties have agreed to fulfil the 'right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services...'⁶⁵

⁶⁰ Carmel Shalev, *Rights to Sexual and Reproductive Health: The ICPD and the Convention on the Elimination of All Forms of Discrimination against Women*, 4 Health & Hum. Rts. 38, 52 (2000).

⁶¹ Usage of the term 'women' "includes girls and adolescents." See *General Recommendation No. 24*, *supra* note 15, P 8.

⁶² See Comm. on the Elimination of Discrimination against Women, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, P 3, CEDAW/C/GC/28 (16 Dec. 2010). [hereinafter *General Recommendation No. 28*]. While the Convention refers to only sex-based discrimination, the Committee has indicated that the Convention also covers gender-based discrimination. *Id.* (highlighting that "[t]he term 'sex' here refers to biological differences between men and women. The term 'gender' refers to socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men").

⁶³ Convention On The Elimination Of All Forms Of Discrimination Against Women, Ex.Rept.107-9, 107th Cong. (2021), <https://www.congress.gov/congressional-report/107th-congress/executive-report/9/1> [hereinafter Biden CFR].

⁶⁴ See generally *Convention on the Elimination of All Forms of Discrimination Against Women*, Dec. 18, 1979, 1249 U.N.T.S. 13; 19 I.L.M. 33, arts.10, 12, 14, 16 (1980) [hereinafter CEDAW]; Serra Sippel, *Achieving Global Sexual and Reproductive Health and Rights*, 35 HUM. RTS. 13, 14 (2008).

⁶⁵ See *Freeman Commentary supra* note 19; see also *Beijing Declaration, supra* note 11.

Ratified by 189 countries, CEDAW “is the only treaty specifically addressing the rights of women,”⁶⁶ the Convention includes specific obligations for the international community and guiding framework for implementation.⁶⁷ Portrayed as an “international bill of rights for women,”⁶⁸ yet the U.S. remains the only country in the Western Hemisphere that has not ratified the international treaty.⁶⁹ Unambiguously, CEDAW recognizes that discrimination against women violates principles of equality and human dignity and emphatically asserts “the role of women in procreation should not be a basis for discrimination.”⁷⁰

Specifically, the Convention provides a general framework for how States can implement the obligations identified in the Convention,⁷¹ and identifies crucial legal obligations of States parties.⁷² Under Article 2, ratifying States have legal obligations to respect and protect women’s rights to non-discrimination.⁷³ Such obligations may be fulfilled via public policies, programs or frameworks aimed at accomplishing specific needs of women to ensure *de jure* and *de facto* equality.⁷⁴ Once ratified, States retain primary territorial jurisdiction and are held responsible for actions affecting human rights, with a due diligence obligation to prevent discrimination by private actors.⁷⁵ Equally important, such obligations “are complementary to the universal human rights framework.”⁷⁶

⁶⁶ Blanchfield, *Global Women’s Issues*, *supra* note 42.

⁶⁷ *See generally* CEDAW, *supra* note 59.

⁶⁸ Koh, *Why America Should Ratify*, *supra* note 16 at 269.

⁶⁹ *See generally* CEDAW, *supra* note 59.

⁷⁰ *Id.* at pmb.

⁷¹ *Id.*

⁷² *Id.* at P 6.

⁷³ *General Recommendation No. 28*, *supra* note 62, P 9.

⁷⁴ UN GR 28

⁷⁵ *Id.* at P 13.

⁷⁶ *Id.* at P 3.

Moreover, CEDAW “is the first human rights treaty explicitly to require States parties to ensure access to family planning.”⁷⁷ Specifically, Article 12 requires State Parties take appropriate measures to ensure equal access to health care services, including family planning services. “A key criterion of compliance with Article 12 is access.”⁷⁸ Increasingly important, Article 16 similarly requires parties take measures to eliminate discrimination in matters relating to family relations including “[t]he same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.”

One way in which CEDAW measures women rights is by having a clear-cut definition for discrimination against women. In affirming equal opportunity and equal protection for women,⁷⁹ CEDAW defines discrimination broadly, to include

*any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*⁸⁰

Under such framing, distinctions in health law or policy that impair women’s access to services are not justifiable under the Convention.⁸¹

⁷⁷ *Freeman Commentary*, *supra* note 19, (citing CEDAW, *supra* note 59, at arts. 12(1), 10(h), 14(2)(b), 16(1)(e)).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *General Recommendation No. 28*, *supra* note 62, P 5. The Committee notes that such a broad definition “points out that any distinction, exclusion or restriction which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women of human rights and fundamental freedoms is discrimination, even where discrimination was not intended. This would mean that identical or neutral treatment of women and men might constitute discrimination against women if such treatment resulted in or had the effect of women being denied the exercise of a right because there was no recognition of the pre-existing gender-based disadvantage and inequality that women face.” *Id.* Similar to United States Constitutional law, the Committee differentiates between direct and indirect discrimination: “States parties shall ensure that there is neither direct nor indirect discrimination against women. Direct discrimination against women constitutes different treatment explicitly based on grounds of sex and gender differences. Indirect discrimination against women occurs when a law, policy, programme or practice appears to be neutral in so far as it relates to men and women, but has a discriminatory effect in practice on women because pre-existing inequalities are not addressed by the apparently neutral measure.” *Id.* at P 16.

⁸¹ See *Freeman Commentary*, *supra* note 19.

Additionally, the duty CEDAW imposes “implies an obligation to respect, protect and fulfil women’s rights to health care” and an obligation not to obstruct actions by women seeking health services.⁸² Actions that obstruct women’s access is construed broadly to include services that require husband, partners, or parents’ authorization, or “laws that criminalize medical procedures only needed by women who undergo those procedures.”⁸³

Subsequently, the CEDAW Committee places a burden on State parties to evaluate and report on “whether measures to eliminate discrimination against women in the field of health care are appropriate,”⁸⁴ with the caveat that such legislation, plans and policies should be “based on scientific and ethical research.”⁸⁵ Under these requirements, State parties should, “from the perspective of women’s needs and interests” report on policies that impact the health rights of women.⁸⁶ Such reports should take into consideration distinctive factors specific to women and should include socio-economic status, psychosocial factors, and respect for confidentiality when seeking medical advice or treatment.⁸⁷ Further, such mandated reports should include what measures the State has taken to ensure timely access to family planning services.⁸⁸

⁸² *General Recommendation No. 24*, *supra* note 15, P 13.

⁸³ *General Recommendation No. 28*, *supra* note 62, P19. Other barriers that women may face include “requirements or conditions that prejudice women’s access, such as high fees for health-care services, the requirement for preliminary authorization by spouse, parent or hospital authorities, distance from health facilities and the absence of convenient and affordable public transportation.” *Id.* at P 21. Interestingly, this “obligation to protect rights relating to women’s health requires State parties, their agents and officials to take action to prevent and impose sanctions for violations of rights by private persons and organizations.” *Id.* at P 15. Furthermore, maternal mortality increases when access to abortion is restricted. *Human Rights Council Report*, *supra* note 8.

⁸⁴ *Id.* at P 9.

⁸⁵ *Id.*

⁸⁶ *Id.* at P 12.

⁸⁷ *Id.*

⁸⁸ *Id.* at P 23. *See also* Human Rights Committee Report (noting that “States have an affirmative obligation to reform restrictive abortion legislation that perpetuates torture and ill-treatment by denying women safe access and care”).

Admittedly CEDAW does not include the word ‘abortion’ within its text, and instead relies upon phrases such as ‘reproductive health’ and ‘family planning’.⁸⁹ However, the treaty emphasizes the importance of family planning and reproductive rights. Recognizably, these topics overlap. Abortion services allow women control over when they start a family, when they add to their family and gives women control over the number and spacing of kids.⁹⁰ Notably, the Committee has repeatedly issued General Recommendations which include explicit recommendations for government action on abortion, affirming that “legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion.”⁹¹ Significantly, the Committee has acknowledged that

Violations of women’s sexual and reproductive health and rights, such as forced sterilizations, forced abortion, forced pregnancy, criminalisation of abortion, denial or delay of safe abortion and post-abortion care, forced continuation of pregnancy, abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services, are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment.⁹²

V. WHAT PRESIDENT BIDEN CAN DO TO PROTECT WOMEN’S RIGHTS DOMESTICALLY AND ABROAD

⁸⁹ See CEDAW, *supra* note 64. Notably, “CEDAW proponents have themselves advanced the specious and misleading argument that CEDAW is ‘abortion neutral.’ While CEDAW does not explicitly refer to abortion, it also does not explicitly refer to ‘bride burning,’ ‘female genital mutilation,’ or ‘sexual slavery.’ Yet the absence of these terms does not make CEDAW “neutral” as to their legality.” Janet Benshoof, *U.S. Ratification of CEDAW: An Opportunity to Radically Reframe the Right to Equality Accorded Women Under the U.S. Constitution*, 35 N.Y.U. REV. L. & SOC. CHANGE 103, 104 (2011). (emphasis added). [hereinafter Benshoof, *U.S. Ratification of CEDAW*].

⁹⁰ World Health Organization, Abortion: Overview, https://www.who.int/health-topics/abortion#tab=tab_1

⁹¹ See *General Recommendation No. 24*, *supra* note 15, P 8.

⁹² See Comm. on the Elimination of Discrimination against Women, *General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, P 18, CEDAW/C/GC/35 (26 July 2017). See also Human Rights Committee, *Concluding Observations of the Human Rights Committee, Peru*, CCPR/C/79/Add.72 (1996), Report of SR on Torture, 5 January 2016, A/HRC/31/57; CEDAW Committee, *L.C. v. Peru*, CEDAW/C/50/D/22/2009, para 8.18 [hereinafter *L.C. v. Peru*]; Human Rights Committee, *Whelan v. Ireland*, CCPR/C/119/D/2425/2014 (2017) [hereinafter *Whelan v. Ireland*]; Human Rights Committee, *Mellet v. Ireland*, CCPR/C/116/D/2324/2013 (2016) [hereinafter *Mellet v. Ireland*].

To begin, it is important to note that President Biden has taken steps that protect women's access to reproductive care, specifically with his actions relating to the Hyde amendment,⁹³ Title X,⁹⁴ the Department of Justice⁹⁵ and the Mexico City Policy.⁹⁶ However, there is more work to be done, both domestically and abroad, to safeguard women's rights. To this end, President Biden should devise a broad policy that aligns legal provisions at the domestic level with international law.

Thus, President Biden should enhance federal protections to safe and accessible reproductive care at the domestic level. Specifically, the President should reframe domestic women's rights as broader, international human rights via the mechanisms CEDAW suggests. Biden has two options on how to do so: first, he can resubmit CEDAW to the Senate for consideration and ratification or, second, he can utilize the reporting mechanisms within CEDAW.

Given the current divisive state of Congress, it is unlikely the President will be able to get enough members to agree to ratification;⁹⁷ nevertheless, submission of the treaty would signal the

⁹³ Sarah McCammon, *Biden's Budget Proposal Reverses A Decades-Long Ban On Abortion Funding*, NPR, May 31, 2021

<https://www.npr.org/2021/05/31/1001881788/bidens-budget-proposal-reverses-a-decades-long-ban-on-abortion-funding>

⁹⁴ See generally Dep't of Health and Hum. Serv., *HHS Issues Final Regulation Aimed at Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services*, Oct. 4, 2021

<https://www.hhs.gov/about/news/2021/10/04/hhs-issues-final-regulation-aimed-at-ensuring-access-to-equitable-affordable-client-centered-quality-family-planning-services.html>

⁹⁵ See generally Sarah N. Lynch and Jan Wolfe, *Biden Administration Asks Judge To Halt Strict Texas Abortion Law*, Reuters, Oct. 1, 2021 <https://www.reuters.com/world/us/biden-administration-urge-halt-strict-texas-abortion-law-2021-10-01/>

⁹⁶ The White House, *Memorandum on Protecting Women's Health at Home and Abroad*, Jan, 28, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/28/memorandum-on-protecting-womens-health-at-home-and-abroad/>. The Mexico City Policy, or the 'Global Gag Rule,' previously barred doctors and health care workers from informing women about their pregnancy care options, effectively eroding womans' rights "by unilaterally prohibiting international organizations from working with their governments to advocate for less restrictive abortion laws, and to enact laws that ensure safer medical practices." Sippel, *Achieving Global* at 15. See also Eran Bendavid, Patrick Avila & Grant Miller, *United States Aid Policy and Induced Abortion in Sub-Saharan Africa*, 89 BULL. WORLD HEALTH ORG. 873 (2011) (concluding that the MCP resulted in increased abortions, increased abortion rates, and decreases in modern contraceptive uses).

⁹⁷ See generally Alvarez, *Biden's International Law Restoration*, *supra* note 37 (discussing how the Biden administration's post-Trump international law restoration will be tempered by President Biden's own desires to

President's commitment to women's human rights while sparking conversations on how women's rights in the United States differ from women's rights abroad. Alternatively, Biden can charge the Gender Policy Council with the mandates proscribed by CEDAW. President Biden's actions would proclaim to both the United States and the international community a total opposition to all forms of discrimination against women.

A. RE-INTRODUCE CEDAW

President Biden's should re-introduce the international treaty to the U.S. Senate to affirm "that access to health care, including reproductive health, is a basic right,"⁹⁸ even if it will likely fail in the Senate.⁹⁹ In resubmitting CEDAW, the Biden administration would be charged with reviewing the Convention before submitting the Convention to the Senate.¹⁰⁰ When doing so it is the role of the Executive "to determine what reservations, understandings and declarations may be required as part of the ratification process."¹⁰¹ Appropriately, the President and his administration should revisit and reassess the reservations, understandings and declarations made in the 2002 report. Specifically, President Biden should revisit the understandings relating to abortion, health care services and the CEDAW Committee's authority.¹⁰² When doing so, President Biden should reaffirm his stance on abortion rights and make clear that reservations focusing on abortion rights must comply with existing federal legal standards and should not be used by politicians to sidestep the legal system.

unite a divided nation, and foreign policy trends-including reluctance to enter into multilateral treaties, circumspection of U.N. system organizations, reluctance towards international courts and tribunals, and on-the-ground obstacles that interfere with or undermine bilateral or multilateral agreements).

⁹⁸ *General Recommendation No. 24*, *supra* note 14, P 1.

⁹⁹ *See infra* Part VI.B. *See generally United States Ratification of International Human Rights Treaties*, Hum. Rts. Watch (July 24 2009) <https://www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties> (noting that CEDAW has not yet been ratified by the Senate, despite being "favorably voted out of the Foreign Relations Committee twice: once in 1994 and again in 2002.").

¹⁰⁰ *See generally* Biden CFR, *supra* note 63

¹⁰¹ *Id.*

¹⁰² *Id.*

Accordingly, President Biden has had time to evaluate his position on CEDAW, having submitted the aforementioned Report as then-Chairmen of the Senate's Committee on Foreign Relations nearly twenty years ago. That report recommended the Senate give its advice and consent to ratification, and it is time the United States government does just that.

B. USE GENDER POLICY COUNCIL TO ADOPT MECHANISMS ENSHRINED IN CEDAW

However, even absent ratification, President Biden should direct executive agencies to report on both measures taken to eliminate barriers to and measures taken to enact barriers. President Biden utilizing executive agencies and actions to address discrimination against women would further human rights goals and actively enhance United States' credibility.¹⁰³ First, President Biden should re-confirm his stance on women's rights by issuing an Executive Order recognizing that ongoing, systematic attacks on women's access to health care undermines women's human rights. When doing so, the President should highlight the adverse impact abortion-restricting legislation has on same, while negatively impacting the United States perceived international legitimacy. Concededly, President Biden is constitutionally limited in his ability to create or alter legislation. However, he does have the necessary authority by which to alter the impact current U.S. law has on domestic women.

In that same executive action, the President should instruct the Gender Policy Council to prepare and develop a strategy by which to respond to ongoing threats to women's human rights. Furthermore, he should instruct the Council to issue reports on how states are actively discriminating against women and on what measures the U.S. has taken to ensure access to family planning services despite state attacks.

¹⁰³ Alvarez, *Biden's International Law Restoration*, *supra* note 37, at 534.

“The Gender Policy Council (GPC) was established by President Biden to advance gender equity and equality in both domestic and foreign policy development and implementation. . . with a focus on gender equity and equality, and particular attention to the barriers faced by women and girls”¹⁰⁴ According, the GPC coordinates efforts that advance gender equity and equality, including programs that “increase access to comprehensive health care, address health disparities, and promote sexual and reproductive health and rights.”¹⁰⁵ Under such mandate, the GPC develops national strategies on gender equity and equality that sets forth an interconnected agenda aimed at advancing gender equity and equality in both domestic and foreign policy.¹⁰⁶

Accordingly, the Administration could use this already existing structure to push domestic policy closer to international standards. Namely, the President should empower the Gender Policy Council to create mechanisms and guidelines by which to comply with CEDAW-mandated reporting requirements. Accordingly, Biden should direct the GPC to issue reports that conform with the Committee’s reporting requirements, namely by including information on access to health care, restrictive abortion legislations and barriers that impedes access, measures that have been taken to ensure timely access to care, and whether appropriate measures have been taken to eliminate the ongoing discrimination women face.

Recognizably, doing so will not have the same overall effects of ratification. However, getting the information out there for people to see will spark conversations on the status of woman’s rights domestically compared to the same abroad.

VI. WHAT U.S. RATIFICATION OF CEDAW WILL DO

¹⁰⁴ The White House Gender Policy Council, <https://www.whitehouse.gov/gpc/>

¹⁰⁵ *Id.*

¹⁰⁶ The White House, *Fact Sheet: National Strategy on Gender Equity and Equality*, (Oct. 22, 2021) <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/22/fact-sheet-national-strategy-on-gender-equity-and-equality/>

U.S. ratification of CEDAW would add cohesion to United States domestic and foreign policy, especially in the arena of women’s human rights.¹⁰⁷ Fundamentally, the United States would be required to “report on measures taken to eliminate barriers that women face in gaining access to health care services and what measures they have taken to ensure women timely and affordable access to such services.”¹⁰⁸ Along these lines, the Committee has expressed concern over punitive abortion laws that deny women substantive equality. Such denial violates Article 12, which has been read to require the abolishment of penal provisions that constitute discrimination against women. For this reason, the Committee continually asks ratifying States to remove penalties for abortion procedures.¹⁰⁹ Looking at United States women rights via this lens of international human rights, it is apparent that the international Committee will likewise call upon the United States to remove such punitive abortion laws.¹¹⁰

Equally important, ratification of CEDAW places an obligatory duty on States “to take appropriate legislative, judicial, administrative, budgetary, economic and other measures . . . to ensure that women realize their rights to health care.”¹¹¹ Thus, ratification would place an obligatory duty on the United States to reassess its current high-level measures that impact women’s realization of care, such as those of the legislative, judiciary and executive levels.

More broadly, “U.S. ratification of CEDAW will serve several important purposes,”¹¹² as noted in then-Chairmen Biden’s 2002 Report to the Foreign Relations Committee. First, United States ratification of CEDAW would reaffirm the U.S.’s commitment to principles of equality

¹⁰⁷ See generally *Freeman Commentary*, *supra* note 19, Koh, *Why America Should Ratify*, *supra* note 16 at 263.

¹⁰⁸ *General Recommendation No. 24*, *supra* note 15, P 21.

¹⁰⁹ *Freeman Commentary*, *supra* note 19.

¹¹⁰ See generally *L.C. v. Peru*, *Whelan v. Ireland*, *Mellet v. Ireland*

¹¹¹ *General Recommendation No. 24*, *supra* note 15, P 17.

¹¹² Biden CFR, *supra* note 63

while simultaneously re-affirming the country's ideals on the promotion and protection of women's rights domestically and internationally.¹¹³

Second, ratification will add to the United States' toolbelt when confronting foreign officials about women's rights because "ratification will enhance the ability of the United States to press for women's rights globally."¹¹⁴ As a former Legal Adviser of the U.S. Department of State has noted, United States failure to ratify CEDAW "has provided anti-American diplomatic ammunition to countries who have exhibited far worse record on human rights generally, and women's rights in particular. Persisting in the aberrant practice of nonratification will only further [U.S.] diplomatic isolation and inevitably harm [the U.S.'s] other foreign policy interests."¹¹⁵ Relatedly, ratification will further empower women in other countries who hope to use the Convention to advance women's rights in their respective nations.¹¹⁶ To support this point, the Senate Report quotes Dr. Sima Samar, a former Afghan Minister for Women's Affairs and current member of the United Nations Secretary-General's High-Level Panel on Internal Displacement and UN Secretary-General's High-Level Advisory Board on Mediation. In the report, Dr. Samar asserts that United States ratification will add to the public discourse in foreign countries, namely Afghanistan, noting that domestic ratification will allow citizens of other countries to

then be able to tell [their] countrymen that the United States, where women already have full legal rights, has just seen the need to ratify this treaty. This treaty will then truly be the international measure of the rights that any country should guarantee to its women. We will be able to refer to its terms and guidelines in public debates over what our laws should say . . . women will achieve full human rights for the first time in a generation.¹¹⁷

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Koh, *Why America Should Ratify*, *supra* note 16 at 269.

¹¹⁶ Biden CFR, *supra* note 63

¹¹⁷ Biden CFR, *supra* note 63

In turn, ratification would allow for women’s advancement, promoting stability and economic growth.¹¹⁸ Most importantly, ratification will promise equal rights to women, so to further enshrine that women’s rights are human rights on a universal scale.¹¹⁹

Similarly, ratification would subject the U.S. to the Committee’s jurisdiction and the related enforcement mechanisms for violations.¹²⁰ As such, the impact ratification of CEDAW will have on existing U.S. law is of note. To begin, “[c]urrent U.S. law is largely consistent with the provisions of the Convention because the U.S. Constitution and federal law provide strong guarantees of equal protection as well as effective protections against discriminatory conduct.”¹²¹ This is largely because existing domestic law provides protections against gender-based discrimination sufficient to satisfy most of the requirements of CEDAW.

While the Convention operates separately from U.S. Constitution, implementation of CEDAW would encourage state governments to comply with stricter mandates enshrined within the treaty by heightening obligations to further support women’s rights.¹²² Janet Benshoof explained more thoroughly that “[r]atification of CEDAW, if taken seriously, would have a radical impact on American women's right to equality.”¹²³ This is because CEDAW “has an inclusive definition of equality that *requires strict scrutiny* of all laws negatively impacting women, and imposes obligations on states parties to undertake affirmative measures to eliminate systemic inequality.”¹²⁴ Thus, ratification would raise U.S. legal standards. Specifically, ratifying CEDAW

¹¹⁸ Biden CFR, *supra* note 63.

¹¹⁹ Biden CFR, *supra* note 63

¹²⁰ *See generally* CEDAW, *supra* note 59, arts. 18, 20, 21.; *See also* Part V.B for a discussion on what this would look like for the U.S.

¹²¹ Biden CFR, *supra* note 63

¹²² Benshoof, *U.S. Ratification of CEDAW*, *supra* note ##. While it may be outside the scope of this paper, it is worth noting that the Convention will not create new private rights of action against the United States. Biden CFR report.

¹²³ Benshoof, *U.S. Ratification of CEDAW*, *supra* note ## at 104.

¹²⁴ *Id.* (emphasis added).

would alter judicial scrutiny of abortion laws, shifting the constitutional standard of analysis from the lesser rational basis standard in *Carhart*¹²⁵, back to the more demanding strict scrutiny standard seen in *Roe*.¹²⁶

Additionally, the United States has the option of complying with the obligations set forth in the treaty in a manner consistent with of the U.S. Constitution. The Convention can be “implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the State and local governments.”¹²⁷

VII. WHAT ADVOCATING FOR RATIFICATION WILL ACHIEVE EVEN IF RATIFICATION FAILS.

In today’s political divisive country, it is hard to imagine CEDAW ratification actually occurring. The aforementioned country-wide attacks on access to reproductive care does not stop at state capitals. Rather, elected officials are unlikely to go against their constituents on something as divisive as abortion access. However, with advocating for ratification, President Biden can take a major step forward by affirming the United States’ stance on an international human rights issue.

Advocating for ratification, even if it fails, can counteract the United State’s ongoing rejection of recognized international standards.¹²⁸ President Biden, shortly after his election, affirmed that America is back. In this speech, President Biden stated that the U.S. “must start with diplomacy rooted in America’s most cherished democratic values: defending freedom, championing opportunity, *upholding universal rights*, respecting the rule of law, and treating every person with dignity.”¹²⁹ When doing so, the President emphasized that America’s global power is

¹²⁵ *Gonzales v. Carhart*, 550 U. S. 124, 127 S. Ct. 1610 (2007).

¹²⁶ *Roe*, *supra* note 1.

¹²⁷ Biden CFR, *supra* note 63.

¹²⁸ See generally Alvarez, *Biden’s International Law Restoration*, *supra* note 37.

¹²⁹ White House Press Release, *Remarks by President Biden on America’s Place in the World* (Feb. 4, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/04/remarks-by-president-biden-on-americas-place-in-the-world>

America's abiding advantage. If President Biden is serious about such a foreign policy, he should take action that showcased a commitment to universal rights by addressing gender-based discrimination via CEDAW. Specifically, President Biden should clarify that attacks on women's access to abortion care counteract goals of human rights treaties, such as CEDAW.

Even if ratification does not succeed, such an action would promote and protect reproductive rights worldwide. At its most basic level, advocating for ratification would show both United States citizens and those elsewhere that President Biden takes women's rights seriously.¹³⁰ Such action by the Executive would show our international counterparts that the United States is serious about women's rights in all aspects of life, including the political, economic, and social arenas.¹³¹ Additionally, U.S. ratification of CEDAW would give foreign nationals something to point to when their countries violate human rights law, which may encourage U.S. allies to reconsider and re-affirm their stance on international women's rights.¹³²

Moreover, Biden's campaign platform included an ambitious "Biden Agenda for Women" in which the Administration drew attention to the disproportionate impact public policies have on women's economic, physical and civil rights.¹³³ In the same vein, then-nominee Biden's website noted that "The Biden Plan" would stop state laws that violate *Roe v. Wade*, by codifying *Roe* while "his Justice Department will do everything in its power to stop the rash state laws that so blatantly violate *Roe*."¹³⁴ Even if ratification fails, it would show the American people that President Biden was serious on his campaign promises.

130 Deborah Bessner, Will The United States Continue To Say "You're Fired" To Cedaw?: Lessons Learned From Germany And Chile's Implementation Of Cedaw And The Potential For United States Ratification, 40 FORDHAM INT'L L.J. 1225, 1279 (2017).

¹³¹ *Id.*, see also Pisan, *How the United States Uses Foreign Policy*, *supra* note 43, at 74.

¹³² See *infra*. Part VI.

¹³³ Biden/Harris, The Biden Agenda for Women, <https://joebiden.com/womens-agenda/>

¹³⁴ *Id.*

Furthermore, even if the Senate opts not to ratify the Convention, Biden resubmitting the treaty would solidify Biden's political legacy. As a Senator, Biden introduced the innovative Violence Against Women's Act.¹³⁵ As Vice President, Biden urged legislators to renew the Act,¹³⁶ appointed the first White House Advisor on Violence Against Women,¹³⁷ launched the 1is2many initiative "to help reduce dating violence and sexual assault among students, teens and young adults,"¹³⁸ assisted in the creation of the White House Task Force to Protect Students from Sexual Assault,¹³⁹ and was involved in the White House Council on Women and Girls.¹⁴⁰ Now, President Biden has the power to continue this legacy as a proponent of women's rights beyond domestic borders to become a champion of women rights internationally.

Lastly, action by Biden would have a pedagogical benefit: The conversations that start from executive-branch action on CEDAW will pull back some of the lattice work surrounding women's reproductive rights.¹⁴¹ Folding women's rights into the domestic dialogue can lead federal level to broader perspective and conversations on how anti-abortion policies are considered cruel and inhumane treatment.¹⁴²

VIII. CONCLUSION

The United States is an international leader where abortion care and access continue to be under attack. Denying women access to safe abortion inflicts the discrimination against women

¹³⁵ Violence Against Women Act of 1993, S.11, 103rd Congr. (1993), <https://www.congress.gov/bill/103rd-congress/senate-bill/11/cosponsors>.

¹³⁶ Tara Law, *The Violence Against Women Act Was Signed 25 Years Ago. Here's How the Law Changed American Culture*, Time, Sept. 12, 2019 <https://time.com/5675029/violence-against-women-act-history-biden/>

¹³⁷ The White House President Barack Obama, *About Vice President Biden's Efforts to End Violence Against Women*, <https://obamawhitehouse.archives.gov/1is2many/about>

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See generally Christopher Hickey et al., Here are the executive actions Biden signed in his first 100 days, CNN:Politics, Apr. 30, 2021 <https://www.cnn.com/interactive/2021/politics/biden-executive-orders/> (showing, quite literally, how whenever there is action by the President, news stories follow).

¹⁴² See *supra* note 92 & accompanying text.

that CEDAW seeks to protect against. As noted, lack of federal guidance leads to inconsistent legislation varying from state to state. Such state actions clearly met the type of policies impairing women's access to care that the CEDAW Committee has been vocal against. As such, these measures would be considered inappropriate by the U.N. Committee.

Relying on the Supreme Court to play whack-a-mole with reproductive rights is not an effective domestic policy. At worst, it denies basic human rights to over half the United States population and further disproportionately impacts those seeking such care.

Specifically, the President should support ratification of the Convention on the Elimination of All Forms of Discrimination Against Women. Looking at CEDAW will encourage President Biden to view United States women's rights in an international human rights and humanitarian law framework, which would further encourage action to protect those rights.

Further, President Biden reintroducing CEDAW to the Senate is a logical next step in the United States' foreign policy agenda. This would strengthen the United States' stance as an international leader by emphasizing the importance of women's human rights. Doing so would emphasize that the United States values human rights, both for its own citizens and abroad. In summation, failure to ratify the Convention undercuts the U.S. ability to promote human rights. `