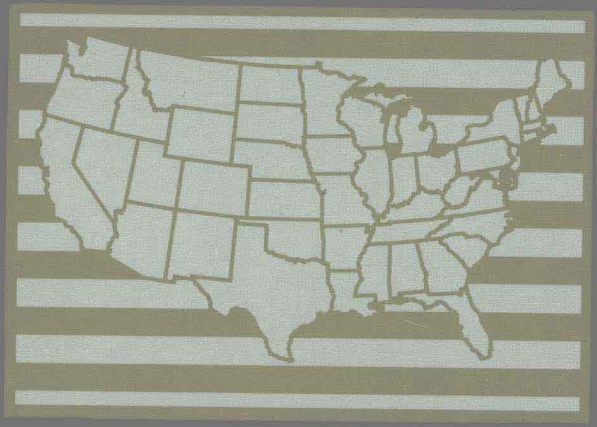
ABORTION POLITICS IN AMERICAN STATES



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Preface

Putting together a book such as this one is a little like participating in a nationwide seminar conducted by phone, fax, and e-mail. As editors, we wanted to produce a volume that would capture the vitality and diversity of state-level abortion politics in the United States, and we felt the best way to do so was to commission a series of case studies from a representative sample of states. From that beginning we embarked on a process of conversation and argumentation that resulted in *Abortion Politics in American States*.

This is not, then, a collection of readings; we did not approach a publisher with a packet of articles and papers that we had found elsewhere. Instead, this is a collaborative volume, an original work by thirteen contributors. All but two of the chapters were written because we expressly asked the authors to do so. None has been published previously. We set out a number of themes we wished the contributors to address and a number of variables we wished them to assess. Then the contributors applied those themes and variables to the complex, particular circumstances of their particular states. The result is a series of studies that we hope comprises a coherent and convincing whole.

We wish to thank Michael Weber of M. E. Sharpe for his initial support of this project and for his patience and guidance as it came to fruition. We also wish to acknowledge Thomas O'Hara for his help and his understanding and Dolores M. Byrnes for indexing the book.

Above all, we want to thank our contributors for making the process by which this book was produced so stimulating and, perhaps as important, so efficient. Over many conversations and exchanges of letters with them we have learned a tremendous amount about the states included in this volume and, of course, about the politics of abortion in the United States. We have

also learned about the merits of collaboration and the value of collegiality. We sincerely hope that our work together has been as rewarding for them as it has been for us.

Mary C. Segers
Timothy A. Byrnes

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MARY C. SEGERS AND TIMOTHY A. BYRNES

Introduction: Abortion Politics in American States

This is a book about the diversity and complexity of abortion politics in America in the 1990s and beyond. During the past thirty-five years, the issue of abortion has, at one time or another, confronted officials at every level of American government—from the White House, Congress, and the Supreme Court to governors, state legislatures, state courts, county boards, and county executives. Even at the local level, school boards have had heated debates over the place of abortion in sex education curricula, zoning boards have considered whether an abortion clinic should be allowed to operate in a community, and police and municipal courts have had to cope with clinic protests and clinic violence. Few issues in American politics have so intensely engaged citizens and public officials at all levels of the American political system.

To be sure, the abortion issue has not confronted officials at all levels simultaneously. The institutional venue for abortion policy has shifted in response to Supreme Court decisions clarifying aspects of abortion in federal law. It is the shifting character of American abortion law that is of deepest interest today to scholars of abortion politics and political scientists who specialize in state politics. After all, abortion was originally a subject of state jurisdiction within the American federal system, a matter of marriage and family law within each state's legal system. The Supreme Court's decision in *Roe v. Wade* changed this and made abortion a matter of both state and federal law. Thus, both historically and currently, the fifty states have been central players in the law and politics of abortion in the United States.

This introductory chapter provides a brief historical overview of shifts and stages in the abortion controversy in the United States. Except for the first

category, these stages are denoted by landmark cases that shifted the primary focus of abortion politics from one level of American government to another. Such stages include (1) the pre-*Roe* period (1800–1973); (2) from *Roe* to *Webster* (1973–89); (3) from *Webster* to *Casey* (1989–92); (4) *Casey* and beyond (1992 to the present). Basically, we argue that while abortion was an issue of state law and politics before 1973, the Supreme Court's decision in *Roe v. Wade* **federalized** abortion and made it a matter of state *and* federal policy. Although states responded in various ways to the Supreme Court's decision and some states continued to enact anti-abortion laws, *Roe* shifted the primary focus of abortion politics to the national level and to activities of the three branches of the federal government. Sixteen years later, a combination of changes at both state and national levels of government led to the Court's decision in *Webster v. Reproductive Health Services,* which **refederalized** abortion. In allowing state governments greater leeway to regulate abortion, *Webster* shifted the primary political emphasis once again back to the level of state politics. As a result of *Webster* and of the Court's 1992 ruling in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the abortion struggle continues to be waged fiercely at *both* national and state levels, a situation that will prevail for the foreseeable future.

The Pre-*Roe* Period: 1800–1973

Legally permissible in 1800, abortion was illegal in all states by 1900. Beginning with an 1821 anti-poison statute in Connecticut, state governments restricted abortion in response to pressure from newly professionalized "regular" physicians, who sought to eliminate competition from midwives and other medical "irregulars."[1] As the Connecticut example indicates, doctors were concerned about the dangers of poisonous abortifacients and the risks of surgical abortion in a nonantiseptic age. Nativist concerns about the threat of European immigration to the power and status of native-born Protestant Americans also fueled the drive to restrict abortion. By 1900 every state had enacted severely restrictive laws, with the result that abortion went underground or, to use the classic phrase, into the "back alleys" of illegal practice. In reality, a double standard developed concerning access to abortion. Wealthy women went to private physicians who discreetly interpreted legal exceptions for therapeutic abortions broadly enough to satisfy their patients. Less fortunate women faced more risky alternatives. Most abortions, and a particularly high percentage of abortions performed on poor women and on women in rural areas, were performed illegally, with grave risks to maternal health. Gradually, physicians and social workers who saw firsthand the consequences of illegal abortions began to call for liberalization of the nation's restrictive abortion laws.

The Movement for Abortion Reform

The abortion reform movement, begun in the 1930s, gathered momentum in the 1950s and 1960s. Led by physicians who feared prosecution for performing illegal therapeutic abortions, the movement included demographers worried about overpopulation, public health officials concerned about maternal mortality from illegal abortions, social workers concerned about family poverty, and police officials worried about illegal abortionists' defiance of, and public contempt for, anti-abortion laws.

This unusual coalition of reformers was influenced by several events. In 1962 the case of Sherri Finkbine drew nationwide attention to the dilemma of an Arizona housewife who had taken thalidomide, a tranquilizer that caused birth defects, in the early stages of pregnancy. Since abortion for fetal defects was not permissible under Arizona law, Finkbine and her husband flew to Sweden, where she had an abortion. The national attention this case drew worked to change public opinion and so made the reformers' campaign slightly easier. The reform cause was similarly influenced by a 1964 rubella epidemic (rubella also poses the threat of birth defects to pregnant women) that again called into question the severity of most state abortion laws. In 1965, the Supreme Court's use of constitutional privacy rights to invalidate a Connecticut birth control statute in *Griswold v. Connecticut* led reformers to wonder whether they could logically extend a woman's constitutional privacy to protect abortion as well as contraception. By 1967 the movement had founded the Clergy Consultation Service on Abortion, a major referral network that began in New York City and rapidly spread nationwide. The reform movement also realized its first state victories in 1967 when Colorado, California, and North Carolina liberalized their abortion laws.

Indeed, between 1966 and 1973, restrictive nineteenth-century abortion statutes were reformed by fourteen states and repealed by four others. Together these eighteen states represented about 42 percent of the nation's population in 1970. Reform states (Mississippi, Colorado, California, North Carolina, Georgia, Maryland, Kansas, Delaware, Arkansas, New Mexico, Oregon, South Carolina, Virginia, and Florida) generally followed the restrictive guidelines suggested in 1959 by the American Law Institute. The ALI model statute permitted abortion in cases of rape, incest, fetal deformity, and to protect the physical and mental health of the mother. Reformers used the ALI statute as the basis for their proposal of moderately permissive abortion laws in many states.

It soon became evident, however, that reform laws did not significantly reduce the number of illegal abortions. These moderately permissive laws contained many provisions, such as state residency requirements and approval by hospital review committees, that made it difficult for young, poor, and rural women to obtain abortions. Moreover, these laws did not reduce the cost of

abortion. Thus the effect of abortion reform was to perpetuate traditional, long-standing discrimination against poor and minority women who could not afford private physician or hospital abortions the way more privileged women could. A two-tiered, class-based system of reproductive health care continued in which wealthy women could have abortions while poor women in rural areas resorted to unsafe, "back alley" abortions.

In the late 1960s, therefore, abortion reformers shifted their efforts from lobbying for moderately permissive abortion laws to supporting repeal of all criminal laws banning or severely restricting abortion. This shift from reform to repeal stemmed from the realization that reform laws did not work; it was also influenced by the resurgence of the women's rights movement in the United States in the late 1960s. Women's liberation activists were crucial in transforming what had been an abortion reform effort led by doctors and population controllers into a movement that argued for the right to legal abortion as an essential ingredient of women's moral autonomy and freedom. Abortion reformers, assisted by women's rights advocates, began to insist that abortion be completely decriminalized and become purely a medical decision between doctor and patient.

In 1970 four states (Hawaii, New York, Alaska, and Washington) repealed their anti-abortion statutes and legalized abortion as an elective, not merely a therapeutic, procedure. In the context of the 1960s, this development seemed to be radical rather than incremental or gradual change. The chief difference between reform and repeal laws was that repeal laws lodged decision making with women themselves (abortion on request) whereas reform laws placed ultimate authority with physicians. Interestingly enough, however, these repeal laws permitting elective abortion contained many restrictions, such as residency requirements, spousal consent, and parental consent.[2]

Setbacks in the Reform Movement

These victories marked the high point for abortion rights advocates in the pre-*Roe* period. By 1972 the movement for reform of the states' abortion laws was slowing as it encountered growing opposition from a nascent right-to-life movement. In 1967 the Arizona state legislature rejected an ALI-type reform statute. In Michigan, a Cincinnati physician, Dr. John Wilke, worked with the recently formed National Right to Life Committee to defeat a 1972 referendum that would have legalized abortion in the first twenty weeks of pregnancy. A 1972 referendum on abortion reform in North Dakota also went down to defeat. Repeal efforts were defeated in Iowa and Minnesota. Only Florida in 1972 enacted liberalized abortion reform based on the ALI model. And in December 1972, after a campaign in which the Pennsylvania State Catholic Conference and Philadelphia Cardinal John Krol actively opposed liberalization, the Pennsylvania state legislature passed a highly restrictive bill (SB800 would have banned all

abortions except those to save the life of the woman) only to have it vetoed by the governor.

By 1973, then, on the eve of the Supreme Court's ruling in *Roe*, a patchwork quilt had developed of various state-level statutes and regulations having to do with abortion. Four states offered "abortion on request," and fourteen states had moderately permissive laws. The remaining thirty-two had highly restrictive statutes, permitting abortion only to save the woman's life. Moreover, women's access to abortion services was severely limited; in twenty-three states, every woman seeking an abortion had to go out of state to obtain one.[3] The stage was set for the Court's dramatic ruling in *Roe v. Wade*.

From *Roe* to *Webster* (1973–89)

In *Roe* the Supreme Court, by a 7–2 vote, ruled that the right of privacy, grounded in the Fourteenth Amendment's concept of personal liberty, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." At issue in *Roe* was an 1857 Texas statute that made it a crime to "procure an abortion" except to save the woman's life. Writing for the majority, Justice Harry Blackmun found this statute unconstitutional and, in effect, declared a fundamental constitutional right to abortion. Nevertheless, this right was not held to be absolute; it had to be balanced against the state's legitimate interest in maternal health and potential human life. Blackmun elaborated a trimester framework to balance these competing interests. During the first three months (or first trimester) of pregnancy, abortion is a matter between a woman and her physician. During the second trimester, government may intervene and regulate abortions in order to preserve and protect the woman's life and health. But during the third trimester, after the point of fetal viability, government may regulate or even prohibit abortion in order to protect fetal life. The lone exception in the third trimester is that states may not prohibit abortions performed to preserve the life or health of the woman.[4]

The Court's decision to legalize abortion had a transforming effect on American law and politics. *Roe* invalidated forty-six of fifty state laws and superseded repeal laws in the remaining four states. In legalizing abortion, the justices inaugurated a national public debate and transformed political discourse about abortion policy. The Court's decision also triggered the rapid development of the right-to-life movement in the United States and lulled abortion rights supporters into a false sense that women's access to abortion was secure.[5] Above all, *Roe* federalized abortion policymaking, shifting the primary focus of abortion politics and political initiative on abortion policy to the federal government in Washington. State governments became reactive, enacting measures to test the limits of the Supreme Court decision and to carve out some degree of state autonomy and control. After *Roe*, however, the center of power shifted to the institutions of the

federal government, especially the Supreme Court and Congress in the 1970s and all three branches of government in the 1980s.

Needless to say, *Roe* was not a resolution of the abortion controversy. Indeed, as Glen Halva-Neubauer has pointed out, the battles over abortion in state legislatures increased in number and intensity after *Roe v. Wade*.[6] The struggle within the federal government also intensified throughout the 1970s and 1980s. Abortion became an issue in the presidential election of 1976 and in congressional debates from 1973 on. Congress considered human life constitutional amendments, human life statutes, conscience clauses, and measures restricting abortion funding. In the 1980s Presidents Reagan and Bush campaigned on Republican Party platforms that supported a constitutional amendment to ban abortion, the reversal of *Roe*, and the appointment of pro-life judges to the federal courts. The Supreme Court ruled in several major abortion cases post-*Roe*, including *Maher v. Roe, Planned Parenthood v. Danforth, Bellotti v. Baird, Colautti v. Franklin, Harris v. McRae, Thornburgh v. American College of Obstetricians and Gynecologists*, and the *Webster* and *Casey* decisions.

Thus, in the years from 1973 to 1989, abortion politics continued at *both* state and federal levels, with emphasis and final determining authority located at the national level. States might pass laws, but the Supreme Court would review their constitutionality. As a result, interest groups directed their attention primarily to the national institutions of American government. At the same time, the abortion struggle continued within state governments as state legislatures sought to define state law in relation to the federal judicial standard enunciated in *Roe*. "Challenger states"[7] such as Illinois, Massachusetts, Minnesota, Missouri, and Pennsylvania enacted new laws both to test the limits of *Roe* and to restrict access to abortion within their boundaries. These laws and regulations concerned everything from abortion advertising and promotion, licensing and reporting requirements for clinics, fetal protection statutes, consent and notification laws, regulations on public funding and the use of public facilities. *Roe* had left so many questions unanswered that it stood as an open invitation to states to regulate and litigate.

Thus, despite the Court's ruling in Roe, shifting the primary focus of abortion politics to the federal level, the fifty states did not withdraw from the abortion debate. Over time, state legislative enactments and test-case challenges, combined with changes in the composition of the Supreme Court, worked to undermine the Roe decision. In its 1989 decision in the Webster case, the Court signaled to the states that increasing state regulation of abortion was constitutionally permissible.

From *Webster* to *Casey* (1989–92)

Webster v. Reproductive Health Services, Inc., presented an abortion clinic's challenge to a restrictive Missouri abortion law. The Missouri law included a ban on the performance of abortion in public institutions, even when the woman

would be paying her own bill; a statutory preamble declaring that "the life of each human being begins at conception"; a provision prohibiting public funding of abortion counseling; and a regulation requiring doctors to determine whether any fetus of twenty or more weeks' gestation was viable, that is, could potentially survive outside the womb. On 3 July 1989 Chief Justice William Rehnquist, writing for a three-member plurality, found the Missouri statute constitutional.

Webster was important because of changes in the political climate of the country and in the composition of the Supreme Court during the 1980s. Both the state of Missouri and the Bush administration asked the Court to use *Webster* as an occasion to reconsider its decision in *Roe v. Wade*. Moreover, by the time this case arrived at the Supreme Court, the composition of the Court had changed dramatically from the nine justices present for the original *Roe* decision. All five justices who retired in the Reagan-Bush era—Potter Stewart, Warren Burger, Lewis Powell, William Brennan, and Thurgood Marshall—were members of the original seven-member majority in *Roe v. Wade*. Their retirement from the Court gave President Reagan the opportunity to appoint three justices (Antonin Scalia, Anthony Kennedy, and Sandra Day O'Connor) and President Bush the chance to name two justices (David Souter and Clarence Thomas). An anti-abortion strategy to alter the complexion of the federal judiciary bore fruit in *Webster* when a more conservative Court, by a 5–4 vote, upheld the Missouri law.

The key finding in *Webster*, in terms of the politics of abortion in the United States, was the acceptance of viability or, put another way, the recognition of the state's interest in potential human life, at twenty weeks (reduced from the definition of twenty-eight weeks in *Roe*). This was a break with the trimester formula established in *Roe* and an invitation to states to enact laws similar to the Missouri statute that would challenge other portions of the *Roe* ruling. In other words, *Webster* sent a clear signal to state governments that the Court was willing to consider abortion restrictions that did not, strictly speaking, adhere to the governing judicial precedent.

Webster thus **refederalized** the abortion issue in American politics. The Court's decision allowed state legislatures more flexibility in regulating abortion. As a result, the attention of pro-choice and pro-life groups shifted immediately away from the Court and back to the grassroots to marshal public opinion in support of their respective positions and to carry on their advocacy in the halls of state legislatures. At the same time, *Webster* spawned renewed efforts at the federal level to "codify *Roe*" and thereby preserve the legal right to abortion in the event the Court reversed *Roe* in the future. In short, the battle over abortion policy continued after *Webster* on *both* the federal and state levels of government, even though the primary focus of political struggle shifted to the states.

The impact of *Webster* was dramatic, unleashing a flurry of activity in state elections, state legislatures, and state courts. From July 1989 to July 1990, some

351 bills concerning abortion policy were introduced in state legislatures. Abortion immediately became a major issue in the November 1989 gubernatorial election campaigns in New Jersey and Virginia; pro-choice candidates became governors in each state. *Webster* also resulted in renewed activism among pro-choice groups. Alarmed at the *Webster* ruling and convinced that the Supreme Court was only one vote away from overturning *Roe*, pro-choice advocates mobilized their supporters for state election campaigns and increased lobbying efforts in state legislatures. Pro-life adherents, on their part, supported passage of restrictive state laws in Louisiana, Pennsylvania, and Utah but ran into political roadblocks in other states (Florida in 1989, Idaho in 1990). Pennsylvania and Louisiana legislators intended these strict anti-abortion statutes to be test cases, to be occasions for the newly constituted Supreme Court to overturn *Roe*. Finally, with the return of abortion to state politics, legislators and governors could no longer hide behind *Roe* and avoid taking a position. Voters insisted that politicians go on record declaring their position on legal abortion and on the specific restrictions they would or would not support.

Perhaps the best indication of the significance and impact of *Webster* is the realization that, in two cases, state laws invalidated by the Supreme Court before *Webster* were upheld by the Supreme Court after *Webster*. In *Thornburgh v. American College of Obstetricians and Gynecologists* (1986), the Court struck down a Pennsylvania law requiring (1) women to be advised of medical assistance and that the natural father is responsible for child support; and (2) physicians to inform women of the detrimental effects and risks of abortion.[8] In *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), the Court upheld similar informed-consent and physician-counseling requirements. Ohio provides an even clearer illustration of the impact of *Webster*. With minor changes, Ohio now has the kind of law—informed consent, mandatory twenty-four-hour waiting period, and parental notification with option of "judicial bypass"—that the Court invalidated in its 1983 ruling in *City of Akron v. Akron Center for Reproductive Health*.[9] Before *Webster*, these provisions did not pass Supreme Court scrutiny; after *Webster*, they were held to be legal.

Casey and Beyond: 1992 to the Present

If *Roe* federalized abortion politics and policy, *Webster* refederalized it. That is, it returned the primary focus of abortion politics and policymaking to the states. In 1992 *Casey* continued the refederalization process, when it both reaffirmed a woman's right to abortion and permitted states to restrict that right. The political result of this is a continuation of the struggle over abortion policy at both federal and state levels of American government.

In *Planned Parenthood v. Casey*, a badly splintered Supreme Court issued a complicated ruling that both upheld a woman's right to abortion and upheld state

restrictions on that right. *Casey* presented yet another challenge by abortion providers to a restrictive state statute. At issue were provisions of the 1989 Pennsylvania Abortion Control Act, which amended the state's abortion law to include additional restrictions: abortion counseling by a physician before obtaining a woman's informed consent; a mandatory twenty-four-hour waiting period; parental consent; spousal notification; and reporting and public disclosure requirements. As in *Webster*, the Bush administration joined *Casey* with an *amicus* brief, urging the Court to overrule *Roe*. Once again, a period of heightened public debate and anxious anticipation preceded oral argument and announcement of the Court's decision. A total of thirty-two *amicus* briefs were filed in the case (compared with the seventy-eight briefs filed in *Webster*). On the last day of the Court's term, in July 1992, the justices delivered their ruling. A plurality of three justices (Souter, Kennedy, and O'Connor) staked out a middle position, reaffirming *Roe* but also upholding most of the challenged provisions of the Pennsylvania law. On 20 March 1994, five years after the legislation was first enacted and two years after *Casey*, the Pennsylvania Abortion Control Act finally went into effect.

Controversy immediately developed over how to interpret the Court's complicated ruling in *Casey*. Pro-choice advocates declared that "*Roe* was dead" and that most people did not understand how deeply *Roe* had been dismantled. By contrast, pro-life activists said that *Casey* was a victory for abortion rights advocates. A more modest assessment was voiced by one of the principals in the case, Pennsylvania governor Robert Casey: "The decision, while not overturning *Roe*, clearly returns to the people the power to regulate abortion in reasonable ways, so as to protect maternal health and reduce the number of abortions in our country."[10]

Appealing to the rule of precedent (*stare decisis*) and to "principles of institutional integrity," a plurality of the Court concluded that "the essential holding of *Roe* should be retained and once again reaffirmed." According to Justices Souter, Kennedy, and O'Connor, that essential holding consisted of three points: a woman's right to abortion before viability, the state's power to restrict abortions after fetal viability (except in life- or health-threatening pregnancies), and the state's legitimate interest throughout pregnancy in protecting maternal health and potential life. While the *Casey* joint opinion reaffirmed *Roe*, however, it seems equally clear that it significantly redefined much of what *Roe* stood for. The plurality rejected *Roe*'s trimester framework for balancing the interests of the woman and the government. The plurality also rejected *Roe*'s argument that the right to abortion is a fundamental right that can be restricted only in the light of "compelling state interests." Instead, O'Connor, Kennedy, and Souter redefined the central principle of *Roe* as guaranteeing the woman a liberty interest under the Fourteenth Amendment "to choose to terminate or continue her pregnancy before viability." This meant that state restrictions on the right to abortion need