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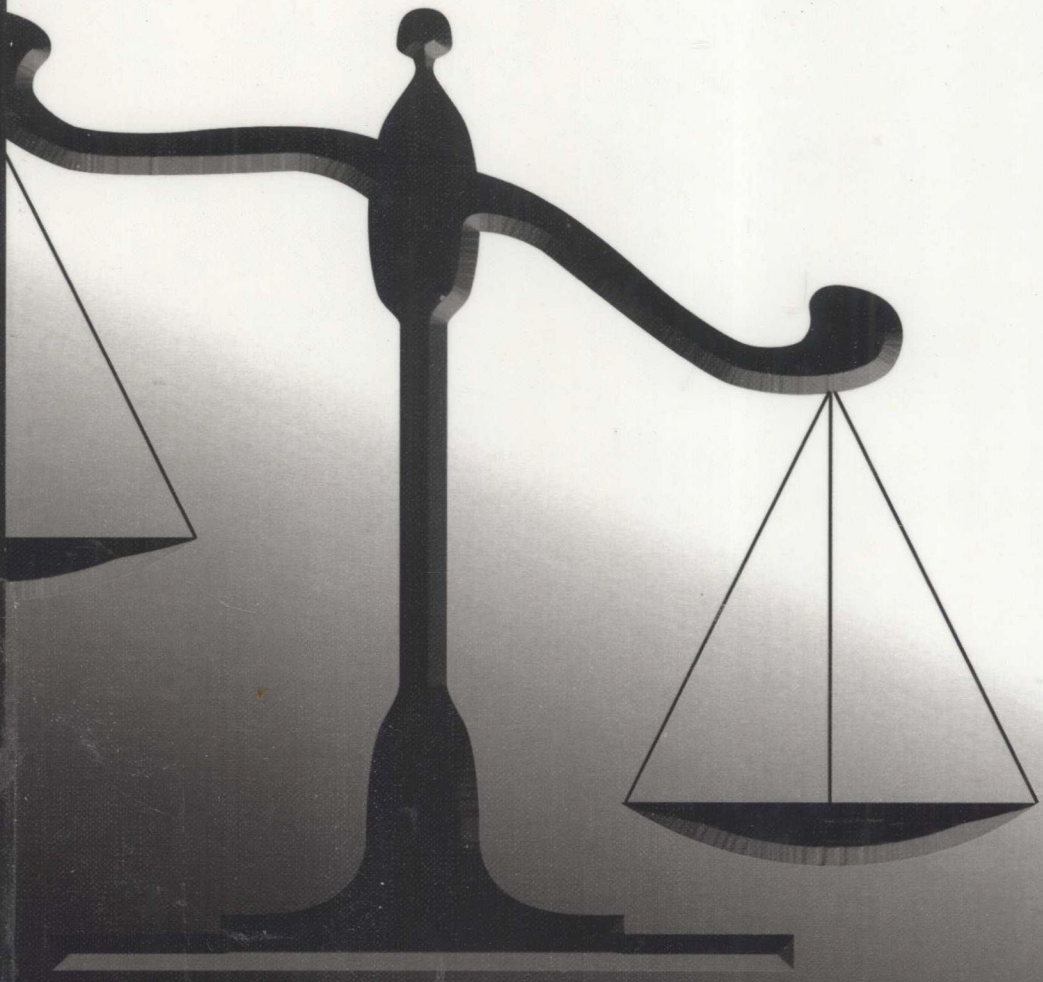
Abortion

Legislative and Legal Issues



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ABORTION: LEGISLATIVE AND LEGAL ISSUES

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PREFACE

In Roe v. Wade, the U.S. Supreme Court determined that the Constitution protects a woman's decision whether or not to terminate her pregnancy. In a companion case, Doe v. Bolton, the Court held further that a state may not unduly burden a woman's fundamental right to abortion by prohibiting or substantially limiting access to the means of effectuating her decision. Instead of settling the issue, the Court's decisions kindled heated debate and precipitated a variety of governmental actions at the national, state and local levels designed either to nullify the rulings or hinder their effectuation. These governmental regulations have, in turn, spawned further litigation in which resulting judicial refinements in the law have been no more successful in dampening the controversy. This book offers an overview of the development of abortion law from 1973 to the present. Beginning with a brief discussion of the historical background, the book analyzes the leading Supreme Court decisions over the past 34 years, emphasizing particularly the landmark decisions of Roe v. Wade and others. This book consists of public documents which have been located, gathered, combined, reformatted, and enhanced with a subject index, selectively edited and bound to provide easy access.

Chapter 1 - In *Roe v. Wade*, 410 U.S. 113 (1973), the U.S. Supreme Court determined that the Constitution protects a woman's decision whether or not to terminate her pregnancy. In a companion case, *Doe v. Bolton*, 410 U.S. 179 (1973), the Court held further that a state may not unduly burden a woman's fundamental right to abortion by prohibiting or substantially limiting access to the means of effectuating her decision. Rather than settle the issue, the Court's decisions kindled heated debate and precipitated a variety of governmental actions at the national, state and local levels designed either to nullify the rulings or hinder their effectuation. These governmental regulations have, in turn, spawned

further litigation in which resulting judicial refinements in the law have been no more successful in dampening the controversy.

The law with respect to abortion in mid-19th century America followed the common law of England in all but a few states. By the time of the Civil War, a number of states had begun to revise their statutes in order to prohibit abortion at all stages of gestation, with various exceptions for therapeutic abortions. The year 1967 marked the first victory of an abortion reform movement with the passage of liberalizing legislation in Colorado. The legislation was based on the Model Penal Code. Between 1967 and 1973, approximately one-third of the states had adopted, either in whole or in part, the Model Penal Code's provisions allowing abortion in instances other than where only the mother's life was in danger. Between 1968 and 1972, abortion statutes of many states were challenged on the grounds of vagueness, violation of the fundamental right of privacy, and denial of equal protection. In 1973, the Court ruled in *Roe* and *Doe* that Texas and Georgia statutes regulating abortion interfered to an unconstitutional extent with a woman's right to decide whether to terminate her pregnancy. The decisions rested upon the conclusion that the Fourteenth Amendment right of personal privacy encompassed a woman's decision whether to carry a pregnancy to term.

The Supreme Court's decisions in *Roe* and *Doe* did not address a number of important abortionrelated issues which have been raised subsequently by state actions seeking to restrict the scope of the Court's rulings. These include the issues of informed consent, spousal consent, parental consent, and reporting requirements. In addition, *Roe* and *Doe* never resolved the question of what, if any, type of abortion procedures may be required or prohibited by statute. In 1989, the Court indicated in *Webster v. Reproductive Health Services*, 492 U.S. 490, that, while it was not overruling *Roe* and *Doe*, it was willing to apply a less stringent standard of review to state restrictions respecting a woman's right to an abortion. Then, in 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Court rejected specifically *Roe*'s strict scrutiny standard and adopted the undue burden analysis. In 2000, in *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Court determined that a Nebraska statute prohibiting the performance of "partial-birth" abortions was unconstitutional. In 2007, however, the Court upheld the federal Partial-Birth Abortion Ban Act of 2003 in *Gonzales v. Carhart*, 550 U.S. 124 (2007). In upholding the federal act, the Court distinguished between the federal measure and the Nebraska statute.

Chapter 2 - In 1973, the U.S. Supreme Court concluded in *Roe v. Wade* that the U.S. Constitution protects a woman's decision to terminate her pregnancy. In *Doe v. Bolton*, a companion decision, the Court found that a state may not unduly burden the exercise of that fundamental right with regulations that prohibit or

substantially limit access to the means of effectuating the decision to have an abortion. Rather than settle the issue, the Court's rulings since *Roe* and *Doe* have continued to generate debate and have precipitated a variety of governmental actions at the national, state, and local levels designed either to nullify the rulings or limit their effect. These governmental regulations have, in turn, spawned further litigation in which resulting judicial refinements in the law have been no more successful in dampening the controversy.

In recent years, the rights enumerated in *Roe* have been redefined by decisions such as *Webster v. Reproductive Health Services*, which gave greater leeway to the States to restrict abortion, and *Rust v. Sullivan*, which narrowed the scope of permissible abortion-related activities that are linked to federal funding. The Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which established the "undue burden" standard for determining whether abortion restrictions are permissible, gave Congress additional impetus to move on statutory responses to the abortion issue, such as the Freedom of Choice Act.

In each Congress since 1973, constitutional amendments to prohibit abortion have been introduced. These measures have been considered in committee, but none has been passed by either the House or the Senate.

Legislation to prohibit a specific abortion procedure, the so-called "partial-birth" abortion procedure, was passed in the 108th Congress. The Partial-Birth Abortion Ban Act appears to be one of the only examples of Congress restricting the performance of a medical procedure. Legislation that would prohibit the knowing transport of a minor across state lines for the purpose of obtaining an abortion has been introduced in numerous Congresses.

Since *Roe*, Congress has attached abortion funding restrictions to various appropriations measures. The greatest focus has been on restricting Medicaid abortions under the annual appropriations for the Department of Health and Human Services. This series of restrictions is popularly known as the "Hyde Amendments." Restrictions on the use of appropriated funds affect numerous federal entities, including the Department of Justice, where federal funds may not be used to perform abortions in the federal prison system except in cases of rape or endangerment of the mother. Such restrictions also have an impact in the District of Columbia, where both federal and local funds may not be used to perform abortions except in cases of rape, incest or where the mother is endangered, and affect international organizations like the United Nations Population Fund, which receives funds through the annual Foreign Operations appropriations measure.

Chapter 3 - In 1993, President Clinton modified the military policy on providing abortions at military medical facilities. Under the change directed by

the President, military medical facilities were allowed to perform abortions if paid for entirely with non-Department of Defense (DOD) funds (i.e., privately funded). Although arguably consistent with statutory language barring the use of Defense Department funds, the President's policy overturned a former interpretation of existing law barring the availability of these services. On December 1, 1995, H.R. 2126, the FY1996 DOD appropriations act, became law (P.L. 104-61). Included in this law was language barring the use of funds to administer any policy that permits the performance of abortions at any DOD facility except where the life of the mother would be endangered if the fetus were carried to term or where the pregnancy resulted from an act of rape or incest. Language was also included in the FY1996 DOD Authorization Act (P.L. 104-106, February 10, 1996) prohibiting the use of DOD facilities in the performance of abortions. These served to reverse the President's 1993 policy change. Recent attempts to change or modify these laws have failed.

Over the last three decades, the availability of abortion services at military medical facilities has been subjected to numerous changes and interpretations. Within the last 15 years, Congress has considered numerous amendments to effectuate such changes. Although Congress, in 1992, passed one such amendment to make abortions available at overseas installation, it was vetoed.

The changes ordered by the President did not necessarily have the effect of greatly increasing access to abortion services. Abortions are generally not performed at military medical facilities in the continental United States. In addition, few have been performed at these facilities abroad for a number of reasons. First, the U.S. military follows the prevailing laws and rules of foreign countries regarding abortion. Second, the military has had a difficult time finding health care professionals in uniform willing to perform the procedure.

With the enactment of P.L. 104-61 and P.L. 104-106, these questions became moot, because now, neither DOD funds nor facilities may be used to administer any policy that provides for abortions at any DOD facility, except where the life of the mother may be endangered if the fetus were carried to term. Privately-funded abortions at military facilities are permitted when the pregnancy was the result of an act of rape or incest.

There has been little legislative activity affecting the military on this issue. The last major effort occurred with an amendment to the House version of the FY2007 National Defense Authorization Act would allow DOD facilities outside the U.S. to perform privately-funded abortions. This language was rejected by the conference committee.

Chapter 4 - On August 24, 2006, the Food and Drug Administration (FDA) announced the approval of an application to switch Plan B, an emergency

contraceptive, from a prescription-only drug to an over-the-counter (OTC) drug for women 18 years of age and older. Plan B will only be sold in pharmacies or healthcare clinics. It will continue to be dispensed as a prescription drug for women 17 years old and younger. Plan B is a brand of post-coital contraceptive that is administered within a few hours or days of unprotected intercourse. Emergency contraception prevents pregnancy; it does not disrupt an established pregnancy.

Approval of the switch to OTC status for Plan B has been controversial. Some Members of Congress urged the FDA to deny OTC status for Plan B. Individuals who criticize the three-year delay in deciding to switch to OTC believe that Bush Administration policy and FDA actions were based on political and ideological considerations rather than on sound science. Conservative religious and pro-life groups believe Plan B may increase unsafe sexual activity and should be used only under the supervision of a healthcare professional and, therefore, should not be available OTC. Their major concern with Plan B, however, is that it might prevent the implantation of an embryo in the uterus, which to pro-life groups constitutes abortion. However, the medical community does not consider prevention of implantation to be an abortion, and FDA does not classify Plan B as an abortion drug.

Emergency contraceptives are currently available without a prescription in more than 40 countries. According to Barr Pharmaceuticals, sales of Plan B in the United States have doubled since August 2006, "rising from about $40 million a year to what will probably be close to $80 million for 2007." Women's health advocates claim that OTC status will improve access to the drug, thereby reducing the number of unintended pregnancies and reducing the number of abortions. However, a medical literature review, published in April 2007, found that "advance provision of emergency contraception did not reduce pregnancy rates when compared to conventional provision.... The interventions tested thus far have not reduced overall pregnancy rates in the populations studied."

The Office of Violence Against Women within the Department of Justice (DOJ) has developed guidelines for the treatment of sexual assault victims. The guidelines, released in September 2004, have been criticized by numerous organizations because they do not mention offering emergency contraception to female rape victims. In January 2005, a letter signed by 97 Members of Congress was sent to the Director of the Office on Violence Against Women expressing concern over the failure to mention emergency contraception and urging that the guidelines be changed to include such information.

Legislation introduced in the 110th Congress (S. 21/H.R. 819, H.R. 464, S. 1240, H.R. 2064/S. 1800, H.R. 2503, H.R. 2596/S. 1555) aims to ensure that Plan

B is made available to women in general and sexual assault victims in particular or encourage education and provide information about Plan B.

Chapter 5 - Conscience clause laws allow medical providers to refuse to provide services to which they have religious or moral objections. In some cases, these laws are designed to excuse such providers from performing abortions. While substantive conscience clause legislation has not been approved, appropriations bills that include conscience clause provisions have been passed. This chapter describes the history of conscience clauses as they relate to abortion law and provides a legal analysis of the effects of such laws. The report also reviews recent proposed regulations to implement some of the conscience clause laws.

Conscience clause laws allow medical providers to refuse to provide services to which they have religious or moral objections. These laws are generally designed to reconcile "the conflict between religious health care providers who provide care in accordance with their religious beliefs and the patients who want access to medical care that these religious providers find objectionable."[1] Although conscience clause laws have grown to encompass protections for entities that object to a wide array of medical services and procedures, such as providing contraceptives or terminating life-support, the original focus of conscience clause laws was on permitting health care providers to refuse to participate in abortion or sterilization procedures on religious or moral grounds.

Chapter 6 - The Partial-Birth Abortion Ban Act ("PBABA" or "the act") was signed into law on November 5, 2003. Within two days of its enactment, the PBABA was enjoined by federal district courts in Nebraska, California, and New York. Since that time, the U.S. Courts of Appeals for the Second, Eighth, and Ninth Circuits have affirmed lower court decisions that have found the act unconstitutional.

This chapter examines *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood*, the partial-birth abortion decisions from the Eighth and Ninth Circuits. In spring 2006, the U.S. Supreme Court agreed to review the two decisions. This chapter provides background information on the PBABA and explores the arguments put forth by the parties.

The Partial-Birth Abortion Ban Act ("PBABA" or "the act") was signed into law on November 5, 2003.[1] Within two days of its enactment, the PBABA was enjoined by federal district courts in Nebraska, California, and New York.[2] Since that time, the U.S. Courts of Appeals for the Second, Eighth, and Ninth Circuits have affirmed lower court decisions that have found the act unconstitutional.[3]

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Eighth and Ninth Circuits. This chapter reviews the two cases and discusses the arguments put forth by the parties. It also provides background information on the PBABA.

Chapter 7 - The term "partial-birth abortion" refers generally to an abortion procedure where the fetus is removed intact from a woman's body. The procedure is described by the medical community as "intact dilation and evacuation" or "dilation and extraction" ("D & X") depending on the presentation of the fetus. Intact dilation and evacuation involves a vertex or "head first" presentation, the induced dilation of the cervix, the collapsing of the skull, and the extraction of the entire fetus through the cervix. D & X involves a breech or "feet first" presentation, the induced dilation of the cervix, the removal of the fetal body through the cervix, the collapsing of the skull, and the extraction of the fetus through the cervix.

Since 1995, at least thirty-one states have enacted laws banning partial-birth abortions. Although many of these laws have not taken effect because of temporary or permanent injunctions, they remain contentious to both pro-life advocates and those who support a woman's right to choose. This chapter discusses the U.S. Supreme Court's decision in *Stenberg v. Carhart*, a case involving the constitutionality of Nebraska's partial-birth abortion ban statute. In *Stenberg*, the Court invalidated the Nebraska statute because it lacked an exception for the performance of the partial-birth abortion procedure when necessary to protect the health of the mother, and because it imposed an undue burden on a woman's ability to have an abortion.

This chapter also reviews various legislative attempts to restrict partial-birth abortions during the 106th, 107th, and 108th Congresses. S. 3, the Partial-Birth Abortion Ban Act of 2003, was signed by the President on November 4, 2003. On April 18, 2007, the Court upheld the act, finding that, as a facial matter, it is not unconstitutionally vague and does not impose an undue burden on a woman's right to terminate her pregnancy. In reaching its conclusion in *Gonzales v. Carhart*, the Court distinguished the federal statute from the Nebraska law at issue in *Stenberg*.

Chapter 8 - State laws that require parental involvement in a pregnant minor's abortion decision have gained greater visibility in light of recent attempts by Congress to criminalize the interstate transport of a minor to obtain an abortion. At least forty-three states have enacted statutes that require a minor to seek either parental notification or parental consent before obtaining an abortion. This chapter discusses the validity of state parental involvement laws in the context of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, *Ayotte v. Planned Parenthood of Northern New England*, and other U.S. Supreme Court cases that

address a minor's right to choose whether to terminate her pregnancy. The report reviews the various state parental involvement law provisions, such as judicial bypass procedures and exceptions for medical emergencies. The report also highlights recent federal parental involvement legislation and provides a survey of current state parental involvement laws.

CONTENTS

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Chapter 1

ABORTION LAW DEVELOPMENT: A BRIEF OVERVIEW*

Jon O. Shimabukuro

SUMMARY

In *Roe v. Wade*, 410 U.S. 113 (1973), the U.S. Supreme Court determined that the Constitution protects a woman's decision whether or not to terminate her pregnancy. In a companion case, *Doe v. Bolton*, 410 U.S. 179 (1973), the Court held further that a state may not unduly burden a woman's fundamental right to abortion by prohibiting or substantially limiting access to the means of effectuating her decision. Rather than settle the issue, the Court's decisions kindled heated debate and precipitated a variety of governmental actions at the national, state and local levels designed either to nullify the rulings or hinder their effectuation. These governmental regulations have, in turn, spawned further litigation in which resulting judicial refinements in the law have been no more successful in dampening the controversy.

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* This is an edited, reformatted and augmented version of a CRS Report for Congress publication, Report 95-724, dated January 15, 2009.

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INTRODUCTION

In *Roe v. Wade*, the U.S. Supreme Court determined that the Constitution protects a woman's decision whether or not to terminate her pregnancy.[1] In a companion case, *Doe v. Bolton*, the Court held further that a state may not