1

The Link Between Public Opinion and Policy

The past decade has brought increasing interest among political scientists in abortion politics research. Yet, in a recent review essay on the abortion politics literature, Malcolm Goggin (1993, 22) suggested that a "number of puzzling and unanswered questions" about abortion politics "cry out for investigation." Ironically, Goggin's plea was grounded in a special issue of *American Politics Quarterly* that focused entirely on the politics of abortion.

Goggin specifically suggested that researchers begin to study the impact that shocks or interventions can have on public opinion and access to abortion (Goggin 1993, 22). For example, we know little about how the 1989 *Webster v. Reproductive Health Services* (492 U.S. 490) decision allowing states greater leeway to restrict abortion has influenced abortion politics and policy-making. Moreover, Goggin indicated that more research needs to be done on the impact policy can have on abortion rates in the American states.

This study seeks to address these concerns. Specifically, this book explores the variation in abortion policies that have been adopted in the American states. The impact policies can have on access to abortion and ultimately on abortion rates is one of the major components of this study. Likewise, policy interventions are explored to determine how policy changes have influenced abortion rates in the United States. Finally, this book presents research that for the first time connects public opinion on abortion with state policies on abortion and abortion rates.

Why Abortion?

The importance of studying abortion as a political issue should be readily apparent. No single issue has retained such a pivotal place in our political psyche since the Vietnam war. The two major political parties have staked out diametrically opposed views on the right of women to obtain abortion services (Tatalovich and Daynes 1981). Interest groups on both sides of the debate have fashioned rhetorical and symbolic arguments that strike at the core of individual values (Luker 1984). Even the labels that have been attached to the opposing sides, pro-choice and pro-life, point to the very different viewpoints individuals bring to the abortion debate (Luker 1984; Rosenblatt 1992).

Ultimately, the politics of abortion in the United States boils down to a number of conflicts at different levels. On the one hand, abortion can be seen as a religious conflict, pitting religious fundamentalists and strict Catholics against others in a moral dispute about the origins of life. Beliefs about life beginning at conception are pitted against secular notions of liberty and the privacy rights of women (Goggin 1993; Tribe 1991; Rosenblatt 1992; Petchesky 1984). Abortion has also come to represent a political struggle, with disputes over abortion policy filling virtually every level and branch of government (Goggin 1993). The issue has come to represent one of the most divisive topics for our Supreme Court, state courts, and political parties. Abortion clearly represents an ideological dispute as well, with most liberals endorsing the right to an abortion and most conservatives backing pro-life forces (Luker 1984; Petchesky 1984; Staggenborg 1991). Yet there are ideological divisions within each camp, with each side splitting between extremists who demand more direct action and less strident activists who pursue more reasoned means of persuasion and political change (Staggenborg 1991; Goggin 1993).

Perhaps one of the best ways to study abortion politics is to assess the nature and scope of conflict over the issue (Goggin 1993; Schattschneider 1960). Schattschneider (1960) has indicated that political disputes in the American system are often conducted between interests that have the most at stake, largely without public attention. It is only when interests begin to lose the political battle that the scope of conflict is expanded to include the mass public (Schattschneider 1960). Because attitudes about abortion are so intensely felt by partisans on both sides of the debate, minor losses often encourage those groups to expand the scope of conflict and call for public support (Goggin 1993). This was evident when pro-choice forces marshaled large demonstrations in Washington D.C., in response to the 1989 *Webster* decision.

Thus, abortion is an important issue to study because the scope of conflict over the issue is often altered by political decisions (Goggin 1993). When courts overturn or uphold abortion restrictions in the states, those policy decisions have the potential to alter political tactics at various levels (Goggin and Wlezien 1993). When legislatures and other policymakers alter regulations, the scope and nature of the abortion conflict is subject to change. Additionally, if public views on abortion undergo change, it is likely that the debate over abortion policy options will be altered.

Why Public Opinion?

Popular notions of modern democratic theory suggest that governmental policy will reflect the preferences of citizens (Downs 1957; Dahl 1956; Schattschneider 1960; Erikson, Wright, and McIver 1993). In the theoretical model of Anthony Downs (1957), political parties compete for the right to

represent the mass public in the institutions of government. Thus, one of the mechanisms the mass public can use to shape or control policy is the ballot box. In a perfect Downsian world, public policy would reflect public opinion because political parties would have to pay attention to the aggregate preferences of the public.

Public opinion is often perceived as playing a vital role in our everyday notions of democracy. V. O. Key, in an often cited work, proclaimed that:

> Unless mass views have some place in the shaping of policy, all the talk about democracy is nonsense. (Key 1961, 7)

Key and other theorists focus on the boundaries that the mass public can set for policymakers (Key 1961; Schattschneider 1960). Such an approach implies that policymakers are given some leeway to enact policies on their own without having to constantly cater to the mass public. Yet if policymakers go beyond the contours of what is deemed acceptable by the mass public, they will be held accountable for their actions. This accountability is usually seen in the electoral process, with voters having the right to "throw the rascals" out of office.

Put simply, modern notions of democratic theory suggest that representation by elected officials is a crucial connection between the mass public and governmental policies. In shorthand notation, elected officials are supposed to represent the wishes of the public when they debate public policy alternatives. If officials execute their representative responsibility effectively, policies should resemble the aggregate wishes of the public.

Such a depiction of the connection between average citizens and public policy runs contrary to much of the recent literature in political science. Numerous authors contend that ordinary citizens have little influence over governmental policy. Scholars like Lowi (1969) and a host of interest group specialists (Schlozman and Tierney 1986; Cigler and Loomis 1986; Gais, Peterson, and Walker 1984) argue that government policy has become the domain of privileged interests in American society. Grant McConnell (1966) suggested some thirty years ago that private interests in our society have the power to capture policy domains and transform policy-making to their benefit. The predominant theme throughout this research is that the public interest, whatever that might represent, is rarely served in the formation of policy.

An example of this pluralist approach to policy formation might be found in the recent debate in the United States over health care reform. Although an overwhelming majority of the mass public supported some type of health care reform, the policy debate was dominated by special interest groups that were effective in defeating any attempt at reform. Here, mass preferences were outgunned by wealthy, privileged interests that were threatened by reform efforts. Rather than reflecting mass preferences, policy-making in this case reflected an elite-dominated competition between interest groups with the most at stake (Mills 1956; Dahl 1956; Schattschneider 1960).

It has also become accepted practice in the discipline to note the failings of the American public in educating itself on issues and the policy positions of candidates (Campbell et al. 1960; Converse 1964; Smith 1989). The American electorate is often uninformed, uninterested, and unwilling to tune in to many political issues. Voters are often perceived as having little impact on most important policy disputes—beyond the simple act of periodically electing government leaders. With an American public that appears uninformed and uncertain about the issues, it is difficult to make a connection between mass preferences and government policy. In the absence of a mass public connection to policy, groups and agencies with intense stakes in the outcome are seen as the major players in American politics (Dahl 1956; Buchanan and Tullock 1962). The result is that many have come to view our national politics as a system in which "minorities rule" (Dahl 1956).

The notion that politics in America is dominated by special interests is a recurring theme in political discourse. Yet, despite the apparent downfall of the rational man in democratic theory and the rise of interest group dominance, there are documented cases when policy does fall in line with the preferences of the majority. Wright, Erikson, and McIver (1993) have indicated that in state politics at least, states with more liberal public opinion tend to have more liberal policies. Their ongoing research on state public opinion has led them to conclude:

> State politics does exactly what it is supposed to do in theory—faithfully translate public preferences into broad patterns of policy outcomes. (Erikson, Wright, and McIver 1993, 245)

Thus, the ideological predisposition of a state's body politic leads to public policies that closely match those ideological leanings (Erikson, Wright, and McIver 1993, 252).

Robert Jackson (1992) has argued that state elections, political parties, legislatures, and interest groups should play a mediating role in the formation of public policy based on mass preferences. These institutions are supposed to aggregate the demands of the mass public and translate them into coherent policy alternatives. Yet his empirical study of forty-seven states suggests that there is a lack of "pervasive evidence that political system characteristics either promote or impede significantly the translation of citizen preferences into policy" (Jackson 1992, 45). Despite that finding, Jackson (1992, 45) concluded his study much in the same way as Erikson, Wright, and McIver (1993): "It should be stressed that citizen preferences are translated into policy." His research simply questions the extent to which political institutions alter or mediate the influence of citizen preferences.

Others have argued that policy preferences in the mass public have been remarkably stable on some issues, serving as an endorsement of government

policy-making (Page and Shapiro 1983, 1992). Stimson (1991) has recently suggested that public opinion "moods" in the United States have followed patterns of policy-making on most issues. When the mood of the public is conservative, policies either reflect that mood or have anticipated it.

Recent work by Jacobs (1992a, 1992b, 1993) suggests that mass preferences on health policy issues helped American and British legislators enact national health policy reforms earlier in this century. Countering the pluralist school of thought, Jacobs has argued that "strong public sentiment produced weak interest group influence" in the development of the American Medicare Act (1965) and the British National Health Service Act of 1946 (Jacobs 1992a, 180). Because of widespread support in the mass public, government officials were able to downplay interest group demands and foster majority support for these programs by manipulating even higher levels of support in the mass public (Jacobs 1992b, 200).

The fact that research points to the connection between mass preferences and public policy may not be earthshaking news to some readers, but it does run counter to the literature of the past thirty years arguing that majority preferences hardly matter any more. In this spirit, we might expect public opinion on abortion to be an important guide for abortion policy-making. In states where mass publics are conservative on abortion issues, we would expect to find conservative abortion policies drafted by state legislatures and governors. Some researchers have already speculated on the effects public opinion might have on abortion decisions by the Supreme Court. Franklin and Kosacki (1989) have maintained that the Supreme Court's 1973 decision in *Roe v. Wade* was merely recognition by the Court that mass preferences on abortion were changing.

Abortion may be one issue area in which majority preferences play a large part in determining policies within the American states. One goal of this book is to determine what role public opinion on abortion plays in shaping state abortion policy. To a large extent, the study is a search for the connection expected by the conventional wisdom in modern democratic theory. Two major questions confronted in this study are: (1) What role does public opinion on abortion have in influencing state policies on abortion; and (2) How much does public opinion influence the number of abortions performed?

Why Abortion Rates?

Few studies explaining the variation in abortion rates have been presented in the literature (Hansen 1980; Tatalovich and Daynes 1989; Meier and McFarlane 1992, 1993). Scholars have been slow to move beyond studies of abortion policy to the next logical level: how policy affects abortion utilization.

The research that has been presented uses demographic and political variables to explain more than 60 percent of the variance in abortion rates. Yet

the studies are flawed in two ways. First, no study of abortion rates includes a measure of public support for abortion. This is largely because data on abortion attitudes is hard to find across all fifty states. Instead, researchers have relied on surrogate measures of public support, like congressional voting on abortion (Hansen 1980). Second, reliable measures of state policy on abortion have not been used to account for abortion rates. Hansen (1980) used a five-point scale of pre-*Roe* laws to help explain abortion rates in 1976. More sophisticated policy measures have been introduced in the political science literature, but they have rarely been used as independent variables to explain abortion rates (Berkman and O'Connor 1993; Meier and McFarlane 1992, 1993; Goggin and Kim 1992).

Goggin (1993) has suggested that studies of abortion politics need to move beyond the use of policy as a dependent variable:

> Much research effort has been expended to try to explain variations in abortion policy across the states. Missing from the current agenda, however, is the use of abortion policy as an independent variable. Rather than sorting out what kinds of factors account for the degree of restrictiveness in state abortion laws, for example, there are a number of puzzling and unanswered questions about the effects of various policies that cry out for investigation: To what extent and in what ways does abortion policy affect abortion rates? (Goggin 1993, 21–22)

Goggin's plea is for research that moves beyond the doorstep of explaining variations in policy. Ostensibly, policies are enacted by governments to regulate the behavior of citizens. Scholars need to turn to the job of assessing the impact mass preferences and policy can have on mass behavior. It is precisely this issue that is addressed in the closing chapters of this book.

It is also important to examine abortion rates as a dependent variable to update previous research. Susan Hansen's (1980) study focused on abortion rates in the states just three years after the *Roe v. Wade* decision. Much has changed in abortion policy-making since that time, including a wider variety of restrictions at the state level and the elimination of federal Medicaid funds for abortion. An updated study of abortion rate variation might turn up new, significant factors.

Research Questions

This book explores a number of research questions concerning abortion politics. Many of the research questions are interrelated and ultimately are tied together to explain the variation in abortion rates in the American states. This section features a discussion of the research questions and the theoretical logic that drives them.

Theory testing in the social sciences begins with either an inductive or deductive process (Manheim and Rich 1986, 19). Hypotheses developed in this

study emerged out of a combination of deduction and induction. For example, several years ago, an examination of abortion research and data indicated that more urban states had higher abortion rates (Henshaw and Van Vort 1988; Tatalovich and Daynes 1989; Henry and Harvey 1982; Hansen 1980). California and New York have consistently had the highest rates of abortion among the states. Thus, through a process of induction, the collection of a set of facts or evidence led to the generalization that states with greater metropolitan populations tend to have higher abortion rates.

That finding led to a deductive process that developed a set of theoretical generalizations. If urban states had higher abortion rates, there had to be other factors that would lead states to have higher abortion rates. For example, states with more liberal mass publics could be expected to have higher abortion rates, largely because the mass public would be more open to liberal abortion laws. States with liberal abortion laws could be expected to have greater access to abortion, making it easier for women to obtain abortion services.

A search of the abortion politics literature points the way to a number of previously documented hypotheses. Much has already been done in cataloging the variations in public opinion on abortion. For example, socioeconomic status of individuals has been shown to have a marked effect on attitudes toward abortion (Granberg and Granberg 1980; Ebaugh and Haney 1980; Legge 1983; Hertel and Hughes 1987). Wealthy and better educated citizens tend to have more liberal views, and respondents living in large metropolitan areas have also been found to be more open to abortion. Therefore, we would expect states with large concentrations of wealthy, better educated citizens living in urban centers to have more supportive attitudes toward abortion.

Religion clearly plays a large role in shaping the political climate of the American states. Daniel Elazar (1984) has maintained that each state has a unique blend of subcultures within its borders, depending on the political values of ethnic and religious groups that settled there. Throughout the debate on the merits of legalized abortion, religious group differences have existed in the United States (Cook, Jelen, and Wilcox 1992; Jelen 1988; Legge 1983; Ebaugh and Haney 1980; Granberg and Granberg 1980). Fundamentalist Protestant churches, Catholics, and Mormons have consistently been more opposed to legalized abortion than mainline Protestant denominations and Jews (Cook, Jelen, and Wilcox 1992; Jelen 1988). Because the American states are populated with varying degrees of these religious adherents, states are bound to have varying degrees of opposition to abortion.

All of these demographic factors—religion, education level, wealth, and metropolitan population—have a role in shaping aggregate public opinion within the states. Yet it has been difficult to find adequate public opinion data at the state level for the abortion issue. Wright, Erikson, and McIver (1987; Erikson, Wright, and McIver 1993) pooled a number of CBS News/*New York Times* surveys to

create an ideological score for each state. Their research allowed them to demonstrate that states with more liberal publics tend to have enacted more liberal policies across a range of issue areas (Wright, Erikson, and McIver 1987; Erikson, Wright, and McIver 1993). Other researchers (Weber et al. 1972; Weber and Shaffer 1972) have used demographic variables at the state level to construct public opinion measures that match well with state policy enactments. Clearly, public opinion on abortion within the American states is subject to the unique population characteristics and environment within each state.

Demographic factors like the socioeconomic and religious structures can play a role in shaping the policies that emerge in the states. Berkman and O'Connor (1993) have indicated that financial contributions to pro-choice groups within the states can have a significant impact on abortion policies that emanate from state legislative chambers. States with greater pro-choice support tend to have more liberal abortion laws (Berkman and O'Connor 1993; Meier and McFarlane 1992, 1993). States with large concentrations of Mormons, as in Utah and Wyoming, have large Mormon representation in their legislative bodies, which has a dampening effect on pro-choice lobbying efforts (Witt and Moncrief 1993). The number of women serving in a legislature and their occupation of key roles can influence efforts to structure new policies on abortion (Day 1992; Berkman and O'Connor 1993). Strong financial support for a pro-life or pro-choice cause can be reflected in the number of satellite offices housed in each state (NARAL 1989, 1992). In short, the states are bound to vary in their interest group activity and legislative approach to abortion based on representation patterns, demographic structure, and public opinion differences.

Ultimately, these state differences translate into varying state policies on abortion. The devolution of responsibility to the states for abortion regulation through a series of Supreme Court decisions has brought forth a wide variety of state policies. Until recently, federal Medicaid money had been withdrawn from the policy equation, and states were free to use their share of Medicaid money to pay for abortions in any of seven circumstances (Weiner and Bernhardt 1990). These Medicaid guidelines ranged from paying for abortion on demand to paying only in cases in which a woman's life is in danger. Moreover, some states have been quick to challenge court rulings and to structure access to abortion around informed consent, parental or spousal notification, and waiting periods (Tribe 1991; Halva-Neubauer 1990; Craig and O'Brien 1993). Theoretically, these state policy differences can be correlated with the opinion climate, demographic makeup, and political environment of the states (Goggin and Kim 1992; Luttbeg 1992).

Judicial decisions like *Roe v. Wade* have had a profound effect on abortion rates in the states. Legge (1985) has demonstrated that the national legalization of abortion in the wake of *Roe* led to vast improvements in maternal and infant health in this country. The 1973 court decision brought on a large increase in the

number of abortions performed in the United States (Hansen 1980). Halva-Neubauer (1990) has indicated that states differ in their approaches to court decisions, with some states active in bringing new challenges to the court while others acquiesce. Yet little has been done to chart the variation in state abortion rates through time series analysis, despite the clear intervention effect that can be modeled through the *Roe v. Wade* decision.

All of the previously mentioned variables have the potential to shape a woman's access to abortion. It is access to abortion providers that is the key factor in explaining abortion rates in the American states (Henshaw and Van Vort 1994; Hansen 1980; Tatalovich and Daynes 1989). Past studies have found a strong correlation (Pearson's r = .72) between the percentage of hospitals offering abortion services and the abortion rate within states (Hansen 1980; Tatalovich and Daynes 1989).

This study seeks to tie all these strands together in a full model that characterizes the variation in state abortion rates. The major hypotheses are outlined in table 1. A key contribution of this research is its inclusion of variables that have been omitted from previous explanations of abortion rates. Moreover, the connection between public opinion and public policy demonstrated by other researchers (Wright, Erikson, and McIver, 1987; Erikson, Wright, and McIver 1993), is likely to receive support from studies of abortion rates.

TABLE 1
Major Hypotheses and Research Methods in the Study

Hypothesis	Dependent Variable	Research Method
Changes in Supreme Court will lead to more conservative rulings on abortion (chapter 2).	Index of votes on abortion cases	Guttmann scaling
Changes to less restrictive abortion policy will lead to increases in abortion rates (chapter 3).	Ratio of abortions to live births	Interrupted time series
States with higher socioeconomic status will have higher levels of support for abortion in public opinion polls (chapter 5).	Percent of respondents who support right to abortion	Multivariate regression
	Percent supporting government funding for abortions	
	Percentage opposed to parental notification provisions (1988–90 National Election Series Senate Panel Studies)	

Table 1 *continued*

Hypothesis	Dependent Variable	Research Method
States with more Mormons, Catholics, and fundamentalist adherents will have lower levels of support for abortion (chapter 5).	Public opinion measures from NES studies	Multivariate regression
States with larger urban populations will have higher levels of support for abortion (chapter 5).	Public opinion measures from NES studies	Multivariate regression
States with institutional variables that favor abortion rights (more women legislators, pro-choice governor, more Democratic legislators, and more abortion-rights supporters) will have fewer abortion restrictions (chapter 6).	Six-point index of abortion policy toward minors in 1992 Four-point index of Medicaid provisions for abortion in 1992 Ten-point combined index of policy	Multivariate regression
States with demographic variables that favor abortion rights (greater public approval, fewer Catholics, fewer Mormons, fewer Christian adherents, and higher socio-economic status) will have fewer restrictions (chapter 6).	Six-point index of policy toward minors Four-point Medicaid index Ten-point combined index of policy	Multivariate regression
States with greater access to abortion will have higher abortion rates (chapter 7).	Ratio of abortions to live births	Structural equation model using LISREL (path analysis)
States with fewer abortion policy restrictions will have higher abortion rates (chapter 7).	Ratio of abortions to live births	Structural equation model using LISREL (path analysis)
States with greater support for abortion will have higher abortion rates (chapter 7).	Ratio of abortions to live births	Structural equation model using LISREL (path analysis)

Table 1 *continued*

Hypothesis	Dependent Variable	Research Method
States with fewer Mormons, Catholics, and fundamentalist adherents will have higher abortion rates (chapter 7).	Ratio of abortion to live births	Structural equation model using LISREL (path analysis)
States with larger urban populations and higher socioeconomic status will have higher abortion rates (chapter 7).	Ratio of abortions to live births	Structural equation model using LISREL (path analysis)

Chapter numbers are included in parentheses to indicate where the results are presented in the book.

Organization of the Study

The research presented follows a sequence that builds up to a causal model of abortion rates in the American states. Chapter 2 presents a detailed account of the impact the Supreme Court has had on abortion policy since deciding *Roe v. Wade*. Specifically, the changing composition of the Court over time helps to explain the evolution of the Court from a largely pro-choice body to a sharply divided one that had fundamentally altered the meaning of *Roe* by the 1990s. In chapter 2, the notion of policy change is studied from the perspective of Supreme Court voting behavior between 1973 and 1994.

After a discussion of Supreme Court voting behavior, the impact of policy change on abortion rates is detailed in chapter 3. Two different levels of analysis are explored. First, national policy changes, represented by the *Roe* and *Webster* decisions, are used in an interrupted time series design to test the impact these decisions had on national abortion rates. Additionally, the impact of national policy changes in Medicaid funding and the impact of the Reagan-Bush era are explored. Next, a series of state policy changes are analyzed to examine the impact of state policy change on abortion rates.

Chapters 4 and 5 focus on public opinion and its role in the abortion policy domain. Chapter 4 outlines the structure and stability of abortion attitudes in the American public with an eye toward demonstrating that stable attitudes allow researchers to pool responses on abortion questions across many surveys. This is important because such an approach allows one to build aggregate mean scores of public support for abortion. The stability of abortion attitudes also has important ramifications for policymakers. Public opinion data on abortion for each

state are presented in chapter 5 and are linked to state policies and state abortion rates.

Chapter 6 presents a more detailed account of abortion policy variation in states during the early 1990s. The statistical models in chapter 6 seek to explain the variation in state abortion policies toward teenagers and Medicaid guidelines for abortions. One model explores the influence of political institutions on abortion policy, using variables like gubernatorial support, legislative composition, and interest group membership to explain variations in abortion policy. A second model uses public opinion and demographic variables to account for variations.

Chapter 7 uses the results of previous chapters to present a causal model of abortion rates. Multiple regression and causal modeling techniques are used to assess the direct and indirect effects variables have on abortion rates. The final chapter summarizes the research findings and makes connections to modern notions of democratic theory discussed in the opening chapter. Finally, suggestions for further research are offered.

2

The Supreme Court and Abortion Policy

The history of U.S. Supreme Court decisions on abortion is a history of a politically changing Court and a continuing struggle to interpret *Roe v. Wade* as a constitutional yardstick for state and federal laws. Interest groups and state legislators have turned to the Court and tested the limits of *Roe*'s trimester framework allowing for abortion on demand in the first trimester of pregnancy; state regulations to protect the health of the mother in the second trimester; and state prohibition of abortion in most cases during the third trimester. The bulk of court challenges since *Roe* lie in the area of establishing how far states can go to protect the health of the mother and to promote the state's interest in childbirth. Of course, many would argue that these regulations were enacted after 1973 mainly to discourage women from obtaining abortions.

The result is that the Supreme Court has been forced to pass judgment on a wide array of legal codes dealing with the regulation of abortion (Craig and O'Brien 1993; Epstein and Kobylka 1992; Tribe 1991; Rosenberg 1991; Ducat and Chase 1992a, 1992b). The Court has been asked to rule on state mandated waiting periods, funding restrictions, informed consent guidelines, spousal notification provisions, parental consent and notification laws, viability testing, licensing requirements, state mandated record keeping and reporting of abortions, hospitalization requirements, laws pertaining to physician duties, and guidelines dealing with the disposal of fetuses. More recently, the Court has been asked to rule on the protest activities of pro-life demonstrators. Many have criticized the Court for stepping into an activist, legislative role. Indeed, Justice Antonin Scalia has been highly critical of Supreme Court decisions and in his 1990 dissent in *Hodgson v. Minnesota* wrote:

> I continue to dissent from this enterprise of devising an abortion code, and from the illusion that we have authority to do so. (110 Sup. Ct. 2961)

This chapter outlines the history of Supreme Court decisions on abortion since the *Roe* ruling. The focus is on the changing political makeup of the Court as it evolved from a largely pro-choice majority in the early 1970s, to a fractured court seemingly on the verge of overturning *Roe* in the early 1990s (Goggin 1993; Epstein and Kobylka 1992, 290–292). The first section highlights the issues the Court has decided in the wake of *Roe*. The second section focuses on

the changing personnel on the Court and its impact on rulings. Specifically, Guttmann scaling is used to characterize the changing policy coalitions on the Court in abortion rulings.

Issues Decided by the Supreme Court After *Roe v. Wade*

Roe v. Wade

The decision handed down by the Supreme Court in *Roe* was several years in the making. It was in the summer of 1969 that Norma McCorvey, a carnival worker, claimed she was raped on her way back to a hotel in Georgia (O'Brien 1986, 23). McCorvey later sought an abortion in Texas and was unsuccessful in a state that prohibited abortions unless they were necessary to save a woman's life. McCorvey eventually was forced to give up her child for adoption and later joined a lawsuit challenging the Texas law, with Henry Wade, the district attorney in Dallas, representing the state (O'Brien 1986, 24).

Original oral arguments in the Supreme Court case were heard in December 1971. Sarah Weddington, representing McCorvey under the anonymous name of Roe, argued that a woman's right to terminate her pregnancy could be found in the Ninth Amendment of the Constitution, which reserves rights that are "retained by the people," or in the Fourteenth Amendment's protection of the right to "life, liberty, and the pursuit of happiness" (O'Brien 1986, 27; Tribe 1991, 262).

After oral arguments, Justice Burger maintained that the case had not been argued well (O'Brien 1986, 28). After conducting a poll of the justices, Burger was unable to tally up votes in any meaningful way, although Justices Douglas, Brennan, Stewart, and Marshall did maintain that the law was unconstitutional (O'Brien 1986, 29; Craig and O'Brien 1993, 18). Burger assigned the task of writing an opinion in the case to Justice Harry Blackmun, a relative newcomer to the Court, but familiar with medical issues from his experience representing the Mayo Clinic in Minnesota. Blackmun's original draft drew criticism from colleagues who sought to overturn the Texas statute, mainly because he was too cautious in his opinion. Blackmun emphasized the vagueness of the law, where others wanted to base the ruling on the Ninth Amendment's protection of privacy that had been established in *Griswold v. Connecticut*, 381 U.S. 479 (1965). Eventually, the case was held over for reargument in 1972 (O'Brien 1986; Craig and O'Brien 1993, ch. 1). By that time, Weddington was able to point out that the strict abortion law in Texas had forced more than 1,600 women to travel out of state to obtain abortions (O'Brien 1986, 31).

The logic of the *Roe* opinion was laid out in a trimester framework that attempted to balance a woman's right to privacy and the state's interest in protecting a woman's health in the middle and later stages of pregnancy, and the

state's "compelling" interest in "protecting the potentiality of human life" in the late stages of pregnancy (*Roe v. Wade*, 410 U.S. 113). Thus, states were allowed to regulate abortion in the second trimester of pregnancy, as long as the regulations were related to the preservation and protection of the mother's health. At the point of viability (roughly the third trimester), the state's compelling interest in protecting potential life kicks in, and states were allowed to proscribe abortion, except in cases to preserve the life or health of the mother.

The Court's 7 to 2 ruling surprised many who believed the need for a second oral argument, and the long delay between oral arguments and the decision, signified a deeply divided court (Epstein and Kobylka 1992). Yet the delay merely reflected Justice Blackmun's attempt to draw together a solid majority in favor of the decision to overturn state laws prohibiting abortion. Blackmun faced difficulties in structuring the ruling around the trimester framework and in establishing the point of viability in a way that would satisfy all of the justices in the majority (Epstein and Kobylka 1992, 197–198).

Justices Rehnquist and White dissented from the rulings in *Roe* and the companion case (*Doe v. Bolton*, 410 U.S. 179 [1973]). Both claimed that the right to privacy, upon which the majority opinion rested, had no constitutional basis, and they believed the compelling interest standard invoked by the majority was inappropriate. In a joint dissent, Rehnquist and White expressed dismay over the "raw judicial power" that had been displayed by the majority in crafting an "improvident" decision (Epstein and Kobylka 1992, 198). *Roe*'s immediate impact was to invalidate the abortion laws of most of the states in the American federal system. Table 2 is a list of state abortion laws prior to the *Roe* ruling. In essence, only four states (Alaska, Hawaii, New York, and Washington) and the District of Columbia had laws that fit within the rubric of the *Roe* decision.

Thus, most states were put in the position of drafting new abortion laws that fit the *Roe* framework. Yet many state legislatures did not act and allowed 100-year-old laws to remain in their statutes, despite the fact that they were enjoined from enforcing those laws (NARAL 1989, 1992). For example, the Arkansas legislature has not repealed a pre-*Roe* law that imposes a $1,000 fine and imprisonment for one to five years for anyone performing an abortion. Courts have declared the law unconstitutional and have issued an injunction that prohibits its enforcement against physicians (NARAL 1992, 8; *Smith v. Bentley*, 493 F. Supp. 916, E.D. Ark. 1980).

Parental Consent and Notification

After *Roe*, state legislatures began to enact restrictions on abortion that sought to test the limits of the *Roe* framework. The first tough challenge brought by a state emerged out of Missouri. Revisions of the state's abortion laws in 1974 required doctors to obtain informed, voluntary consent from a woman

TABLE 2
State Abortion Laws Before *Roe v. Wade*

States Allowing Abortions:

For any reason	To protect the woman's physical and mental health	To preserve the woman's life and cases of rape	Only to preserve woman's life	Prohibited all abortions
Alaska	Arkansas	Mississippi	Alabama	Louisiana
D.C.	California		Arizona	New Hampshire
Hawaii	Colorado		Connecticut	Pennsylvania
New York	Delaware		Idaho	
Washington	Florida		Illinois	
	Georgia		Indiana	
	Kansas		Iowa	
	Maryland		Kentucky	
	New Mexico		Maine	
	N. Carolina		Massachusetts	
	Oregon		Michigan	
	S. Carolina		Minnesota	
	Virginia		Missouri	
			Montana	
			Nebraska	
			Nevada	
			New Jersey	
			N. Dakota	
			Ohio	
			Oklahoma	
			Rhode Island	
			S. Dakota	
			Tennessee	
			Texas	
			Utah	
			Vermont	
			W. Virginia	
			Wisconsin	
			Wyoming	

Sources: Craig and O'Brien 1993, 75; Hansen 1980.

seeking an abortion; required mandatory record keeping and reporting to a state health agency; required a married woman to obtain the consent of her spouse before an abortion; required minors to obtain the consent of a parent before an abortion; prohibited the use of saline amniocentesis as an abortion technique; and imposed criminal penalties on physicians who failed to protect the life and

health of a fetus (*Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 [1976]; Ducat and Chase 1992a; Craig and O'Brien 1993).

The Court split on the various measures in the law, with a 5 to 4 majority opinion striking down many of the provisions. The spousal consent provision, the criminal penalties against physicians who fail to protect the health of the fetus, and the amniocentesis prohibition were struck down by a 6 to 3 majority. All nine justices agreed with the record keeping and informed consent provisions in the law, indicating that they fell within the *Roe* guidelines of protecting maternal health (*Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52; Epstein and Kobylka 1992, 219).

Blackmun's opinion struck down the parental consent regulations, arguing that they represented a "third party veto" over the decision of a physician and a woman (*Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 74). Yet the majority was only 5 to 4 on this provision, with Stevens joining the minority of White, Burger, and Rehnquist. Stevens' vote was prophetic because it represented a willingness on his part to include parents in the decision making of minors about abortion, while he was unwilling to force married women into the same role with spouses.

More important, Stewart's concurring opinion on the parental consent law indicated a willingness to uphold such provisions if they provided a route for minors to seek relief from judges when disputes emerged between parents and the child. Such a "judicial bypass" outlet would be expounded by the Court in subsequent years (*Bellotti v. Baird*, 443 U.S. 622 [1979]; *Planned Parenthood Association of Kansas City v. Ashcroft*, 462 U.S. 476 [1983]; *Hodgson v. Minnesota*, 497 U.S. 417 [1990]). In Bellotti, the Court voted 8 to 1 to strike down a Massachusetts law that required parental consent for a minor to obtain an abortion. Writing for the Court, Powell stated that minors must have the opportunity to go directly to a court "without first consulting or notifying her parents" (*Bellotti v. Baird*, 443 U.S. 647). As he had done in *Planned Parenthood v. Danforth*, Stevens dissented, maintaining the important role parents should play in minors' decisions.

Two years later, the Supreme Court voted 6 to 3 to uphold a Utah law that required parental notification by a physician "if possible" (*H. L. v. Matheson*, 450 U.S. 398 [1981]). Three of the original supporters of *Roe* were in the minority (Blackmun, Marshall, and Brennan). Stevens, who had previously been alone on the Massachusetts consent law, was now joined by the *Roe* dissenters (Rehnquist and White), Burger, Stewart, and Powell. The key wording in the Utah law placed the decision to notify parents in the hands of the physician and did not make it mandatory—only "if possible."

The issues of parental notification and consent emerged much later with a vastly different Court. By 1990, Stewart, Burger, and Powell had been replaced by Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy. While Burger,

Stewart, and Powell had been reluctant supporters of abortion rights since *Roe*, the appointment of three conservative justices by the Reagan and Bush administrations swayed the Court's balance. Indeed, there was wide speculation that the Court had moved to an anti-choice majority.

Yet in mixed opinions in *Hodgson v. Minnesota* (110 Sup. Ct. 2926) and *Ohio v. Akron Center for Reproductive Health* (110 Sup. Ct. 2972 [1990]), the new Court upheld similar parental notice laws as the earlier Court. But the new Court relied on an emerging standard of review favored by Justice O'Connor. Using an "undue burden" test to gauge the constitutionality of state laws, the Court voted 6 to 3 to uphold a Minnesota law that required one-parent notification with a judicial bypass. Similarly, an Ohio law that required "timely" notice to a parent of a minor about an abortion was held constitutional as long as a judicial bypass procedure was open to the minor. Significantly, Stevens and O'Connor joined with the liberal wing of the Court (Blackmun, Brennan, and Marshall) to strike down a portion of the Minnesota law that required both parents be notified of a minor's abortion. In O'Connor's view, two-parent notification was an undue burden, while one-parent notification was not. Moreover, a forty-eight-hour waiting period for minors was also upheld as constitutional, because it provided a parent time to consult with the child, her physician, and family members, and promoted an informed choice by the minor.

The *Hodgson* decision drew biting criticism from Justice Scalia. He succinctly described the fractured opinions of the Court in his dissent:

> As I understand the various opinions today: One Justice holds that two-parent notification is unconstitutional [without] judicial bypass, but constitutional with bypass (O'Connor, J.); four Justices would hold that two-parent notification is constitutional with or without bypass (Kennedy, J.); four Justices would hold that two-parent notification is unconstitutional with or without bypass, though the four apply two different standards (Stevens, J.; Marshall, J.); six Justices hold that one-parent notification with bypass is constitutional, though for two different sets of reasons (Stevens, J.); and three Justices would hold that one-parent notification with bypass is unconstitutional (Blackmun, J.)....The random and unpredictable results of our consequently unchanneled individual views make it increasingly evident, Term after Term, that the tools for this job are not to be found in the lawyer's—and hence not in the judge's—workbox. I continue to dissent from this enterprise of devising an Abortion Code, and from the illusion that we have authority to do so. (110 Sup. Ct. 2961)

The position of each Justice on parental notification issues in *Hodgson* is shown in table 3. What is important to note is that the 1990 Court had essentially the same split as the earlier Court on these issues. Despite the changing personnel, there was a continuing willingness to let states regulate abortion for minors, as long as a judicial bypass provision was available.

TABLE 3
Supreme Court Positions on Parental Notification in *Hodgson v. Minnesota*, 1990

Justice	Two-Parent Notice, No Bypass	One-Parent Notice, No Bypass	Two-Parent Notice, With Bypass	One-Parent Notice, With Bypass
Blackmun	U	U	U	U
Marshall	U	U	U	U
Brennan	U	U	U	U
Stevens	U	U	U	C
O'Connor	U	U	C	C
Kennedy	C	C	C	C
White	C	C	C	C
Rehnquist	C	C	C	C
Scalia	C	C	C	C
Vote	4–5	4–5	5–4	6–3

U = Vote to declare provision unconstitutional
C = Vote to uphold provision as constitutional

Sources: Hodgson v. Minnesota, *1990; Tribe 1991, 199-201.*

Government Funding of Abortions

In 1977, the Supreme Court decided three cases that centered on issues of government funding for abortions. In all three cases, the Court ruled in a 6–3 majority that state and local governments could not be forced to provide funds for abortions that were not medically necessary (*Beal v. Doe*, 432 U.S. 438 [1977]; *Maher v. Roe*, 432 U.S. 464 [1977]; and *Poelker v. Doe*, 432 U.S. 519 [1977]). *Beal* focused on a Pennsylvania state law that prohibited the use of Medicaid funds for most abortions. The Court essentially indicated that participation in the federal Medicaid program does not force states to provide Medicaid funds for abortions. Indeed, the majority opinion indicated that states have "a valid and important interest in encouraging childbirth" (*Beal v. Doe*, 432 U.S. 445).

In *Maher*, the same 6 to 3 majority argued that states do not violate the Equal Protection Clause of the Constitution when they provide funds for medically necessary abortions only (*Maher v. Roe*, 432 U.S. 464). The *Poelker* decision extended the same sort of logic to cities, allowing governmental agencies the right to prohibit the performance of elective abortions in hospitals that they operate (*Poelker v. Doe*, 432 U.S. 519).

A decision on federal governmental funding of abortions came three years later (*Harris v. McRae*, 448 U.S. 297 [1980]). In *Harris*, the Court upheld the