THE HENRY J. KAISER FAMILY FOUNDATION

Update

Issue Update

Abortion Policy and Politics

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Since the landmark U.S. Supreme Court decision *Roe v. Wade* legalized abortion in 1973, debate has continued over how and when abortions are provided. Every state has laws regulating some aspect of the provision of abortion, and many have passed restrictions that are now in effect, such as parental consent or notification requirements; mandated counseling and waiting periods; and limits on funding for abortion. In Congress, the primary focus of legislation has historically been on limiting use of public funds for abortions.

In more recent years, public debate has centered on methods of abortion, particularly those performed later in pregnancy. Congress and most state legislatures have considered whether certain procedures—labeled by opponents as "partial-birth abortions"—should be outlawed. To date, the U.S. Supreme Court and other lower courts have struck down or significantly curtailed enforcement of these bans. Most recently, in August 2002, President Bush signed the "Born-Alive Infants Protection Act," which grants federal rights to human fetuses "born alive" at any stage of development, specifically including those that might occur during an attempted abortion procedure. Meanwhile, new medical developments—most notably the Food and Drug Administration's (FDA) September 2000 approval of mifepristone (RU-486), the first non-surgical "medical abortion" drug—is drawing increased attention to early abortions. Federal and state legislators have discussed whether to adopt restrictions specific to medical abortions, and anti-abortion groups filed a petition to the FDA in August 2002 urging the agency to reverse approval of mifepristone.

While the debate over abortion has not abated, the abortion rate—the number of induced abortions per 1,000 women aged 15-44—in the U.S. is at an historic low. In 1998, the most current year for which data is available, there were 17 abortions per 1,000 women of reproductive age, the lowest level in two decades.[1] Even with these declines, abortion remains one of the most commonly performed surgical procedures in the U.S.: Based on 1992 rates, an estimated 43 percent of women will have had an abortion by age 45.[2]

History and Overview of Abortion

Individual states began restricting or outright outlawing abortion beginning in the mid-1800s. By 1880, the procedure was criminalized in every state with exceptions often allowed in cases where a woman's life was at risk. In spite of these bans, many women sought out illegal means of terminating unwanted pregnancies, leading to high rates of maternal mortality and reproductive complications.

Beginning in 1970, a handful of states started considering legislation to allow abortion in certain circumstances. The U.S. Supreme Court decriminalized abortion nationwide in 1973 in two companion cases, *Roe v. Wade* and *Doe v. Bolton* (see box on Key Supreme Court Cases on Abortion). The Court asserted that the fundamental constitutional right to privacy encompasses a woman's decision to terminate a pregnancy before the point of viability, that is, when the fetus can survive outside of the woman's body. As a result, legislation regulating abortion during the first two trimesters of pregnancy had to satisfy a "compelling" state interest—a tough legal standard that many restrictions passed after *Roe* did not meet. Abortions could still be banned after viability—with exceptions to protect a woman's life and health.

Immediately after the Supreme Court's ruling, abortion opponents introduced legislation at the state and federal level aimed at overturning *Roe*—or at least limiting access to abortion. As a result, the Supreme Court heard several cases challenging abortion regulations during the 1970s, typically rejecting the state laws as violations of the right to choose abortion. The exception was limitations on the use of public funds or public facilities, several of which were found constitutional during this period.

During the 1970s and early 1980s, Congressional attempts to pass a constitutional amendment banning abortion failed. However, in 1980, the U.S. Supreme Court upheld Congress's first significant national abortion restriction. The justices found constitutional a 1977 appropriations bill rider known as the Hyde Amendment, which forbid the use of federal Medicaid funds for abortions unless a woman's life is threatened by pregnancy. (Medicaid is the federal-state health insurance program for the poor, including 9.5 million women of reproductive age.) Congress also passed similar restrictions on public funding of abortion in a range of federal agencies and programs.

A series of Supreme Court cases in the 1980s and 1990s considered the constitutionality of various state abortion restrictions and regulations, such as waiting periods or directed counseling. Although most were struck down, the Court did find that states could require girls under age 18 to notify or receive permission from a parent for an abortion, as long as a judicial bypass procedure was available that also allowed for this permission to be granted by a local court.

Public Supports Legal Abortion, With Restrictions

According to recent national surveys, a majority of Americans—58 percent—think that abortion laws should remain as they are or be loosened, rather than tightened.[3] However, half favor some restrictions on abortion. Overall, 28 percent of Americans say abortion should be *legal under all circumstances*; 19 percent say abortion should be *illegal under all circumstances*, and a slim majority (51 percent) say abortion should be *legal under certain circumstances*. Further reflecting the public's mixed views on abortion, the nation is now divided in the percentage of people who identify as "pro-choice" versus "pro-life." The percentage of Americans who say they are "pro-choice" has *decreased* from 56 percent in 1995 to 47 percent in 2000; likewise, those calling themselves "pro-life" *increased* from 33 percent to 45 percent during the same time period.[3]

Key Supreme Court Cases on Abortion

January 22, 1973. In *Roe v. Wade*, the Court legalized abortion. The Court based its 7-2 ruling on a woman's constitutional right to privacy. This case established the "trimester framework" to determine when and how abortion services could be regulated. During the first trimester of pregnancy, the Court reserved for the pregnant woman and her physician the right to decide whether or not to terminate a pregnancy, generally without interference from the state. In the second trimester, states were allowed to regulate abortion procedures and services, but only in ways that could be reasonably related to protecting the health of the woman. In the third trimester, the government's interest in potential life became "compelling" at the point of viability, meaning that abortion could be regulated, limited, or even prohibited. States were not allowed, however, to prohibit abortion if it affected the life or health of the pregnant woman.

On the same date, in *Doe v. Bolton*, the Court struck down, also by a 7-2 vote, restrictions on facilities and procedures that could be used to perform abortions. The Court noted that a doctor's judgment about the necessity of an abortion may include "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient."

July 1, 1976. In *Planned Parenthood v. Danforth*, the Court, by a 6-3 vote, said that states may not give a husband the power to overrule his pregnant wife's decision to have an abortion and that the state may not prohibit the most common second-trimester abortion method at that time (saline amniocentesis). By a 5-4 vote, the Court also said that parents of minor, unmarried girls may not be given an absolute veto over their daughter's abortion choice.

January 9, 1979. In *Colautti v. Franklin*, by a 6-3 vote, the Court reaffirmed its intention to give doctors broad discretion in determining the timing of "fetal viability"—when a fetus can live outside the mother's womb. The justices said states can seek to protect a fetus that has reached viability, but that the determination of when that occurs must be made by doctors, not courts or legislatures.

June 30, 1980. In *Harris v. McRae*, the Court decided, 5-4, that public health care programs for the poor, such as Medicaid, need not cover abortions. The Court noted that while the government may not place obstacles in front of a woman seeking an abortion, it does not have to remove obstacles—such as poverty—"not of its own creation."

June 15, 1983. In three decisions led by one called *City of Akron v. Akron Center for Reproductive Health*, the Court ruled, 6-3, that states and local communities may not require that all abortions after the first trimester of pregnancy be performed in a hospital. The Court also held that states *can* require girls under age 18 to notify a parent, so long as they establish an alternative mechanism—such as a judicial bypass procedure—for girls who could not involve their parents to demonstrate they were mature enough to make the decision or that an abortion was in their "best interests."

June 11, 1986. In *Thornburgh v. American College of Obstetricians and Gynecologists*, the Court struck down, 5-4, Pennsylvania abortion regulations that would have required women to delay their abortions for at least 24 hours and said that doctors must inform them about potential risks of abortion and available medical assistance benefits for prenatal care and childbirth.

July 3, 1989. In *Webster v. Reproductive Health Services*, the Court provided states with new authority to limit a woman's right to choose abortion, but stopped short of reversing *Roe v. Wade*. In fact, it was the first time since that ruling that only four justices—less than a majority—supported *Roe* as originally formulated. The High Court upheld Missouri's restrictions on use of public money, medical personnel, or facilities in performing abortion procedures. Also upheld was a requirement that doctors determine, when possible, whether a fetus at least 20 weeks old is capable of surviving outside the womb, by testing lung capacity and conducting other tests.

June 29, 1992. In its most important abortion ruling since 1973, *Planned Parenthood v. Casey*, the Court voted 5-4 to uphold the core of its *Roe v. Wade* decision and affirmed that states may not outlaw abortions before viability. But a plurality of the Court upheld several abortion restrictions—including a 24-hour "waiting period" and specific counseling requirement—and said states may impose limits on women seeking abortions as long as they do not create an "undue burden." Thus, the Court's decision in *Planned Parenthood v. Casey* abandoned the legal framework of its 1973 *Roe* ruling and adopted a new test—abortion regulations will only be struck down if they place a "substantial obstacle" in the path of a woman seeking to end her pregnancy.

June 28, 2000. In *Stenberg v. Carhart*, the Court voted 5-4 to strike down Nebraska's ban on "partial-birth abortions" because it imposed an "undue burden" on women's right to end their pregnancies. The Court said the law, versions of which were also passed in 30 other states, lacked an exemption to preserve women's health and was so broadly worded that it could have been used to ban some of the most common abortion methods used after the first trimester.

In 1992, the Supreme Court explicitly modified Roe v. Wade with its decision Planned Parenthood of Southeastern Pennsylvania v. Casey. While the Court affirmed the legal right for women to terminate a pregnancy, it also allowed states to restrict abortion services under a new standard: at any point in the pregnancy, including the first trimester, as long as an "undue burden" (defined as a "substantial obstacle") was not created for the woman. This "undue burden" standard has generally been easier for states to meet when attempting to regulate abortion services, but the interpretation of what constitutes an undue burden is ongoing. Waiting periods, counseling requirements, regulation of abortion providers, parental involvement laws, and bans on abortion methods are among the restrictions still being negotiated in state and federal courts and legislatures.

The Current Policy Framework of Abortion

Public Health Programs and Private Insurance

Restrictions on the use of public funds for abortion have been a part of the legislative landscape since the 1970s. At the federal level, the Hyde Amendment continues to ban abortion coverage under Medicaid, unless a woman's life is endangered or the pregnancy resulted from rape or incest. Similar limits apply to a range of other federal departments and programs, including the Federal Employee Health Benefits Program, the health insurance plan for federal employees, their dependents, and retirees. Military health care coverage does not include abortion except in cases of life endangerment. Military personnel and their dependents are prohibited from obtaining abortion services at military facilities overseas (even if they wish to use their own funds), except in cases of life endangerment, rape, or incest.

Since the 1970s, federal law has generally prohibited the use of foreign aid funds for abortion services. In the early 1980s, the federal government implemented additional regulations restricting the activities of organizations that receive U.S. foreign aid to provide family planning services. This so-called "global gag rule" was lifted during the Clinton Administration, but the Bush Administration implemented a new version of the policy in 2001, forbidding organizations receiving U.S. international family planning grants from using additional funds of their own to provide legal abortion services, lobby for abortion law reform, or counsel or refer clients for abortion.

As of July 2002, thirty-two states (AL, AZ, AR, CO, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MI, MO, NE, NV, NH, NC, ND, OH, OK, PA, RI, SC, TN, TX, UT, VA, WI, WY) and the District of Columbia fund abortions only under specific conditions, generally when a woman's life is endangered or the pregnancy results from rape or incest. Of these, three (IA, WI, VA) also provide funds for other exceptional circumstances, such as fetal anomaly, while two (MS, SD) only do so in cases of life endangerment – in theory violating federal Medicaid law.[4] Fourteen states (AK, CA, CT, IL, IN, MA, MN, MT, NJ, NM, OR, TX, VT, WV) were under court order to pay for medically necessary abortions sought by low-income women under Medicaid. An additional four (HI, MD, NY, WA) use their own funds for these abortions, with one (MD) placing limits on the health conditions that qualify.

Eleven states (CO, IL, KY, MA, MS, NE, ND, OH, PA, RI, VA) also prohibit insurance coverage of abortion services for all public employees or in cases when public funds are used; most have some exceptions, such as in cases where the woman's life is endangered.[4] In five states (ID, KY, MO, ND, RI), abortion can only be covered through private insurance if done so through an optional rider with an additional premium (ID, KY, MO, ND, RI), but one (RI) is not enforcing this law.[5]

Policies Affecting Patients

Forty-three states have passed requirements that a young woman notify or get the consent of one or both parents before an abortion. Of these, thirty-two were in effect as of August 2002: eighteen consent laws (AL, ID, IN, KY, LA, ME, MA, MI, MS, MO, NC, ND, PA, RI, SC, TN, WI, WY) and fourteen notification requirements (AR, DE, GA, IA, KS, MD, MN, NE, OH, SD, TX, UT, VA, WV). For the remaining eleven, consent (AK, AZ, CA, NM, OK) or notification (CO, FL, IL, MT, NV, NJ) were not in effect largely due to court orders.[6]

The U.S. House of Representatives has voted several times, most recently in April 2002, to pass the Child Custody Protection Act (H.R. 476), which would make it a federal crime for anyone other than a parent or legal guardian to "knowingly" transport a minor across state lines for her to obtain an abortion if she has not met a parental notification or consent requirement in her home state. As in previous years, it remains to be seen if this bill will see action in the Senate.

Twenty-two states have passed requirements that women delay set numbers of hours (typically at least a full day or more) and receive state-specified counseling before an abortion. Seventeen have policies that are in effect (AR, ID, IN, KS, KY, LA, MI, MS, NE, ND, OH, PA, SC, SD, UT, VA, WI). Four do not currently enforce the requirements (DE, MA, MT, TN), and one (AL) has a law that has not yet taken effect.

Policies Affecting Medical Practitioners

Recently, a number of state legislatures have considered whether to adopt additional, detailed regulations governing abortion providers' medical practices and facilities. These regulations, and to whom they apply, vary considerably from state to state. Some examples include permitting state health departments to copy and remove patient records; mandating specific structural details, such as doorway widths, of spaces where abortions are performed; or mandating comprehensive and unique administrative reporting or quality assurance programs and special training for staff procedures. Seventeen states (AL, AZ, AR, CT, FL, KY, MI, MS, MO, NE, NC, PA, RI, SC, TN, TX, WI) and Puerto Rico currently have enforceable laws regulating abortion providers and abortions at any stage of gestation, including the first trimester.[8] Of these, six (AR, MS, NC, PA, RI, SC) have enforceable provisions also regulating second-trimester abortions, while an additional nine states (AK, GA, HI, IN, MN, NJ, SD, UT, VA) have enforceable regulations specific to second-trimester procedures.[8] In early 2001, the U.S. Supreme Court refused to grant review in the first case challenging one of these laws, which was passed in South Carolina.

"Partial-birth Abortion" Bans

In the 1990s, the emphasis in legislative debate over abortion shifted to types of procedures used after the first trimester of pregnancy—which account for a small proportion of the total number of abortions performed in the United States. Some abortion opponents began to refer to one method—dilation and extraction (D&X), a variant of the more common second-trimester procedure, dilation and evacuation (D&E)—as "partial-birth abortion."

Between 1995 and 2000, the House and Senate passed a bill outlawing so-called "partial-birth abortions" three times. Former President Clinton vetoed the legislation twice—in 1995 and 1997. Both times, override attempts succeeded in the House, but the Senate fell short of the two-thirds majority needed to do so. During the 1999-2000 session, the House and Senate voted again to approve versions of the bill, but differences in the two measures did not get reconciled and sent to the President before the Congressional term ended.

In 2000, in Stenberg v. Carhart, a divided Supreme Court struck down a Nebraska law banning "partial-birth abortions." Voting 5-4,, the justices said that the law imposes an "undue burden" on a woman's constitutional right to decide to end her pregnancy. The Court found that the Nebraska law was written so broadly that it could criminalize the D&E method as well as the D&X method.[9]

The Court also took issue with the fact that the Nebraska law did not include an exception to preserve a woman's health, even in situations where doctors considered the banned method the best way to do so. Justice Sandra Day O'Connor, who was a crucial fifth vote for the majority, wrote a concurring opinion that said some version of a "partial-birth abortion" ban might be constitutional if it were crafted to only prohibit the D&X procedure and included an exception if the life or health of the pregnant woman was at risk.

Nebraska was one of thirty-one states that passed "partial-birth abortion" bans.[10] Some state legislators have begun crafting new bans in light of the Supreme Court decision, and Congress is likely to consider the issue again. Recently, the Judiciary Committee of the U.S House of Representatives approved a new version of a "partial-birth abortion" ban, which—unlike previous years—has the President's support.

"Born-Alive Infants Protection Act"

The debate over "partial-birth abortion" is believed to have helped pave the way for the "Born-Alive Infants Protection Act" (HR 2175). Passed in August 2002, the measure gives federal rights to a human fetus "born alive" at any stage of development. Any "live birth" that might occur during an attempted abortion is explicitly included. Essentially, the legislation amends the legal definition of a "person," "human being," "child," and "individual" in federal laws and regulations to include any "born alive infant," meaning that it is completely outside of the woman's body and has a beating heart or other signs of life. The law also states that it does not "affirm, deny, expand, or contract the legal status of a fetus." Abortion opponents strongly supported this legislation, while abortion rights advocates did not actively oppose it.

Medical Abortion

In September 2000, the FDA approved mifepristone (also known as "RU-486") for use as a medical abortion method. The FDA found the drug, when used with a second drug called misoprostol, to be safe and effective in terminating early pregnancies.[11] FDA approval was preceded by clinical trials conducted between 1994 and 1995 by the Population Council, the non-profit research organization that holds the U.S. patent for mifepristone.

Mifepristone is being marketed as *Mifeprex*, an early option pill, by Danco Laboratories, a New York-based company licensed by the Population Council. As distribution has gotten under way, questions remain as to whether insurance plans—both public and private—will cover this abortion method in a manner similar to surgical abortions. Some lawmakers, including members of Congress, are debating whether new laws should be adopted to specifically regulate these types of pregnancy terminations. Anti-abortion groups have filed a petition with the FDA calling for the agency to withdraw its approval of mifepristone.[12]

Clinic Violence

Many abortion facilities received threatening mail and hoax overnight packages during the fall of 2001, when the U.S. population was on heightened alert to the possibility of receiving anthrax in their mail.[13] These were the latest episodes in the ongoing harassment and violence experienced by abortion providers and their staff, which led abortion rights advocates to seek protection from legislatures and the courts. In response, states passed a myriad of laws in the 1990s, and Congress adopted the Freedom of Access to Clinic Entrances Act (FACE) in 1994, making it a federal crime to engage in certain violent, threatening, obstructive, and destructive conduct intended to injure, intimidate, or interfere with those seeking to obtain or provide reproductive health services.

The U.S. Supreme Court has refused appeals by abortion opponents who argue FACE violates the First Amendment. However, the justices have ruled in three other cases brought against abortion opponents for their actions at the workplaces and homes of abortion providers – lawsuits that were among the hundreds filed by physicians and clinics in the 1990s. Most recently, in 2000, a 6-3 majority of the Supreme Court upheld a Colorado law making it a crime to "knowingly obstruct" another person's entry to or exit from a health care facility. Hill v. Colorado found that it is constitutional to bar any person within 100 feet of a facility's entrance from coming within eight feet of another person—without their consent.

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