

# Making Rights Real: *Roe*'s Impact on Abortion Access

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## I. INTRODUCTION

In its controversial 1973 *Roe v. Wade* decision, the Supreme Court overturned abortion statutes of all fifty states and affirmed a constitutional right to choose abortion.<sup>1</sup> Since then, pro-life activists have struggled in courts, legislatures, and clinics to reduce the accessibility of abortion in the United States.<sup>2</sup> More recently, critics on the political left and center who favor abortion rights have joined in the criticism of *Roe*, arguing that judicial protection was not the best way to ensure access to reproductive choice. By examining the connections between the Court's abstract reasoning and the concrete ability of women to control their reproductive lives, these contributions have opened an important and largely unexplored aspect of the abortion debate.

In this article I investigate the social reality of abortion rights and assess these recent criticisms. My principal conclusion is that, among the political possibilities available to pro-choice activists in the 1960s and 1970s, the Court-based rights strategy of *Roe* alone had the potential to secure broad access to abortion. Those who contend that abortion could have been widely available without *Roe* have thus far based their arguments on speculative historical hypotheses. I show that these hypotheses cannot withstand closer empirical scrutiny.

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*The New Critics*

Though criticism of the legal reasoning behind *Roe* began virtually the day it was decided,<sup>3</sup> several pro-choice analysts have focused in recent years on the political impact of the decision, arguing that abortion access was not well served by the Court's ruling. Two versions of this pro-choice, anti-*Roe* argument will be addressed in this article. The first of these claims that constitutionalizing abortion undermined the possibility of a social consensus established through ordinary legislative processes.<sup>4</sup> Supreme Court nominee Ruth Bader Ginsburg<sup>5</sup> and Mary Ann Glendon,<sup>6</sup> for example, contend that *Roe* would have been a better legal and social decision if the Court had left abortion regulation largely to the states.<sup>7</sup> If the Court had allowed the issue to be settled primarily in state and national legislatures, they contend that a high and stable level of abortion access would have resulted from compromises struck in ordinary political processes. Such a result, they argue, would have avoided the storm of controversy that engulfed the Court following *Roe*'s truncation of legislative debate.<sup>8</sup>

This optimistic view rests on two dubious assumptions: that pro-abortion political forces could have achieved compromises capable of sustaining a high level of abortion access and that abortion would have been widely available under a variety of compromise laws. I will argue below that neither of these contentions is supportable. The first is defeated by an examination of the distribution of political forces prior to *Roe*, which shows that it is unlikely that the pro-choice movement had the capacity to achieve significant legislative victories in the years after 1973. The second falls in light of the close empirical connection between legislation and abortion access. Variations in abortion rights legislation lead to real differences in abortion access. In the absence of *Roe*, legislative restrictions would have significantly reduced the availability of abortion in some regions of the country.

A second version of the pro-choice argument against *Roe* is that the Court's decision demobilized pro-choice forces at the same time that it galvanized a pro-life backlash.<sup>9</sup> Mark Tushnet has argued that rights-based strategies for social progress are hazardous because over reliance on the courts as a political arena fosters complacency and political debilitation.<sup>10</sup> In the case of *Roe*, he argues that pro-choice activists lost their incentive and capacity to mobilize for legislative action after the 1972 victory while pro-life political strength increased.<sup>11</sup> Should *Roe* be overturned, he argues, abortion defenders may lack the strength to win back the right in legislatures. An examination of political mobilization in the pro-choice movement, however, reveals increasing strength rather than the creeping ineptitude Tushnet fears.

Although each of these writers solidly favors freedom of choice, this concern is, in each case, embedded in a larger argument about the proper role of the Court and court-enforced rights in the American political system. Thus Glendon's view that a social consensus could have encompassed both pro-life and pro-choice

forces implies a less active role for the Court.<sup>12</sup> Ginsburg's discussion of *Roe* occurs in the context of her vision that courts "do not alone shape legal doctrine but . . . participate in a dialogue with other organs of government, and with the people as well."<sup>13</sup> Tushnet's concern for the availability of abortion is part of a general argument against the utility of rights for political combat in contemporary institutional arenas. Each of these critics assumes that their larger agenda is compatible with a high level of abortion access. I argue below that these various goals and the availability of abortion are not so easily harmonized.

### *Bringing the Data Back In*

By analyzing the physical, legal, and political factors which determine the accessibility of abortions and the legal-political stability of that access—the relationship between rights and reality—I hope to refine two elements of the abortion debate: empirical and counterfactual analysis. Perhaps from a desire for analytical elegance, many critics emphasize the theoretical and legal aspects of the abortion debate at the expense of empirical investigation.<sup>14</sup> To the extent that actual data are used, they are typically deployed in an ad hoc rather than comprehensive fashion. Though a fairly large body of empirical data on abortion accessibility does exist,<sup>15</sup> empirical investigators have focused their energy on gathering data and refrained from using data in sustained political analysis. One aim of this essay is to arrive at a more nuanced understanding of the impact of laws by bringing the legal-political and empirical aspects of the abortion debate together.

In addition, understanding *Roe*'s effects requires understanding what the situation would have been like without *Roe*. Friends of access who criticize the Court's decision must hold that some counterfactual political arrangement would have secured a higher quality of abortion access. Commentators have attempted to describe such counterfactuals by extrapolating from pre-*Roe* trends,<sup>16</sup> looking at the experience of Western European states,<sup>17</sup> examining the political experience of states in the United States before *Roe*,<sup>18</sup> reviewing current state statutes,<sup>19</sup> and by deduction from assumptions about the institutional mechanics of social movements, courts, and legislatures.<sup>20</sup> These discussions suffer from a thinness of description: they examine only one or a few facets of abortion politics rather than constructing complete scenarios. I will attempt to overcome this weakness by drawing out full descriptions of two plausible counterfactual alternatives to *Roe*.

The argument proceeds as follows: Section II contains a theory of abortion access, which draws on empirical data overlooked by many participants in the abortion discussion. In Section III, I discuss the political background of abortion access in the years immediately preceding the *Roe* decision. Section IV examines the evolution of abortion access and its political stability in the twenty years since *Roe*. Section V describes the accessibility and stability of abortions under a counterfactual national regime in which the abortion right has been established

through congressional rather than Court action. Section VI explores a second counterfactual situation in which individual states regulate abortion.

To anticipate, I argue for three conclusions. First, *Roe* established a very stable political framework in which abortions are highly accessible. Second, critics are right to point out that *Roe* had demobilizing effects on the pro-choice movement, and this political weakness resulted in a lower level of abortion access than one might have hoped. Third, from the point of view of those who desire a high level of abortion access, *Roe's* legal-political regime considered as a whole is more attractive than the other examined scenarios.

## II. A THEORY OF ABORTION ACCESS: WHAT MATTERS AND WHAT DOESN'T

This discussion begins with an examination of the factors which determine the accessibility of abortions and their relative importance. Surprisingly, there is (so far as I know) no satisfactory discussion of how easily a woman may get an abortion. Activists on both sides of the abortion debate hamper attempts to acquire such knowledge by inflating the importance of relatively minor changes in abortion law.<sup>21</sup> Theorists, on the other hand, have emphasized the study of law and politics rather than the impact of these factors on flesh-and-blood women. What follows is an attempt to fill in this silence.

### *Methodology*

I posit that abortion ratios (the number of abortions per 1,000 live births) correlate to levels of abortion access. If abortions are less accessible, then it stands to reason that fewer women will obtain them. By examining abortion ratios in areas and times of particular legal and political conditions, we may be able to determine the degree to which laws affect the accessibility of abortions. On this admittedly crude reasoning, abortion ratios provide a good first-cut empirical indicator of the substance behind formal abortion laws. This empirical metric, however, is subject to several objections.

First, one might object that abortion ratios measure aggregate behavior. As a result, the metric may fail to register numerically small but still important variations. In the recent *Casey* decision, for example, Justice O'Connor's opinion for the Court held that Pennsylvania's spousal consent requirement would pose an "undue burden" on the ability of women to obtain abortions.<sup>22</sup> In all likelihood, such restrictions would not have affected the majority of women seeking abortions and thus would not have significantly altered Pennsylvania's overall abortion ratio. For a small number of women, perhaps those with antiabortion and violence-prone husbands, the consent statute would pose an insurmountable obstacle. One desiderata of an abortion access metric is that it reflects the accessibility of abortions to small at-risk populations such as these.

But abortion ratios can be used to examine the effect of laws such as the spousal consent requirement. To use the ratio metric, an investigator must identify the segment of the population at risk and examine the abortion ratio for that group living under various legal conditions. One study that employs this procedure is cited in the following discussion of public abortion funding. The cost of an abortion is too low to deter most women from obtaining one. However, the reduction of public funding has an observable effect on the abortion ratios of carefully selected subpopulations (i.e., those who receive Medicaid benefits).

Second, some commentators have argued that the demand for abortions is highly inelastic.<sup>23</sup> If this were true, abortion ratios in given regions would remain constant across variations in factors such as expense and possible legal sanction. However, abortion ratios do vary greatly across times, regions, and legal regimes.

Third, one might object that variance in the number of abortions reveals nothing about accessibility because demand for abortions varies widely. Some European countries attempt to reduce the demand for abortions by making the prospect of motherhood more attractive through child support and subsidy measures.<sup>24</sup> If these efforts are successful, then lower numbers of abortions in these countries reflect reduced demand rather than low access. While this is no doubt true to some extent, abortion ratios vary systematically according to variables which appear unrelated to demand considerations such as density of providers and availability of funding. These uniform patterns suggest that the number of abortions depends more upon access (supply) than demand.

Finally, abortion ratios can be difficult to estimate due to reporting practices or legal restrictions. Even in relatively liberal countries such as France, Germany, and Italy, doctors sometimes fail to report performance of legal abortions. Some figures may therefore slightly underestimate the actual number of abortions.<sup>25</sup> For obvious reasons, the problem of underreporting is most severe when the law prohibits abortion. Using creative but imprecise techniques, investigators have estimated the number of illegal abortions before legalization in certain regions of the United States to be between one-half and three-quarters of the post-*Roe* figure.<sup>26</sup> Due to the difficulties involved in accurately assessing illegal abortion statistics, this examination relies strictly on official statistics and does not attempt to compensate for unreported cases. Thus figures for areas in which abortion is less legal may significantly underestimate actual practices.

### *Primary Determinant of Abortion Access: Three Legal Regimes*

The law which specifies the reasons for which a woman may legally terminate her pregnancy is the single most important determinant of abortion access. Examining legal restrictions from U.S. states before *Roe*<sup>27</sup> and from countries in Western Europe,<sup>28</sup> statutes fall into three general types: some laws allow unrestricted abortion in the early stages of pregnancy, others require would-be mothers to claim that additional children would pose a physical or mental health concern

or cause social distress, and some laws allow abortion only if pregnancy jeopardizes a woman's life.

I will designate as Type I those legal regimes which allow abortions only in case a mother's life is in danger. The Texas law challenged in *Roe* was a Type I law, as were the abortion restrictions in twenty-nine other states.<sup>29</sup> Ireland currently has such a law in effect and Belgium only recently liberalized its abortion law away from the Type I variety.<sup>30</sup> We expect abortion access to be most restricted under these legal conditions.

Type II legal regimes, then, are those which allow abortion for "softer" reasons. Some such laws allow for abortion when a pregnancy results from rape or incest, or when it threatens the health of the mother. The American Legal Institute's (ALI) 1959 modification of the Model Penal Code is one variant of this law.<sup>31</sup> It allows abortions in cases where there is danger to a woman's mental as well as physical health. Liberalizing a step further, laws in West Germany and France allow abortions in cases of "social distress." Since physicians exercise more discretionary latitude under such laws, access will likely be greater.

Type III legal regimes are most permissive, allowing women to abort their pregnancies for any reason whatsoever in the early stages of pregnancy. The 1973 *Roe* decision nationalized this kind of legal regime in the United States and countries such as Norway, Denmark, and Sweden have such laws.<sup>32</sup> We can expect abortion access under these conditions to be greater than under Type I or Type II regimes.

Mary Ann Glendon writes that "in general, strict and lenient abortion laws do not appear to be related in any simple way to abortion rates."<sup>33</sup> Two sets of data presented in Figure 1 and Figure 2, however, belie this assertion; areas with more permissive laws usually have higher abortion ratios. Based on the methodological discussion above, we infer from this data that abortions are typically least accessible in Type I states and most available under Type III conditions. The first set (shown in Figure 1) displays abortion ratios (abortions per 1,000 live births) against regime type for a number of European countries and the United States.<sup>34</sup>

The next set of data (shown in Figure 2)<sup>35</sup> is taken from the United States in 1973. At that time, thirty states had Type I laws, sixteen states had Type II laws, and four states had Type III laws. The U.S. data are not as reliable as the international comparison in Figure 1 because some legal regimes had been in effect for only a few years. The four states which repealed abortion legislation, for example, did so in 1970. Women may still have been adjusting to these legal changes and thus abortion ratio figures for some areas may underestimate substantive access. On the other hand, some figures may overestimate the number of abortions performed because the data do not differentiate between in-state versus out-of-state patients. Thus the statistic for New York is distorted by the widespread practice of "abortion tourism." Data for California almost certainly suffer similarly. Nevertheless, the pattern of Figure 1 repeats itself. Four outlying states—

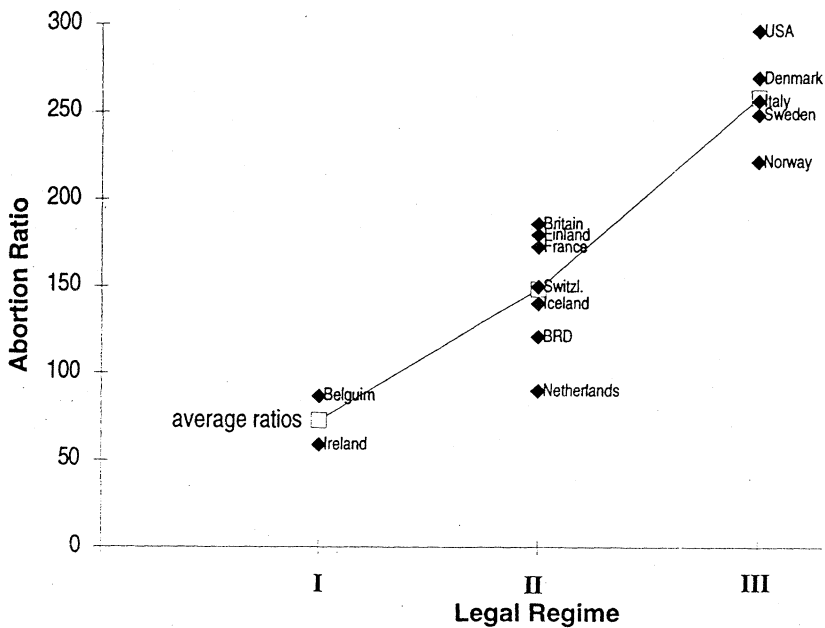


Figure 1 Abortion ratios in Western countries, 1984-88.

New York, California, Kansas, and Oregon—fall far from the central tendencies of their respective groups and thus distort the averages for Type II and Type III states. Even when these points are removed from the data set, however, average ratios continue to be higher in states with liberal regulation. Without these four outliers, the average abortion ratio is 92 for Type I states, 143 for Type II states, and 283 for Type III states.<sup>36</sup>

### *Secondary Factors Determining Abortion Access*

The data in Figures 1 and 2 support the contention that liberal legal conditions correlate with greater abortion access. Nevertheless, the data also show that laws alone do not explain variations in the availability of abortion. For example, abortion ratios in California in 1972 were higher than those in three of the four states which had repealed their restrictions. Several important secondary factors that are not captured by the legal regime typology account for significant differences in the accessibility of abortions: enforcement and interpretation of abortion laws, distance to abortion facilities, and the availability of public funding.

The harshness or leniency with which law enforcement officials and physicians interpret abortion statutes is the most important of the secondary factors discussed here. Legal interpretation can be decisive in determining abortion

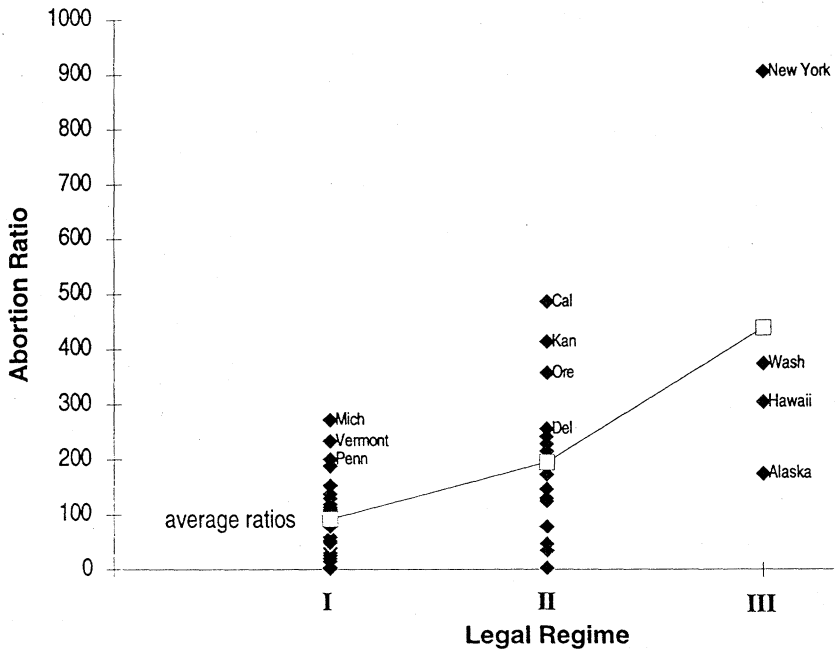


Figure 2 State abortion ratios versus regime type, 1973.

access because the willingness of doctors to perform abortions depends in part on the risk of prosecution. Many states reformed their abortion laws between 1967 and 1973 in order to provide doctors more latitude in which to exercise professional judgment.

California provides an example of a Type II regime in which abortion laws were interpreted quite liberally. Its restrictive abortion law was reformed into a statute resembling the ALI code in 1967. For each of the following three years, the number of abortions obtained in the state tripled the previous year's figure. By 1971, 99.2% of women who requested abortions in California obtained them; "abortion was as frequent as it would ever become in California, and one out of every three pregnancies ended in abortion." The de facto condition of access had become "abortion on demand."<sup>37</sup>

By contrast, three other states—Georgia, Colorado, and North Carolina—experienced little increase in abortion access after reforming from Type I to Type II regulation. In 1973, the abortion ratios for those three states respectively were 129, 195, and 146 (abortions per 1,000 live births). In that same year, abortion ratios in liberalized Pacific states and New York ranged well over 300 and the ratio for the United States as a whole was 239.<sup>38</sup> In Colorado, one legislator noted that 19 out of 20 abortion requests were refused under the liberalized law.<sup>39</sup> The sponsor of the North Carolina Abortion Liberalization Law commented dis-



appointed that the half measure was “a system that will continue to send 95 out of every 100 women to illegal abortionists or to self-terminations.”<sup>40</sup>

Enforcement and interpretation practices also strongly determine the level of abortion access in Type I regimes. Under the harshest laws, all but a few abortions occur outside the bounds of written law. In the past, abortions under these regimes have been performed by sympathetic doctors or unqualified abortionists.

Although data on this subject are thin, one study found that about 80% of the illegal abortions which occurred in the years before *Roe* were performed by physicians.<sup>41</sup> The degree to which illegal abortionists are willing to provide their services depends upon expectations of sanction. Legal control targeted at physicians is particularly efficacious. Socially and economically well placed, doctors stand to lose much from illegal activity. They will therefore be unlikely to engage in illegal activity and “hence be more easily deterred by the criminal law for all but the most profitable forms of crime.”<sup>42</sup> Additionally, doctors compose a relatively small group that is easily identified, easily monitored, and the first to draw suspicion in any crackdown on abortion.

Despite harsh laws and these factors that would facilitate enforcement, states showed a very tolerant attitude toward abortion during the first part of this century. Over a period of three decades, many states indicted less than 100 illegal abortionists. Typically less than half those indicted were convicted, and most of those brought before the law were caught as a result of botched abortions.<sup>43</sup>

The vacuum suction device and the abortifacient pill RU486 are two recent innovations which simplify the medical procedure, make it easier for nonprofessionals to perform abortions, and thus make effective enforcement more difficult.<sup>44</sup> Vacuum suction abortions are far easier to perform and are safer than the old method of scraping the uterus. Many fewer abortions are botched and thus likely to be discovered. Furthermore, persons with technical expertise can fashion suction devices from common materials. The French drug RU486, a second technology, has been shown to be 80% effective in inducing abortions when used in the first six weeks of pregnancy. In areas of Type I legal restriction on abortion, the advent of this drug has “transformed the enforcement of laws against abortion into an attempt to suppress a drug traffic. Since drugs, whether psychoactive or abortifacient, are easy to conceal and sell on an illegal market, obtaining an illegal abortion will become as easy as purchasing an illegal drug.”<sup>45</sup> None of this, however, implies that technological progress has made abortion in Type I regimes as accessible as they are likely to be under Type III laws. To the contrary, women who seek illegal abortions would likely find it difficult to discover how to use and where to procure these technologies. Medical advances only make the enforcement of abortion prohibition laws more difficult now than in the pre-*Roe* era. Abortions today are safer and more accessible under any of the three legal regimes.

The density of abortion providers also determines the level of access. By definition, the farther a woman must travel to obtain an abortion, the less accessible

it is to her. Data demonstrate that this factor is more than a mere inconvenience. The fact that abortion ratios are systematically lower in regions where women must travel farther indicates that the obstacle of distance prevents many women from terminating their pregnancies. Figure 3 charts the percentage of women who have to travel more than fifty miles to obtain an abortion against the abortion ratio for each census region in the United States.<sup>46</sup>

The number and density of abortion service providers depends largely on a region's abortion laws. Under the restrictive conditions of a Type I regime, public providers will not proliferate because abortion services are prohibited. Under Type III regimes, political, social, and geographic pressures rather than legal prohibitions limit the number of providers. Under such liberal legal conditions, more abortion services will be found in cities than in rural areas, and more in socially liberal regions than in conservative ones. Political considerations also affect the density of providers. Currently under *Roe*, for example, the vast majority of abortions are performed in specialized clinics rather than in hospitals. Some states have passed laws that forbid public facilities from being used for abortions and others have conscience clauses that allow public institutions to refuse to perform abortions.

The availability of public funding for abortions also conditions accessibility. Again, this factor is secondary to legal restrictions in importance. Since there are few legal abortions in Type I regimes, there are few candidates for public funding. In Type II regimes, the accessibility of abortions depends first upon the zeal with which restrictions are enforced. If the state holds a lenient attitude toward abortions that are justified on soft grounds, then it may also display generosity. The availability of public funding is most significant within the class of Type III regimes.

Lack of funding poses a barrier only to poor (defined here by Medicaid eligibility) women who compose perhaps one-quarter of those who obtain abortions when funding is available.<sup>47</sup> The price of an abortion in the early 1980s was \$150; for most women, this cost is insignificant compared to the far greater burden of raising an unwanted child. For impoverished women, however, even this sum can pose a significant obstacle (a typical monthly Aid to Families with Dependent Children allowance at this time was \$250). One study has shown that 20% of poor women carried their pregnancies to term as a result of funding cutoffs, while about 7% resorted to nonlegal abortions.<sup>48</sup> In addition to these severe effects, lack of funding delays the abortion procedure; women need time to "get the money together" from friends and other sources. One study of the Hyde amendment Medicaid cutoff concluded that poor women delayed their abortion operations an average of three days for lack of funding.<sup>49</sup>

### *Tertiary Factors in Abortion Access*

There are a number of additional factors whose effects are difficult to measure and in all likelihood far less significant than those discussed above. Factors such

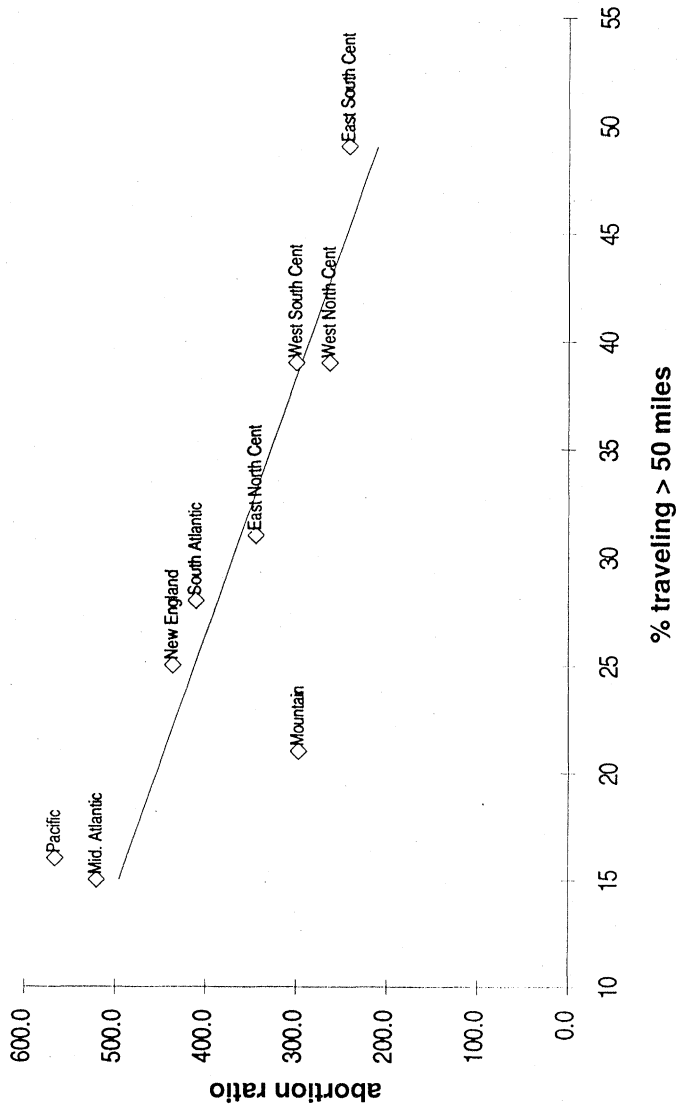


Figure 3 Abortion ratio versus distance traveled, 1990.

as mandatory spousal or parental consent, advice and counseling requirements, and mandatory waiting periods have been contentious abortion issues.<sup>50</sup> The recent majority opinion in *Planned Parenthood v. Casey*, for example, ruled that states may enact such laws if it is not clear that they pose an “undue burden” on the ability of women to obtain abortions.<sup>51</sup> Though it is unlikely that these tertiary factors will affect abortion access as much as the primary and secondary determinants discussed above, the intensity with which activists have fought over these issues compels the analyst to examine their possible impact on abortion access. Pro-choice activists have two good reasons to object to the enactment of such statutes.

First, some might think that tertiary factors directly restrict access for small (but nevertheless important) portions of the population. Consent requirements, for example, transfer the liberty of reproductive choice from pregnant women to parents, spouses, or judges. Such restrictions would pose a high barrier for some women. On the other hand, constraints which nominally encourage informed reproductive choices—such as waiting periods, literature provisions, and counseling requirements—seem unlikely to significantly reduce abortion access.

Clinic obstruction by pro-life activists is primarily a political statement, but it does restrict timely abortion access in targeted geographic regions. Recent studies show that the harassment of abortion facilities is a widespread phenomena. In 1988, for example, 49% of all nonhospital facilities providing abortions experienced harassment. The problem is especially acute for large providers; 85% of those facilities which performed more than 400 abortions per year experienced harassment. At half of these facilities, demonstrations involved physical obstruction of clinic access. Arrests occurred at 38% of these large clinics.<sup>52</sup> However, the existence of widespread clinic harassment reveals little about its effect on would-be patients.

Lack of empirical work renders any evaluation of these tertiary factors highly speculative. Establishing the quantitative effect of these factors on abortion access (and thus that they really are third-order considerations) would require investigating the empirical connection between these variables and abortion access. Such new information would not only add to our understanding of abortion access, but might contribute valuable social scientific content to the Court’s as yet imprecise “undue burden” standard.<sup>53</sup> Unfortunately, there have been few such carefully controlled studies to date.

Even if these factors do not directly reduce access, pro-choice advocates may follow a second line of argument and object to consent and information requirements on the grounds that they undermine the abortion right. While such laws may not themselves restrict access, they may blaze the constitutional trail for states to enact more substantively restrictive legislation. Judging by the recent shift in focus from the courts to the states and Congress, this development has already occurred in the eyes of many pro-choice activists.

Table 1  
*Summary of Abortion Access Determinants*

Primary factor, legal regime	Type I	Type II	Type III
Secondary factors	Interpretation and enforcement	Interpretation and enforcement Distance to provider Public funding	Distance to provider Public funding
Tertiary factors		Information/counseling Parental/spousal consent Waiting periods Clinic harassment	Information/counseling Parental/spousal consent Waiting periods Clinic harassment

Table 1 summarizes the factors which determine abortion access discussed above and their relative importance.

### III. POLITICAL BACKGROUND CONDITIONS: 1967-72

Having sketched the outlines of a theory of abortion access, the rest of this essay explores the extent and stability of access under three distinct and well-specified sets of political circumstances in the United States. The first examines the actual character of abortion access in the post-*Roe* years, and the second and third describe how abortion access might have evolved had *Roe* been less decisive. All three scenarios begin from a common historical starting point: the years of dynamic reform between 1967 and 1972. In order to understand how abortion access actually developed after the impact of *Roe*, and how it might have evolved in *Roe*'s absence, it is useful to lay out the salient political facts of this period. All three abortion access scenarios must then be consistent with these initial conditions.

#### *Divided Public Opinion*

To begin, there was no broad public consensus on whether or not abortion on demand in the early stages of pregnancy ought to be legal. National Opinion Research Center (NORC) data show that public opinion in favor of abortion had been rising steadily since the mid-1960s, but that this secular trend had largely leveled off by 1972.<sup>54</sup> At that point and now, between 80% and 90% of the general population favored legal abortion for hard cases in which pregnancy jeopardized the mother's physical health, was a result of rape, or would likely result in birth defects. Much smaller percentages, between 35% and 50%, favored legalization for soft reasons such as the avoidance of poverty, lack of desire to raise more children, or unwillingness to marry. Given this deep division in public opinion, it is unlikely that large democratic majorities in the nation as a whole would have actively favored either strong pro-choice or pro-life legislation in any post-1972 scenario.

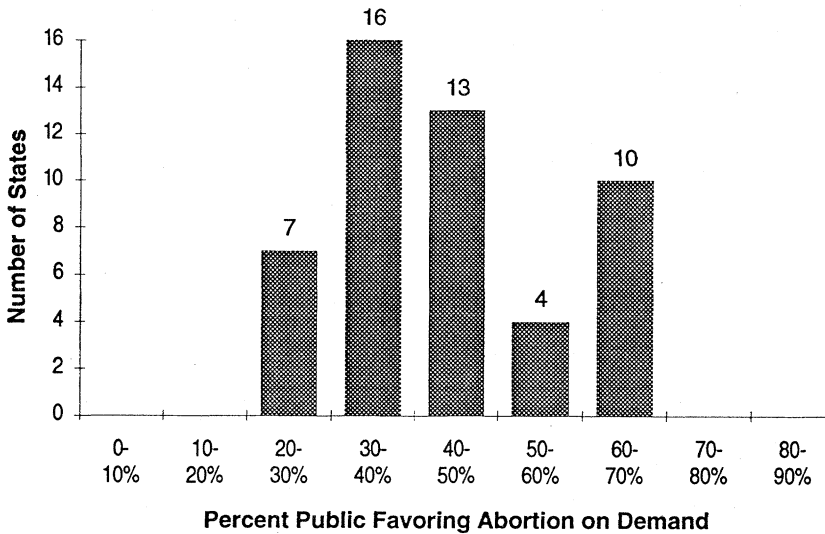


Figure 4 State opinion favoring early abortion on demand.

The strength of public support and opposition to legal abortion also varied a great deal from state to state in 1972. In Mississippi, for example, only 23% favored the legalization of early abortion on demand, while 69% of the populations of California and Alaska favored this liberalization. This local variation makes it unlikely that individual states, left to themselves, would have legislated uniform abortion codes. The histogram shown in Figure 4 depicts the distribution of state opinion in favor of early abortion on demand in 1972.<sup>55</sup>

#### *Diverse and Dynamic State Laws*

Abortion laws were in flux in many states during the 1967-72 period. In 1967, abortion reform bills were debated in twenty-eight state legislatures. Four states repealed their abortion laws in 1970. By the time of the Court's *Roe* decision in 1973, thirteen other states had reformed their laws into a permissive Type II variety.<sup>56</sup>

There is little reason to believe that this state-level movement had settled down by 1972. Had it not been for the *Roe* intervention, many other states might have reformed their abortion laws as part of this "legislative crescendo."<sup>57</sup> Furthermore, public opinion in areas with Type I and Type II laws did not correlate with state laws in 1972. Many states in which majorities favored abortion legalization had not reformed prohibitive laws, while some states in which majorities opposed abortion legalization had enacted Type II reform. These discordant statistics, depicted in Figure 5, indicate that abortion laws were in the midst of transition in 1972.<sup>58</sup>

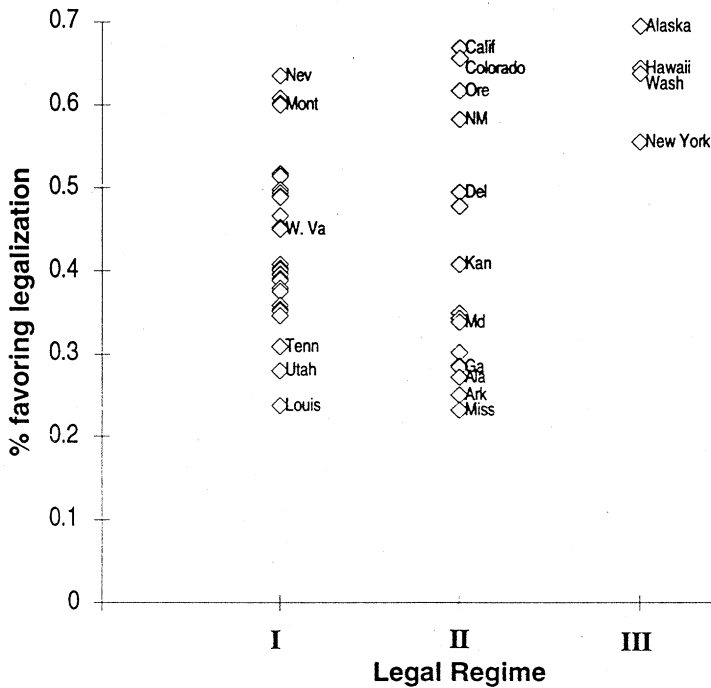


Figure 5 State opinion versus legal regime, 1972.

*Nascent Mobilization on Abortion*

In the pre-Roe period, three main groups were mobilized on the issue of abortion: doctors (who supported Type III or Type II laws), antiabortion groups (favoring Type I), and women’s groups (favoring Type III). The first group was established, well organized, and influential, while the latter two were in relative infancy.

Doctors were perhaps the most powerful group concerned with abortion law during this period. Many supported legal reform because they feared that exercising professional judgment could result in liability under Type I laws. Liberalization into Type II or III laws would protect doctors from prosecution and extend their discretionary scope. Also, many medical professionals began to feel that abortions were more humane than pregnancies that would result in defective babies.<sup>59</sup> In 1967, the national American Medical Association endorsed ALI, Type II, legal reform.<sup>60</sup> Abortion law in many states, such as Georgia, was reformed at the behest of doctors in order to protect them.<sup>61</sup>

In contrast to many doctors, feminist organizations demanded complete repeal. Radical women’s groups such as Redstockings and WITCH in New York and Women’s Radical Action Project in Chicago used disruptive tactics to dramatize the violence of illegal abortions. The National Organization of Women (NOW),

more mainstream and more likely to have legislative impact, was formed in 1966. In 1967, the group adopted "reproductive control" as part of its women's Bill of Rights.<sup>62</sup> While such groups were vocal and no doubt drew attention to the issue, their legislative impact was limited in this period.<sup>63</sup> In North Carolina's 1967 campaign for legislative reform, for instance, only one woman, a professional physician, testified in favor of the bill. NOW, the largest of the women's groups, boasted a membership of only 14,000 in 1972.<sup>64</sup>

Pro-life forces were also relatively weak. While Catholic groups had testified against legislative reform in California,<sup>65</sup> this activism was largely limited to Church professionals, doctors, and social workers.<sup>66</sup> In North Carolina, the Catholic church refrained from participating in hearings for fear of arousing anti-Catholic sentiment.<sup>67</sup> When Hawaii repealed its abortion laws in 1970, Catholic state senator, Vincent Yano, actually promoted the repeal of restrictions in order to avoid the harm caused by illegal abortions and to respect the separation between church and state.<sup>68</sup> New York is an exception to this pattern. There, the Catholic church took a very vocal and public stand against abortion reform and managed to mobilize a powerful coalition against it. Kristin Luker's observation about California that "the period between 1967 and 1973 was one of slow but steady growth for the pro-life movement," could be generalized to many states.<sup>69</sup>

While associations like the AMA organized doctors at the national level, both pro-life and pro-choice groups mustered their strength at state and local levels during the 1967-72 period. There were powerful pockets of pro-choice women's groups in places like New York, California, and Chicago. Opportunity for local legislative reform presented itself in these places, and parts of the women's movement rose to the challenge. In many areas, however, the movement was silent or weak on the issue of abortion. Furthermore, feminists had not mobilized to fight for abortion rights in Congress. Churches and their associated networks formed the centers of organized opposition to legal abortion. In the pre-*Roe* years, the Catholic church had not yet adopted its current unequivocal opposition to legal abortion. Local church organizations varied widely in the extent of their efforts to oppose abortion liberalization.

### *Low Political Polarization on Abortion*

By the 1980s, the abortion issue had become highly politicized and polarized along partisan party lines. In the pre-*Roe* period, however, matters were not so deeply entrenched. While then Governor Ronald Reagan initially opposed California's 1967 abortion reform bill, he eventually signed it into law after language about "fetal indications" was removed.<sup>70</sup> The Population Institute described George Bush as "in 1970, a principal sponsor in Congress of the landmark family planning and contraceptive research bill."<sup>71</sup>

This lack of partisan polarization has suggested to some that the current popular controversy and division over the issue of abortion could have been



avoided. If the low level of polarization could have been maintained in the absence of *Roe*, perhaps a national consensus on abortion would have emerged.

#### IV. ABORTION ACCESS AND STABILITY UNDER *ROE*

The *Roe* decision settled many of the dynamic factors reviewed above. Most importantly, it imposed a Type III legal regime upon the entire nation when the Court ruled that the option to terminate early pregnancies lay within a woman's protected sphere of personal privacy. Although the ruling allowed states to prohibit abortions in the third trimester of pregnancy and regulate them in the second, a woman's claim dominates state interests in the first trimester.<sup>72</sup> This radical change in the law vastly extended abortion access in many areas of the country. It would be a mistake to underestimate, as some recent commentators have done, how much *Roe* accomplished in this regard.<sup>73</sup> Additionally, the Court's decision affected political actors in pro-choice and pro-life movements institutionally and psychologically. Development of these movements, in turn, further altered the level and stability of abortion access.

##### *Uniform, National Type III Abortion Legislation with Varying Regional Effects*

In one quick and decisive stroke, the Court imposed a very liberal and nearly uniform abortion code over the entire land. Thirty states were transformed from Type I to Type III regimes and sixteen from Type II. Four states which had already effectively enacted early abortion on demand also had their laws overturned on technical grounds. Though *Roe* imposed Type III laws everywhere, its impact on abortion access as measured by regional abortion ratios has varied greatly across time and space (see Figure 6).<sup>74</sup> One can discern three rough regional trends which correspond to three qualitatively different levels of impact. The top two lines in Figure 6, which represent the Pacific (Washington, Oregon, California, Alaska, and Hawaii) and Middle Atlantic states (New York, New Jersey, and Pennsylvania), compose the first level. These high and flat lines indicate that abortions have been very accessible across the entire time for which data are available. The Court's decision had relatively little impact in these regions because abortions were already widely available before *Roe*.

This statistical result is consistent with the theoretical framework presented in Section II. Half of the states in this group (New York, Washington, Alaska, and Hawaii) had already enacted Type III laws before 1973. Two of the remaining four states, Oregon and California, had Type II legal regimes in which laws were liberally interpreted.

The second set of lines consists of the Northeast (Maine, New Hampshire, Rhode Island, Vermont, Massachusetts, and Connecticut), South Atlantic (Delaware, Maryland, Virginia, North Carolina, South Carolina, West Virginia, Georgia, and Florida) and perhaps the East North Central<sup>75</sup> (Ohio, Indiana, Illinois,

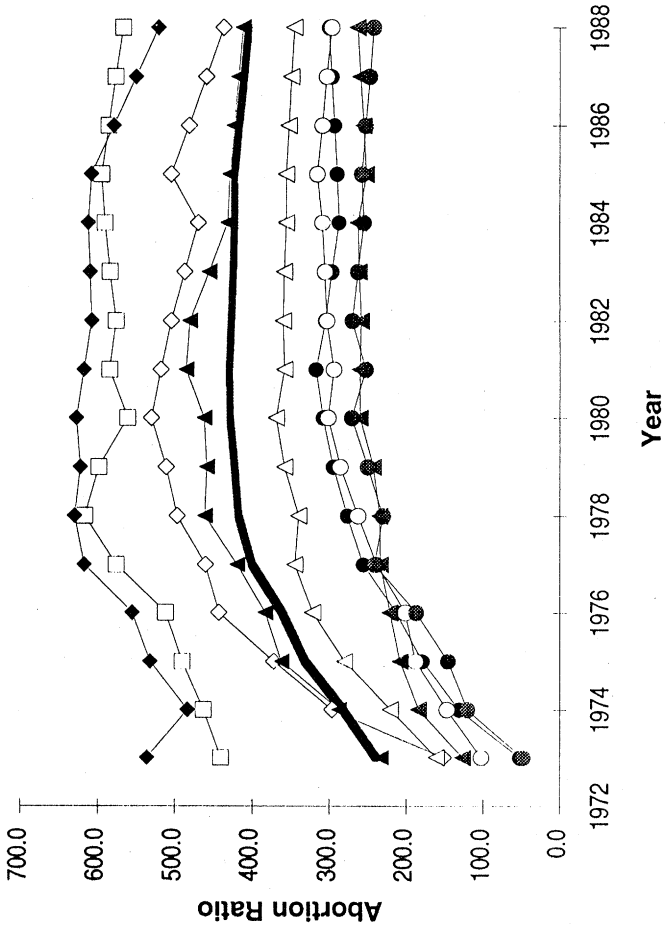


Figure 6 Abortion ratios by region, 1973-88.

Michigan, and Wisconsin) states. The abortion ratios in this band rise steeply in the five years immediately following *Roe*. From this behavior, we can infer that *Roe* had its greatest impact on these states. Abortions were not widely available before 1973 in spite of large potential demand for them. The dramatic increase in the number of abortions obtained after *Roe* reflects a large increase in abortion access.

The third band of data consists of the West South Central (Arkansas, Louisiana, Oklahoma, and Texas), Mountain (Montana, Idaho, Wyoming, Colorado, New Mexico, Arizona, Utah, and Nevada), the West North Central (Michigan, Iowa, Missouri, the Dakotas, and Kansas), and the East South Central (Kentucky, Tennessee, Alabama, and Mississippi) regions. These states exhibit the lowest abortion rates in the country, ranging from one-half to two-thirds of the national average. From this, I infer that abortion is least accessible in these areas. Though low relative to other regions of the country, abortion access did improve immensely in these areas after *Roe*. East South Central states, for example, continue even now to exhibit the country's lowest abortion ratios. Between 1973 and 1988, however, abortion ratios in this region nearly quadrupled. This enormous increase in abortion access is explained by the fact that *Roe* greatly altered the nature of abortion regulation in all of these states (seventeen of them had Type I and six had Type II laws).

Having discussed these aggregate statistics, we now turn to *Roe*'s political effects and the effect of politics upon the secondary and tertiary factors of abortion access.

### *Constitutionalization: Rights without Mobilization and Backlash*

The legislative crescendo of abortion law reform was accompanied by a simultaneous rise in litigation. Since 1967, women's groups and doctors had been testing the constitutionality of existing statutes in dozens of uncoordinated local and federal court cases.<sup>76</sup> Six state-level abortion statutes, including *Roe* and *Doe*, had come before the Supreme Court by 1971.

Abortion reform proponents had several good reasons to view the courts as an attractive venue of public policy change. First, decisions such as the 1954 *Brown v. Board* desegregation case demonstrated to many that the Court could be an effective agent of progressive social change.<sup>77</sup> Second, the Court seemed to have become more active toward public policy since 1954. Rubin writes that "in many of the newer cases, the courts have come to act more like legislative bodies in that they respond not to individuals seeking settlement of particular disputes, but to the demand of interest groups using the courts to promote their policy goals."<sup>78</sup> Also, the scope of a constitutional decision would be national. Abortion access could be expanded widely in a single battle rather than through fifty separate fights. Finally, litigation required vastly fewer political resources than legislative struggle. Rather than mobilizing sections of the public, the movement needed

only to gain the services of a few good lawyers to argue their cause. Neither the money, organization, nor political energy required for legislative combat was necessary to press a Court offensive for women's constitutional rights.

These forays in the judicial venue paid off dramatically and unexpectedly when the Court handed down *Roe* and *Doe* in early 1973. Whereas physicians' and women's legislative efforts had met with frustratingly uneven success, abortion reform activists regarded the extent of constitutional protection and national sweep of the *Roe* ruling as an unmitigated victory. Activists "thought this was the most far reaching constitutional and legislative advance for women's rights since women had gained the right to vote."<sup>79</sup> One abortion activist wrote that *Roe* "came like a thunderbolt—a decision from the United States Supreme Court so sweeping that it seemed to assure the triumph of the abortion movement."<sup>80</sup> In spite of the movement's evaluations of its own political efficacy, the abortion right was won without the pain of having to generate an active base of national support. Because the other side had gained the litigational initiative, antiabortion forces, once ignited, were not spared the burdens of organization and mobilization.<sup>81</sup>

As much as *Roe* elated friends of abortion reform, it spurred and galvanized pro-life activists. The high Court's announcement rocked the world views of social conservatives and drove many otherwise apathetic souls to political activism. In her excellent study of the California pro-life movement, Kristin Luker writes that

More of the people we interviewed joined the [pro-life] movement in 1973 than in any other year, before or since; and almost without exception, they reported that they became mobilized to the cause on the very day that the decision was handed down.<sup>82</sup>

In addition to being a symbolic trumpet call to action, *Roe* also shaped an institutional terrain in which broad-based mobilization became the only path to victory for antiabortion forces. *Roe* placed the burden of action squarely on the side of pro-life forces by establishing abortion within the constitutional right of individual privacy, and conservative activists responded with several strategies. In the mid-seventies, they focused on constitutional amendment, with little success.<sup>83</sup> A second strategy has relied on a two-step war of attrition. First pro-life forces gain enough support at state and national levels to reduce abortion access by enacting legislation such as funding limitations, consent requirements, reporting procedures, and conscience clauses.<sup>84</sup> Then, in the second step of the dance, pro-choice advocates challenge the constitutionality of these laws in the courts. Though this back-and-forth routine met with equivocal success in restricting abortion,<sup>85</sup> it did impose an organizational discipline which has driven the growth of a national backlash pro-life movement.

The flip side of this institutional dynamic is that pro-choice activists did not have strong incentives to mobilize politically in the first decade and a half

following *Roe*. Until the 1989 *Webster* decision,<sup>86</sup> the abortion right seemed safe and rear-guard actions in the courts were regarded as sufficient to defend the relatively costless victory of *Roe*.

### *Politics and the Secondary Factors Determining Abortion Access*

With the abortion right secure through the Court's decision, abortion access within this Constitutional Type III context was determined by the imbalance of power between pro-life and pro-choice forces. Two secondary factors decided the actual level of access: availability of public funding for poor women and density of abortion providers. On these counts, the political weakness of the pro-choice movement in the years following *Roe* rendered the movement incapable of securing higher levels of abortion access. Focused on defending abortion as a right, pro-choice forces failed to advance these secondary determinants.

While the courts have a history of ruling against legislatures on matters of individual rights, they are much more reluctant to tell states how to spend their money.<sup>87</sup> One might have predicted with some confidence, then, that the battle for funding of abortions would be fought primarily in legislatures rather than courts. In two cases, *Maier v. Roe* and *Harris v. McRae*, the Supreme Court banished the funding battle to the electoral arena by ruling that state and national legislatures could restrict Medicaid funding of abortions even for nonelective abortions.

Several factors advantaged pro-life forces in legislative contests over abortion funding. Most important, they were more highly organized and mobilized than were pro-choice forces.<sup>88</sup> While relative differences in levels of political mobilization may not make much difference in litigation, they are often decisive in state and national legislatures. Also, many among those who favored a woman's right to choose abortion may have been ambivalent toward or even opposed to the public funding of abortions. Since public funding affects only the poor, few women are directly interested in the issue compared to those concerned with preventing legislative restriction. Therefore, abortion funding is a more difficult issue on which to mobilize than the right itself.

By 1990, the pro-choice movement had lost public abortion funding in all but eight state legislatures. In five more states, courts ruled that state constitutions required public funding of elective abortions. Table 2 shows changes in state provision of abortion funding.<sup>89</sup>

Pro-choice political weakness on the question of funding was also apparent in the national arena. In 1976, freshman Representative Henry Hyde introduced an amendment which would prevent the use of federal Medicaid moneys for abortions even to save the life of a pregnant woman. This version of the bill passed the House by a vote of 207 to 167 but failed the Senate. In the debate over a compromise solution, a House-Senate committee amended the Hyde amendment to allow federal funds for abortions "where the life of the mother would be

Table 2  
*State Funding of Abortions in 1977 and 1990*

Funding category	Number of states in 1977	Number of states in 1990
Legislative-supported nonrestrictive funding	36	8
Court-ordered nonrestrictive funding	9	5
Restricted funding	2	7
Funding to save life of mother only	3	30

endangered.” This version of the bill passed the House by a vote of 201 to 155, and the Senate accepted it as well.<sup>90</sup>

The availability of medical providers also affects the accessibility of abortions. The *Roe* decision established that the procedure need not be performed in hospitals, and thus created the space for motivated practitioners to provide abortions in environments such as clinics.<sup>91</sup> However, a series of court decisions and legislative actions limited abortion services in public and private hospitals. By 1975, forty states had implemented “conscience clauses” which allowed private institutions and individual doctors to refuse to perform abortions.<sup>92</sup> In 1977, the Supreme Court ruled in *Poelker v. Doe* that public hospitals were not required to perform abortions. Finally in 1989, the Court ruled in *Webster* that legislatures could prohibit public facilities and public employees from being used to perform non-life-threatening abortions.

In his *Poelker* dissent,<sup>93</sup> Justice Blackmun argued that the Court’s ruling would restrict the supply of abortion in two ways. First, doctors willing to perform abortions but who work in public facilities may be prevented from providing the services. Second, Blackmun argued that the ruling would drastically reduce the density of abortion providers and thus many, “particularly poor women” would face “an insuperable obstacle to access.” Those areas in which there is insufficient “demand to support a separate abortion clinic” would lack local providers because public hospitals in rural areas “will in all likelihood be closed to elective abortions.” Blackmun’s second prediction has come true. A distinct pattern of abortion provision has emerged against this legal background in which concerned practitioners are free to provide abortion services but existing medical institutions can refuse to do so. The vast majority of abortions are performed in clinics specialized to that task. Additionally, the majority of public and private hospitals perform *no* abortions (see Figure 7).<sup>94</sup> The refusal of so many hospitals to provide abortion services reduces density of abortion suppliers and hence the level of access.<sup>95</sup> As a result of uneven provision, access varies greatly from region to region and from rural to metropolitan areas. Had the political strength of pro-choice supports been greater, they may have been able to ease this supply-side constraint by defeating local conscience clauses and prohibitions on the use of public facilities for abortion services.

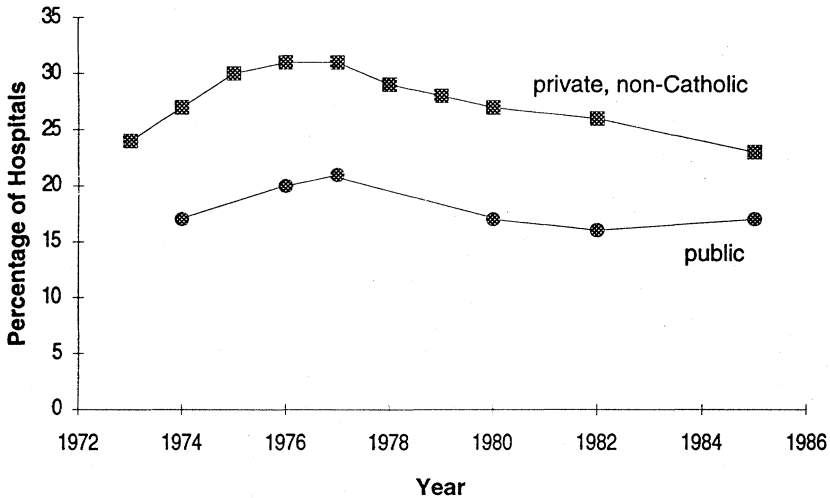


Figure 7 Hospitals providing abortion services.

#### *Stability of Abortion Access under Roe*

Abortion access has remained remarkably stable over the past two decades. Though hostile antiabortion presidential administrations have ruled for twelve of those years, *Roe's* legal framework has only recently begun to show cracks. Nevertheless, the Court's actions since *Webster* in 1989 point to an ominous trend which may ultimately culminate in the destruction of *Roe's* nationalized Type III law. Justice Blackmun wrote that the plurality opinion in *Webster* "implicitly invites every state legislature to enact more and more restrictive abortion regulations in order to provoke more and more test cases."<sup>96</sup>

In *Webster* and most recently in *Casey*, Justice O'Connor construed the *Roe* ruling to mean that states may regulate abortion just so long as legislation does not pose an "undue burden" on the right of women to obtain abortions. Though she opens her *Casey* opinion with the stirring declaration that "liberty finds no refuge in a jurisprudence of doubt," the Court has yet to indicate precisely the content of its "undue burden" standard.<sup>97</sup> *Casey* fails to close *Webster's* implicit invitation for legislatures to probe *Roe*. Even as the majority opinion in *Casey* affirmed the *Roe* (Type III) framework of early abortion on demand, Justice Blackmun felt compelled to point out that his days on the Court (and thus the swing vote in favor of *Roe*) were nearing an end and that the chief justice had hardened his position in favor of reversal.

Some friends of the abortion right fear that withdrawal of judicial support for *Roe* combined with the political weakness of the pro-choice movement will leave the abortion right without institutional or political backing. These critics fear that abortion access in a post-*Roe* environment will be drastically reduced due to lack

of mobilized political support. For example, Mark Tushnet writes that, were *Roe* to be overturned,

Many states, including those with large urban centers, where, prior to *Roe*, the trend was toward relatively unrestrictive abortion laws, would adopt quite restrictive ones. This would occur because the anti-choice movement has mobilized for legislative action in a way that, in recent years, the pro-choice movement has not—and the latter's relative lack of mobilization is at least in part the result of its reliance on appeals to rights.<sup>98</sup>

Thus Tushnet predicts that pro-choice forces will mobilize only in reaction to a reversal of *Roe*. This argument that the abortion right is unstable stems from the hypothesis that pro-choice forces won't take action until after the right has been lost. Massively reduced abortion access may be the price the pro-choice movement pays for overreliance on the Court and "resting on its laurels."

Recent evidence, however, suggests that the pro-choice forces mobilized widely in reaction to the threat against *Roe*. Sensing decreased support and anticipating ultimate failure in the judicial arena, national abortion rights advocates such as NOW (National Organization for Women) and NARAL (National Abortion Rights Action League) shifted their attention to national and state legislatures. Moreover, the sheer quantity of legislative activity in favor of reproductive choice has risen since *Webster*. While pro-choice forces failed to fight effectively for secondary access factors such as public funding, they seem to be more sensitive to the possibility of losing *Roe*'s Type III rights framework. Table 3 depicts the number and total receipts of pro-choice and pro-life political action committees in the years since *Roe*. One can see that pro-life forces mobilized early and powerfully, but that pro-choice forces have largely caught up as Court support for *Roe* waned.<sup>99</sup> This mobilization pattern suggests that the pro-choice movement rested on its laurels only so long as the abortion right was secure. Once threatened by hostile rulings against constitutional protection of abortion, pro-choice remobilized. One might explain this reinvigorated activity by speculating that it is easier to mobilize supporters to defend a right which already exists than to motivate them to gain that right in the first place. It seems far too early to tell whether pro-choice political strength will ever be great enough to impose a legislative Type III regime (by enacting legislation such as the 1992 Freedom of Choice Act) on the entire nation. However, the recent pattern of increased pro-choice mobilization contradicts the claim that the *Roe*-secured abortion right is unstable due to lack of mobilized support.

#### V. ABORTION ACCESS UNDER A NATIONAL LEGISLATIVE TYPE III REGIME

Choice-friendly critics of *Roe* must hold that abortions would have been readily accessible under some other political arrangement. What might such an arrangement be? To understand this often unstated part of such arguments about a world without *Roe*, it is necessary to fix the idea of abortion access by providing



Table 3  
*Strength of Pro- and Antiabortion PACs,<sup>a</sup> 1980-90*

	1980	1982	1984	1988	1990
Number of pro-life PACs	46	59	66	66	66
Pro-life receipts (\$ mil)	1.61	1.62	1.99	2.70	2.00
Number of pro-choice PACs	2	3	3	5	15
Pro-choice receipts (\$ mil)	0.75	0.86	0.81	1.20	2.48

a. PAC = political action committees.

a relatively full description of the alternative one has in mind. Only by drawing such a picture can one compare what abortion access would have been to what it was and see if the account is plausible or the scenario desirable.

In this section, I will lay out the salient contours of a national Type III regime won through Congress. From a pro-choice point of view, this counterfactual scenario seems to offer several advantages compared against *Roe*. Securing a legislative abortion right would have required pro-choice forces to mobilize forcefully. This broad support, in turn, promises increased abortion access and greater stability than a *Roe*-style abortion right which is not accompanied by mobilization. While I agree that access would probably have been higher under this scenario, the abortion right would not have been more stable. More important, however, this scenario was not politically accessible in 1973; there was simply not enough pro-choice support to enact such laws. The implausibility of this counterfactual scenario counts fatally against it, and so against one major interpretation of the claim that abortion access would have been greater without *Roe*.

#### *Positing Political Mobilization and Pro-Choice Efficacy*

The scenario runs like this. If the Court hadn't ruled decisively on *Roe* and *Doe* in 1972, deciding instead that legislatures were constitutionally free to resolve the abortion question, pro-choice activists would have had no choice but to increase the intensity of their legislative efforts. Engaging in this political struggle would have imposed an organizational discipline upon pro-choice activists and forced them to mobilize mass public support. Sooner or later the issue would have come before Congress, and pro-choice support would have been deep and broad enough for Type III laws to be enacted.

Some critics argue that *Roe* endangered abortion access by galvanizing the pro-life movement, but there is little reason to believe that pro-life forces would have been less aggressive under this legislative counterfactual scenario. While *Roe* shocked many pro-lifers into action in one brief moment, a successful national legislative struggle would likely have had a similar aggregate effect. The pro-choice movement's substantive demands for abortion liberalization would have been at least as radical as the Court's *Roe* framework, and supporters would have employed the uncompromising language of rights even in legislative con-

tests. Thus an effective feminist pro-choice social movement would likely have shocked and threatened the same people who were dismayed by *Roe*. Pro-life support would probably have been as broad and deep. However, pro-choice forces would also have been highly mobilized as a result of having to press their cause in legislatures. Thus relative mobilization of the pro-choice movement would have been greater in this scenario than under *Roe*.

### *Abortion Access under Type III Legislation*

Two features of the posited scenario already establish that abortion access would be higher under this counterfactual scenario than under *Roe*. First, we assume that pro-choice interests manage to establish a uniform Type III law across the land. This stipulates that the primary factor determining access—the legal regime—is already settled. Secondary factors determine access within this Type III regime.

Since these considerations in turn depend on the balance of forces between pro-life and pro-choice, our hypothesis of relatively more pro-choice strength entails that secondary factors facilitate a higher degree of abortion access than under *Roe*. In this counterfactual scenario, public funding for abortions probably would have been fought out, as with *Roe*, in the legislative arena. While it is true that not everyone who supports abortion access favors funding, it nevertheless stands to reason that increased support for access is likely to bring with it stronger backing for funding. Therefore, we suppose that the same political organizations which won the abortion right could be employed to fight for public Medicaid subsidy. Under *Roe*, the funding battle had been lost in all but eight states by 1990. Pro-choice bids for public funding would probably have fared much better in both national and state legislatures under this counterfactual scenario.

That few hospitals offer abortion services under the *Roe* regime poses an obstacle to access. Had pro-choice forces been stronger, as they are under this hypothetical scenario, they might have been able to enact legislation that compelled public and private hospitals to offer abortion services.

### *Stability of National Legislation*

The accessibility of abortion services under a liberal legal regime must again be distinguished from the political stability of that environment. Though the legislative framework in this counterfactual scenario would have been backed by active political groups, it would not have been as stable as *Roe* has proved to be. Assuming that pro-choice forces could have built up a legislative coalition to enact national Type III laws, the stability of these laws would then depend largely on the shifting balance of political force between pro-life and pro-choice advocates.

Several institutional features of the Court suggest that its decisions are more resilient compared to similar legislation. First, the Court's legitimacy depends on its consistency in the face of political storms. Justice O'Connor's heavy emphasis

on the *stare decisis* principle in her *Casey* opinion exemplifies this commitment to stable rulings. A ruling by the Court is supposed to resolve the matter. Though *Roe* obviously did not settle the abortion question, it placed inertia on the side of the abortion right. Second, the opinion of the Court on a decision such as *Roe* is likely to change only with rotation of membership or under very extraordinary political circumstances. The shifting of the Court's position on abortion shows the slow effects of changing membership. Legislative battles, by contrast, are much more sensitive to quick electoral shifts. Under this legislative counterfactual scenario, it is likely that abortion would have become a party issue and thus that the fate of an abortion right would depend on the outcome of partisan legislative encounters.

Legislation contested by the major political parties seems on its face less stable than a right that is backed by the Court. While it is difficult to predict such outcomes, one can imagine that pieces of the abortion right might have been traded away in legislative compromises. In this event, an initial Type III regime might have been logrolled into a Type II regime or some middle-range configuration.

In addition, the stability of a Type III legislative regime requires the maintenance of improbably favorable conditions. First, a very high portion of pro-choice legislators must be hard core in the sense that they support abortion strongly enough to maintain the integrity of the right; they must be unwilling to trade components of the abortion right. Legislative stability would also depend upon the long term maintenance of pro-choice Democratic majorities in Congress or a Democratic president with enough pro-choice votes in Congress to sustain a veto. It is doubtful whether such overwhelming strength and depth of support could have been maintained over long periods on an issue as divisive as abortion has proven to be.

### *Political Implausibility*

This scenario's political implausibility counts even more heavily against it. Readers may rightly object that this counterfactual scenario posits unrealistically that pro-choice groups would have been able to enact a national abortion right in the seventies. The political conditions of this period indicate that victory in Congress would have been unlikely. Public opinion in favor of early abortion on demand was split evenly on the national level and varied immensely from region to region. Even in New York, where public support for abortion was high, opponents fought bitterly against repeal legislation. Politicians who introduced abortion reform proposals were young and eager to make names for themselves; older and more influential legislators were unwilling to risk standing decisively on such a controversial issue. Pro-choice political organizations were weak and only just beginning to develop. They had neither the experience nor the numbers to mount a successful national legislative campaign. Furthermore, existing pro-choice groups were organized primarily on the state rather than the national level.

Finally, only two abortion liberalization bills were introduced in Congress before 1973. In 1970, Senator Packwood (Republican, Oregon) introduced a National Abortion Act designed to enact the abortion right across the country and another which would enact that right in the District of Columbia.<sup>100</sup>

All this suggests that the idea of a legislative national Type III regime in lieu of *Roe* is little more than wishful thinking. If the Court had stayed silent, abortion laws would more likely have been determined in state legislatures.

#### VI. ABORTION ACCESS UNDER STATE SOVEREIGNTY

Consider now a counterfactual scenario in which state legislatures determine abortion laws.<sup>101</sup> Under these political circumstances, neither pro-choice nor pro-life interests are able to prevail in Congress, the Court rules that the Constitution does not guarantee an abortion right as one of those implicit in a scheme of ordered liberty, and activists have no choice but to continue their battles in state legislatures.

Several writers have suggested that abortion access would not be significantly lower in this scenario. Mary Ann Glendon, for example, argues that national division over the abortion question is largely a result of the "rights talk" which infects the debate. She writes that "leaving abortion regulation basically up to state legislatures would have encouraged constructive activity by participants of both sides."<sup>102</sup> Since the institutional venue of legislatures is more conducive to bargaining and mutual concession than the courts,<sup>103</sup> she claims that compromise legislation would have been reached in many states and abortion access early in pregnancy would have been widely legal and available. Furthermore, this situation would have been more stable than *Roe* because majorities on both sides of the debate would have reached consensus on a compromise settlement.

Against Glendon, I argue that abortion access would have been much lower had the Court left the issue to individual states. Her argument turns on two critical hypotheses. She asserts first that most states would have reformed their abortion laws into the Type II variety. Second, liberal interpretation of the laws by physicians and enforcement officials would have resulted in wide access. I am not as sanguine as Glendon on either of these points. Even given Glendon's optimistic 1973 counterfactual scenario, it does not follow that abortion access would be assured in any post-*Roe* regime. The abortion issue has been greatly politicized and polarized since *Roe*. If abortion regulation were returned to the states today, I argue that compromise regimes would be much less likely now than they were in 1973.

Similarly, Ruth Bader Ginsburg has argued that a variation of this pure state-sovereignty scenario would have better served the institutional commitments of the Court without jeopardizing the ability of women to obtain abortions.<sup>104</sup> She writes that

*Roe*, I believe, would have been more acceptable as a judicial decision if it had not gone beyond a ruling on the extreme statute before the Court. The political process [of abortion liberalization] was moving in the early 1970s, not quickly enough for the advocates of quick, complete change, but majoritarian institutions were listening and acting.<sup>105</sup>

In my analytical framework, Ginsburg prescribes a system of state sovereignty in which the Constitution allows only Type II and Type III abortion regulation. Even when the harshest form of restriction is ruled out, however, I contend that the state-sovereignty scenario would have resulted in a low level of abortion access in comparison to the situation under *Roe*.

### *Diversity of Legal Regimes under State Sovereignty*

Glendon writes that

By the time of 1973, abortion law in the United States, as in the rest of the world, was in ferment. True, most states had not yet revised their [Type I] criminal laws. . . . There is every reason to think, however, that statutes of the Texas or even Georgia type struck down in *Roe* and *Doe* would not have survived long. Starting in 1967, nineteen states had changed their laws by 1973, as had England, Canada, and most Australian States.<sup>106</sup>

State legislative activity provides some evidence for an optimistic prediction. In addition to the nineteen states which liberalized their abortion statutes, thirty other states had considered reform legislation by 1968.<sup>107</sup>

Some argue that this legislative “ferment” did not indicate a decisive legislative trajectory. Lawrence Tribe, for example, cites the “instructive” fact that “between 1971 and 1973 not one additional state moved to repeal its criminal prohibition on abortion” to argue that many states would not have reformed their abortion laws.<sup>108</sup> By the beginning of the 1970s, he claims, the pro-life movement had already gained enough political strength to defeat reform proposals in many areas. Liberalization had come up in thirty states and had won in nineteen; however, it had lost in the remaining eleven.

The evidence is not sufficient to predict with confidence the pattern of state legislation in the absence of *Roe*. For the sake of argument, however, we posit a pattern that is both reasonable and charitable to Glendon’s case. First, a few states would have enacted outright repeal (by 1973, four states had already done so) and become Type III regimes. Abortion access in these areas would likely have been as high or higher than under *Roe*. Second, a small number of intransigent states—those in which popular opinion overwhelmingly disfavored abortion legalization,<sup>109</sup> the nascent pro-life movement had already gained formidable strength,<sup>110</sup> or where significant portions of the population were Catholic or Mormon—would probably have retained Type I legislation. The level of abortion access would have remained near their low pre-*Roe* levels in these areas. We posit, however, that the majority of state legislatures would have enacted compromise Type II legislation. In these states, each side settles for a middle-ground resolution

because neither is sufficiently powerful to prevail. Public opinion plays only as a secondary consideration because polarization and mobilization remain low. The history of the pre-*Roe* period shows that states such as California, in which there was overwhelming support for abortion legalization, enacted Type II legislation as a compromise. States such as Georgia, in which majority opinion disfavored legalization, also enacted Type II laws. These intermediate regimes are envisioned by Glendon as the outcome of social consensus and by Ginsburg as a constitutional minimum. In such legal environments, secondary factors determine abortion access.

### *Access under Type II Regulation*

In Type II regimes, the manner in which laws are interpreted by physicians and enforced by law enforcement officials most significantly determines the level of abortion access. On this issue, Glendon writes that

Restrictive abortion laws in the early 1970s were being undermined by collusion between doctor and patient, by travel for those who had the means to do so, and by liberal interpretations of what constitutes a threat to the life or health of a pregnant woman. This interpretive shift, it might be argued, marked the decisive transition to making abortions widely available. . . . To a great extent, later statutory changes . . . simply consolidated previous practices.<sup>111</sup>

Empirical evidence contradicts the last sentence of this passage; low abortion rates for many areas in the immediate aftermath of *Roe* indicate that abortion was not a widespread practice and that restrictive laws were by no means effectively undermined.<sup>112</sup> What of the first assertion that loose interpretation of laws would lead to greater access?

The degree of liberal interpretation in the pre-*Roe* period varied greatly from state to state and this pattern of regional disparity would probably have continued were it not for the *Roe* intervention. Figure 2 shows large variations in abortion access in Type II regimes. This variance is due in large part to regional differences in statutory interpretation. In California, restriction was interpreted as loosely as Glendon predicts; abortion was as accessible under California's Type II laws as it was after *Roe* transformed the state into a Type III regime. In other states, such as Georgia and Colorado, where Type II statutes were interpreted more strictly, abortions were not significantly more accessible than under restrictive Type I laws. The factors that determine how liberally laws are interpreted are not readily analyzable: regional social norms, unspoken public support, willingness of law enforcement agencies and the public to "look the other way." One can be sure, however, that these conditions vary greatly from region to region and therefore that abortion access would also have varied. In a Type II regime, the level of access lies largely at the mercy of cultural norms and discretionary exercise of local authority. These factors form a very weak foundation for abortion access.

Furthermore, abortion access that depends on liberal interpretations of compromise statutes is particularly vulnerable to pro-life political pressure.<sup>113</sup> Anti-abortion advocates too weak to impose Type I legislative regulation might nevertheless be strong enough to insist on strict enforcement of Type II laws. If opposing abortion interests reach stalemate and must settle for compromise in the legislative arena, the battle might then shift to the harshness of statutory enforcement. In this case, pro-life forces would seem to have a distinct advantage because they would be insisting on the rule of law. Pro-choice forces, on the other hand, would be arguing for hypocritical interpretations of compromise statutes.<sup>114</sup> This asymmetry suggests that abortion advocates would probably be unable to maintain liberal enforcement practices where pro-life forces were even moderately well organized.

All these considerations suggest that access to abortions would have differed widely from region to region had states been left to regulate abortions. Even if most had enacted Type II consensus-based compromise legislation, this analysis of the determinants of enforcement and interpretation behavior suggests that abortions would have been relatively difficult to obtain in many areas. Almost certainly, abortion would have been less legal and less accessible than it was under *Roe*.

#### *Path-Dependent Results of State Sovereignty: 1973 and 1992*

Glendon also claims that the outcome of state sovereignty over abortion would be the same today as before *Roe*. Based on her 1972 counterfactual hypothesis, she reasons that "if the issue were returned to the states today, it therefore seems likely that very few states might return to strict abortion laws, a few more would return to early abortion on demand, and the great majority would move to a [Type II] position."<sup>115</sup> This account fails to consider the intense politicization and polarization that followed *Roe*. Interest groups on both sides of the issue have organized and mobilized widely since 1972. Abortion has become a highly partisan topic with Democratic national platforms supporting reproductive choice and Republicans, for the most part, adopting the pro-life positions. If the issue devolved to the states, there are few areas in which either side would settle for Type II compromises. Both sides would fight hard to activate their constituencies. Given the growth of activist organizations and their increased ability to mobilize voters, the balance of public opinion in each state is more likely to determine the law than in 1973.

If *Roe* were reversed tomorrow, legislative events might well take the following course. First, existing state laws would become immediately enforceable. As of 1990, eleven states had legislation of the Type I variety, there were nine Type II states, and the remaining thirty states had laws which protect the abortion right.<sup>116</sup> Almost immediately after reversal of *Roe*, the battle would be fiercely joined in the state legislatures. The pattern would likely be bimodal; at least

fourteen states would probably enact Type I laws, perhaps more than fifteen would adopt liberal Type III laws, and outcomes in the remaining twenty-one states are difficult to predict.<sup>117</sup> It is likely, however, that these states would jump to one extreme or the other rather than adopt a compromise position on abortion restriction.

What of abortion access under these conditions? Certainly, it would be less than under *Roe* and it would probably be less than under the 1972 state-sovereignty counterfactual. Type I abortion statutes would be the result of hard fought legislative struggle, backed by active constituencies, and thus likely strictly enforced. Fewer states would have Type II laws, but such laws would likely be based on the stalemate of large and active coalitions rather than a meaningful social consensus. Under these conditions, statutes are likely to be interpreted more strictly as well. In Type III states, abortion would be more accessible than under *Roe* because the abortion right would be backed by a mobilized pro-choice constituency. These groups would likely demand public funding for abortions and perhaps increase the density of abortion providers by compelling public and private medical institutions to perform low-cost abortions. These Type III states would become abortion mills similar to New York and California in the pre-*Roe* period. For women living far from these liberalized zones, especially those who are poor, distance would pose a substantial obstacle to access.

## VII. CONCLUSION

I have tried to show that the Supreme Court's 1973 *Roe* decision established institutional and political conditions which supported a remarkably stable and high level of abortion access. Recent critics of *Roe* have argued variously that the Court's decision was not a major factor in extending abortion access,<sup>118</sup> that rights-based abortion access secured by the Courts entails the political weakness of the pro-choice movement,<sup>119</sup> and that a legal compromise would have also established widely accessible early abortion on demand.<sup>120</sup> These critiques of *Roe*, and my defense of it, require an understanding not only of the effects of *Roe*, but also of the alternatives to it.

To that end, I have tried to construct two counterfactual sets of political conditions which might arguably secure higher and more stable abortion access than *Roe*. One was a national legislative scenario. Though abortion access would have been higher under these circumstances, it is unlikely that pro-choice forces could have gained the political support necessary to enact such legislation in the years immediately following 1973. Mary Ann Glendon's influential 1987 comparative discussion of abortion law motivated the second counterfactual. She suggests that abortions would have been widely accessible under state-legislated compromises had *Roe* not occurred. Against this, I argued that even if such compromise laws had been established, there would have been large regional variations in abortion access and the result would have been less access overall



than under *Roe*. Additionally, legislative compromises that might have been possible in 1972 are unlikely in 1993. The issue has become so highly politicized and opposing activist forces so deeply entrenched that social consensus would be unlikely in most states.

Many critics of *Roe* and its rights-based defense of women's reproductive freedom are quite correct. It did allow pro-choice activists to "rest on their laurels" and galvanize antichoice forces, as Mark Tushnet argues. Mary Ann Glendon is right to point out that *Roe* caused " 'the desperate sense of embattlement' that has characterized abortion debate in the United States after *Roe*."<sup>121</sup> Ruth Bader Ginsburg properly criticizes *Roe* because it "occasioned searing criticism of the Court, over a decade of demonstrations, [and] a stream of vituperative mail addressed to Justice Blackmun."<sup>122</sup> Taking these objections into account, the level and stability of abortion access created under *Roe* nevertheless remains superior to the plausible alternatives. If the analysis in this essay is correct, then critics of *Roe* may face a hard choice between realizing a high level of abortion access on one hand and remaining true to their particular democratic visions of social consensus or political process on the other. Despite its blemishes, the rights-based constitutional strategy was and continues to be the pro-choice movement's first best hope.

#### NOTES

1. *Roe v. Wade*, 410 U.S. 113 (1973).
2. Throughout this article, I use the term *abortion accessibility* to refer to the ease with which a woman who desires an abortion can get one. Most legal and social-theoretical discussions of abortion use terms like abortion on demand or right to abortion to refer to accessibility of abortion under *Roe*, but these terms place too much emphasis on legalistic and formal aspects and not enough on the actual obstacles faced by women who try to get abortions. Therefore, abortion accessibility is the object of study in this essay. Of course, part of the object of the investigation is to determine the connections between a formal right to abortion and substantive abortion accessibility.
3. John Hart Ely, "The Wages of Crying Wolf," *Yale Law Journal* 82, no. 5 (1973): 920-49.
4. See Mary Ann Glendon, *Abortion and Divorce in Western Law: American Failures, European Challenges* (Cambridge: Harvard University Press, 1987); Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991); Ruth Bader Ginsburg, "Some Thought on Autonomy and Equality in Relation to *Roe v. Wade*," *North Carolina Law Review* 63, no. 2 (1985): 375-86; Ruth Bader Ginsburg, "Speaking in a Judicial Voice," Madison Lecture at New York University Law School and forthcoming in *New York University Law Review*; Carl E. Schneider, "States-Interest Analysis in Fourteenth Amendment 'Privacy' Law: An Essay on the Constitutionalization of Social Issues," *Law and Contemporary Problems* 51, no. 1 (1988): 79-122.
5. Ginsburg, "Speaking in a Judicial Voice," 40-41 and "Some Thoughts on Autonomy," 382.
6. Glendon, *Abortion and Divorce*, 42-43.
7. The Texas law which was struck down by *Roe* allowed abortion only when "procured or attempted by medical advice for the purposes of saving the life of the mother"

(cited in *Roe*, 410 US 118). Glendon favors a situation in which the Court had stayed silent and left regulation "basically up to state legislatures" (*Abortion and Divorce*, 48), while Ginsburg argues that the Court should have allowed states to determine the bulk of abortion law by limiting itself to ruling unconstitutional only extreme statutes such as the Texas law at issue in the case ("Speaking in a Judicial Voice," 38-45). Both writers argue vehemently that the Court ruled far too broadly in the *Roe* decision.

8. Paul Freund, "Storms over the Supreme Court," *American Bar Association Research Journal* 69 (1983): 1480. Ginsburg, "Speaking in a Judicial Voice," 41.

9. See Mark Tushnet, "Rights: An Essay in Informal Political Theory," *Politics & Society*, no. 4 (1989): 403-51, 412-15.

10. Tushnet, "Rights: An Informal Essay," 412-15, 421.

11. In his comments on a previous draft of this essay, Mark Tushnet points out that the broad version of the rights critique claims not that *Roe* was bad for abortion access specifically, but that it spurred a conservative movement which worsened other aspects of the situation of women. This interesting claim lies far outside the purview of this article, in which I focus exclusively on the abortion issue and thus only on the narrow version of the rights critique. However, the prospect that both the central claim of this article and the broader form of the rights critique of *Roe* are correct raises a perplexing implication. If both claims are right, then there is in the realm of political possibility a trade-off between abortion access and other aspects of equality between the sexes.

12. Glendon, *Rights Talk*, 58, and *Abortion and Divorce*, 40-49.

13. Ginsburg, "Speaking in a Judicial Voice," 38.

14. For recent critics of *Roe*, see Glendon, Schneider, Rosenberg, and Tushnet. For prominent lawyers who defend *Roe*, see Lawrence Tribe, *Abortion: The Clash of Absolutes* (New York: Norton, 1990) and Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (New York: Alfred A. Knopf, 1993).

15. See these excellent contributions from Stanley Henshaw. Stanley Henshaw, Jacqueline Darroch Forrest, Ellen Sullivan, and Christopher Tietze, "Abortion Services in the United States, 1979 and 1980," *Family Planning Perspectives* 14, no. 1 (1982): 5-14; Stanley Henshaw and Kevin O'Reilly, "Characteristics of Abortion Patients in the United States, 1979 and 1980," *Family Planning Perspectives* 15, no. 1 (1983): 5-16; Stanley Henshaw, "Induced Abortion: A World Review, 1990," *Family Planning Perspectives* 22, no. 2, (1990): 76-89; Stanley Henshaw, "The Accessibility of Abortion Services in the United States," *Family Planning Perspectives* 23, no. 6, (1991): 246-52; Stanley Henshaw and Lynn S. Wallisch, "The Medicaid Cutoff and Abortion Services for the Poor," *Family Planning Perspectives* 16, no. 4 (1984): 170-80.

16. Rosenberg, *Hollow Hope*, 178-80.

17. Glendon, *Abortion and Divorce*.

18. See Tribe, *Abortion* and Eva R. Rubin, *Abortion, Politics, and the Courts: Roe v. Wade and Its Aftermath* (Westport, CT: Greenwood, 1982).

19. Paul Benjamin Linton, "Enforcement of State Abortion Statutes after *Roe*: A State by State Analysis," *University of Detroit Law Review* 67, no. 2 (1990): 157-259. In a recent book, Professor Ronald Dworkin disputes Glendon's thesis that a legal and social consensus on abortion would have emerged from legislative debate. He anecdotally cites recent enactments of very strict antiabortion statutes in Guam, Louisiana, and Utah as evidence against Glendon's thesis. I agree with Dworkin's pessimistic appraisal, and I hope that this essay can provide a somewhat sustained political analysis to support that view. See Dworkin, *Life's Dominion*, 9.

20. Tushnet, "Rights: An Informal Essay," 412-15.

21. For recent cases which narrow the *Roe* holding, see *Webster v. Reproductive Health Services* 492 U.S. 490 (1989) and *Planned Parenthood v. Casey* 112 S. Ct. 2791 (1992). It is in the interests of pro-choice forces, for example, to exaggerate the extent to which recent Court decisions such as *Webster* and *Casey* erode the *Roe* precedent. By creating the impression that *Roe* is always on the verge of being overturned, activists hope to mobilize support for their cause.

22. In the plurality opinion of *Casey*, Justice O'Connor wrote that:

The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety or the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases. (slip. op., at 52)

23. John Kaplan, "Abortion as a Vice Crime: A 'What if' Story," *Law and Contemporary Problems* 51, no. 1 (1988): 151-80, 162.

24. Glendon, *Abortion and Divorce*, 23.

25. Henshaw, "Induced Abortion," 79.

26. Kaplan, "Abortion as a Vice Crime, 165-66," citing Franklin Zimmering, "Of Doctors, Deterrence, and the Dark Figure of Crime—A Note on Abortion in Hawaii," *Chicago Law Review* 39 (1972): 699; for information on abortion practices before widespread legalization, see Edwin Schur, *Crimes without Victims, Deviant Behavior and Public Policy: Abortion, Homosexuality, and Drug Addiction* (Englewood Cliffs, NJ: Prentice-Hall, 1965); and Kenneth R. Whitmore, "The Availability of Non-Hospital Abortions" in *Abortion in a Changing World*, edited by Robert E. Hall (New York: Columbia University Press, 1970): 212-17.

27. See Linton, "Enforcement of State Statutes" for a detailed discussion.

28. Glendon, *Abortion and Divorce*, 14-15.

29. Linton, "Enforcement of State Abortion Statutes," 256-57.

30. Glendon, *Abortion and Divorce*, 13-22. Henshaw, "Induced Abortion," 77-78. For a discussion of the 1992 Irish referendum in which the majority rejected a liberalization of abortion laws, see Dworkin, *Life's Dominion*, 47-48. See note 35 below for more detail on abortion restriction in Belgium.

31. Tribe, *Abortion*, 35-36.

32. Glendon, *Abortion and Divorce*, 14.

33. Glendon, *Abortion and Divorce*, 59.

34. Data in this graph were generated from information in Glendon, *Abortion and Divorce*, 14 and 145-54, and Henshaw, "Induced Abortion," 76-78. Since abortion data are available for different countries at different times, the abortion ratios in this figure are taken from different years. All of the data, however, were collected between 1984 and 1988. The countries are categorized according to the legal regime in place at the time of data collection.

Some countries have altered their laws since this period. Belgium, for instance, recently liberalized its abortion law (to Type II) to permit abortion in the first 14 weeks of pregnancy if a woman is "in distress." This law incorporates a mandatory consultation followed by a six-day waiting period. Abortions after 14 weeks are permitted if there is a risk to the woman's health or danger of fetal malformation (Henshaw, "Induced Abortion," 78). Following reunification, the German parliament passed a relatively liberal abortion law in 1992, but the German high court ruled that law unconstitutional on May 28, 1993. They

imposed strict limitations on abortion, ruling that "abortion may only be permitted in exceptional circumstances," and that women seeking abortions must receive counseling which makes them "aware that the unborn child has its own right to life." These guidelines place Germany at the restrictive extreme of the Type II continuum. See Steven Kinzer, "German Court Restricts Abortion Angering Feminists and the East," *New York Times* (May 29, 1993): A1.

These recent changes in the abortion laws of other countries invite further investigation and provide an additional opportunity to test this article's hypothesis that there is a relatively tight connection between abortion rates and legal regimes.

35. Data in this figure are taken from Linton, "Enforcement of State Abortion Statutes," 258, and *US Statistical Abstracts*, 1991.

36. Average abortion ratios (abortions per 1,000 pregnancies) for all the data sets discussed are given in the body of the table below. Europe is depicted in Figure 1, all United States is depicted in Figure 2, and United States without outliers is not graphed, but is discussed in the text to which this is a footnote.

Data Set	Legal Type		
	I	II	III
Europe	73	148	259
U.S. w/o outliers	92	143	283
all US	92	195	438

37. Kristin Luker, *Abortion and the Politics of Motherhood* (Berkeley: University of California Press, 1984), 94.

38. *US Statistical Abstracts 1981*, Table 104.

39. Tribe, *Abortion*, 42-43.

40. Rubin, *Abortion*, 28.

41. Kaplan, "Abortion as a Vice Crime," 164.

42. *Ibid.* Though most abortions were performed by licensed physicians, a significant portion were performed outside of hospitals by nonphysicians. See Whittemore "Availability of Non-Hospital Abortions," 212-15, for a discussion of the unsavory character of clandestine abortionists in one medium-sized U.S. city in 1970. In many cases, abortionists in this study had little or no medical training. Some seemed to be ideologically motivated, while others moonlighted in order to make money or obtain sexual favors.

43. For a discussion of enforcement in the early period of this century, see Luker, *Abortion and the Politics of Motherhood*, 53-55. She writes that

In Alabama in the period 1894 to 1932, for example, there were forty indictments and five convictions; in Arkansas between 1921 and 1932, twenty seven indictments and nine convictions; in Massachusetts between 1849 and 1858, thirty two indictments and one conviction; in Michigan between 1893 and 1932, 156 indictments and forty convictions; in Minnesota between 1911 and 1930, one hundred indictments and thirty one convictions; and in Utah between 1896 and 1932 seventeen indictments and three convictions. . . . A statistical analysis of all 111 convictions for abortion in New York County between 1925 and 1950 (about four convictions per year) indicates that 44 percent of those convicted were given probation. This is all the more remarkable when it is realized that 55 percent

of these prosecutions were brought about because of a woman who was sufficiently ill after abortion to arouse public notice and that in 10 percent of the cases a woman has died as a result of the abortion.

44. In the years before *Roe*, the standard surgical abortion procedure was dilation and curettage. In D and C, as it was called, a woman's cervix was first dilated, and then the fetus and the uterine lining were scraped out with a sharp metal device. The danger and pain involved in this procedure should be obvious. Illegal abortionists frequently used a procedure which involved "inserting a rubber catheter into the cervical canal and packing the vagina with gauze" (see Whittemore, "Availability of Nonhospital Abortions," 214).

Today, suction or vacuum abortion is the standard procedure. In this procedure, a thin plastic tube attached to a syringe or vacuum pump is inserted into the uterus and used to suck out the fetus and its membranes (see Kaplan, "Abortion as a Vice Crime," 169).

45. *Ibid.*, 170.

46. This figure was compiled from data in *US Statistical Abstracts 1991* and Henshaw, "Accessibility of Abortion Services," 248.

47. Henshaw and Wallach, "Medicaid Cutoff," 171.

48. Willard Cates conducted this study, which compared abortion data for poor women in the years just before and after the Hyde amendment Medicaid cutoff in 1977. Note that many poor women continued to receive public subsidies for abortion from state sources even after the federal funding cutoff. The effects of funding cutoff cited above describe women who received no public (as opposed to simply no federal) subsidy for their abortions. Willard Cates, "The Hyde Amendment in Action: How Did the Restriction of Federal Funds for Abortion Affect Low-Income Women?" *Journal of the American Medical Association* 246, no. 10 (September 4, 1981): 1109-12.

49. Henshaw and Wallisch, "Medicaid Cutoff."

50. For written consent and record keeping, see *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). For parental consent to pregnant minors, see *City of Akron v. Akron Center for Reproductive Health* 462 U.S. 416 (1983); *Planned Parenthood, Kansas City, Mo. v. Ashcroft*, 462 U.S. 476 (1983); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); and *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 503 (1990). For conscience clauses and abortion at public facilities, see *Poelker v. Doe*, 432 U.S. 519 (1977) and *Webster v. Reproductive Health Services*, 492 U.S. 490 (1988). For public funding of abortions, see *Maher v. Roe*, 432 U.S. 464 (1977) and *Harris v. McRae*, 448 U.S. 297 (1980).

51. See the plurality opinion in *Casey* for the Court precise reasoning for each of the Pennsylvania statutes in question. Justice O'Connor writes that the informed consent requirement "cannot be considered a substantial obstacle to obtaining an abortion" (slip. op., at 45); "we are unconvinced that the 24-hour waiting period constitutes an undue burden" (slip. op., at 45); that the spousal consent requirement "is an undue burden, and therefore invalid" (slip. op., at 53); the "increased cost" of record keeping requirements "could become a substantial obstacle," but that "there is no such showing on the record before us" (slip. op., at 59).

52. Data in the paragraph are taken from Henshaw, "Accessibility of Abortion Services."

53. I have sketched a method by which such studies might be conducted in the methodology discussion which introduces this section. However, such detailed investigations lie beyond the scope of this article and would require expertise which I lack.

54. See Donald Granberg and Beth William Granberg, "Abortion Attitudes, 1965-1980: Trends and Determinants," *Family Planning Perspectives* 12, no. 5 (1980): 250-61.

55. This histogram was generated from Eric M. Uslander and Ronald E. Weber, "Public Support for Pro-Choice Abortion Policies in the Nation and States: Changes and Stability after the *Roe* and *Doe* Decisions," *Michigan Law Review* 77 (1979): 1772-89.

56. Rosenberg, *Hollow Hope*, 184, 262-64.

57. Tribe, *Abortion* 42-43.

58. This graph was generated from data in Linton, "Enforcement of Abortion Statutes" and Uslander and Weber, "Public Support."

59. This consideration became important because of two well-publicized abortion controversies. The first concerned thalidomide, a tranquilizer which caused birth defects when taken by pregnant women. Sheri Finkbine, an Arizona woman, had unknowingly taken thalidomide when she was pregnant in 1962. She then tried to schedule an abortion after she discovered that danger, but could not obtain a legal abortion in America and had to travel to Sweden.

The second controversy occurred with the outbreak of German measles (rubella) in 1962-65. Rubella can cause serious birth defects when contracted by pregnant women. In years between 1962-65, some 15,000 American babies were born with birth defects as a result of the disease (Tribe, *Abortion*, 36; Rubin, *Abortion, Politics, and the Courts*, 22-24).

60. Tribe, *Abortion*, 38.

61. Rubin, *Abortion, Politics, and the Courts*, 22.

62. *Ibid.*, 24-26.

63. New York is an exception to this statement. That city was a center of both radical and mainstream feminist organizations that had a significant impact on abortion repeal (Tribe, *Abortion*, 47-49; Rubin, *Abortion, Politics, and the Courts*, 24-27).

64. By comparison, NOW's membership in 1987 was 260,000. See Rosenberg, *Hollow Hope*, 243.

65. Luker, *Abortion and the Politics of Motherhood*, 83.

66. *Ibid.*, 83, 127-37.

67. Rubin, *Abortion, Politics, and the Courts*, 27.

68. Tribe, *Abortion*, 46-47.

69. Luker, *Abortion and the Politics of Motherhood*, 137.

70. *Ibid.*, 88-89.

71. Tribe, *Abortion*, 145.

72. Rubin, *Abortion, Politics, and the Courts*, 69.

73. See, for example, Rosenberg, *Hollow Hope*, 179, 201, Glendon, *Abortion and Divorce*, 48-50, and Tribe, *Abortion*, 73-76, for a critique.

74. Data in this figure are taken from *US Statistical Abstracts*, various years.

75. Whether or not the East North Central region fits into the second or third category is, I suppose, a matter of judgment and not particularly critical for the purposes of this analysis. My artificial categories are designed to be suggestive rather than definitive.

76. See *People v. Belous*, *United States v. Vuitch*, *Abroamowicz v. Lefkowitz*, *Hall v. Lefkowitz*, *Doe v. Lefkowitz*, *Lyons v. Lefkowitz*, *Babbitz v. McCann*, *Abele v. Markle* (see Rubin, 43-57).

77. The importance of *Brown v. Board* to the civil rights movement is an unsettled issue of academic contention (see Rosenberg, *Hollow Hope*).

78. Rubin, *Abortion, Politics, and the Courts*, 61-62.

79. *Ibid.*, 89.

79. *Ibid.*, 88.

81. Tushnet, "Rights," 413.

82. Luker, *Abortion and the Politics of Motherhood*, 137.

83. Tribe, *Abortion*, 145.

84. Rubin, *Abortion, Politics, and the Courts*, 117-49.
85. For a discussion of case law, see *Ibid.*, 117-49. Also, see note 38 above.
86. Tribe, *Abortion*, 20-26.
87. Rubin, *Abortion, Politics, and the Courts*, 174; Gerald E. Frug, "The Judicial Power of the Purse," *University of Pennsylvania Law Review* 126 (1978): 715.
88. See Table 3.
89. The 1977 data in this table are from Rubin, *Abortion, Politics, and the Courts*, 166, while the 1990 data are from Rachel Benson Gold and Daniel Daley, "Public Funding of Contraceptive, Sterilization, and Abortion Services, Fiscal Year 1990," *Family Planning Perspectives* 23, no. 5 (September/October 1991): 204-11.
90. For an account of the progress of the Hyde amendment, see Tribe, *Abortion*, 153-57.
91. On such "supply side" considerations, see Rosenberg, *Hollow Hope*, 195-201.
92. Rubin, *Abortion, Politics, and the Courts*, 130.
93. 432 U.S., 522-25.
94. This figure is taken from Rosenberg, *Hollow Hope*, 190.
95. See Figure 3.
96. 492 U.S., 538; see also Tribe, *Abortion*, 23.
97. Slip. op., at 1.
98. Tushnet, "Rights," 414.
99. Data in this table were taken from Carol Matlack, "Abortion Wars," *National Journal* 23 (March 16, 1991): 630-34 and Clyde Wilcox, "PACs and Abortion: A Longitudinal Analysis," *Women and Politics* 9, no. 1 (1989): 1-19.
100. Rosenberg, *Hollow Hope*, 183.
101. Joshua Cohen has suggested that I include discussion of a national Type II legislative regime as a third counterfactual scenario. I have not done so because the scenario, while somewhat plausible, seems vulnerable to the criticisms discussed in this section. Under the charitable state-sovereignty scenario discussed here, most states adopt Type II laws. I argue that abortion access would be unacceptably low in this event. The same criticism also applies to a national, legislatively secured Type II regime. The national Type II version has the additional defect of being less plausible than the state-sovereignty scenario of this section (although it is more plausible than the Type III regime discussed in the previous section).
102. Glendon, *Abortion and Divorce*, 47.
103. See Schneider, "States-Interest Analysis," 110-18.
104. To be clear, Ginsburg's position on *Roe* has three distinct but related elements. First, she claims that *Roe* ought to have been decided on equal protection rather than privacy grounds. Second, she defends a view of the courts in which they participate as a restrained agent in a political dialogue with legislatures and the public. *Roe*, then, was decided too broadly in light of this institutional standard. Third, she maintains, implausibly in my view, that abortion services would have been widely available if the Court had stayed true to its proper institutional commitment by ruling narrowly on the *Roe* decision. My argument focuses centrally with the third point, but the important issue of the alleged dichotomy between privacy and equal protection lies beyond its scope. Concerning Ginsburg's second point, I argue neither for nor against the merits of her conception of institutional dialog beyond pointing out that this vision of the Court's proper role may be incompatible with a high level of abortion access. While this conflict may be an important consideration in evaluating Ginsburg's view of the Court's institutional limits, by no means do I intend it to be decisive. See Ginsburg, "Speaking in a Judicial Voice," 38-39 and "Some Thoughts on Autonomy," 380-86.

105. Ginsburg, "Some Thoughts on Autonomy," 385.
106. Glendon, *Abortion and Divorce*, 48.
107. Rosenberg, *Hollow Hope*, 184; Rubin, *Abortion, Politics, and the Courts*, 23.
108. Tribe, *Abortion*, 51.
109. See Figure 5.
110. For example, Michigan and North Dakota, see Tribe, *Abortion*, 147.
111. Glendon, *Abortion and Divorce*, 48-49.
112. See Figure 6.
113. See Tribe, *Abortion*, 73.

114. While I argue that such hypocritical legal enforcement would be difficult to maintain in the face of organized opposition, Tribe argues that a major obstacle facing loose interpretation is the American consensus commitment to the rule of law. He writes that, "An approach that relies on a strict normative judgment embodied in legislation but dramatically softened in its application by pragmatic concerns is bound, in the long run, to offend American conceptions of equal justice . . . we probably could not expect the kind of practical results—relative ease in safely terminating first trimester pregnancies . . . , whatever the experience of more homogeneous European countries." He argues further that such an arrangement would not be attractive even if it could be sustained because it would "take an unacceptably high toll on confidence in the rule of law. . . . The French solution . . . [to abortion regulation] seems to teach mostly hypocrisy" (Tribe, *Abortion*, 73-75).

115. Glendon, *Abortion and Divorce*, 49.

116. Linton, "Enforcement of State Abortion Statutes," 259. Two states, Louisiana and Utah, are counted as Type III based on the laws which would come immediately into effect should *Roe* be overturned. Both of these states, however, recently enacted very restrictive abortion legislation in anticipation of *Roe's* imminent defeat. This legislation was later struck down by federal courts. See Dworkin, *Life's Dominion*, 9-10.

117. These predictions are from John Moore, "Lobbying the Court," *National Journal*, 21 (April 15, 1989): 908-13. He points out that six states have enacted legislation in anticipation of *Roe* reversal: Arkansas, Idaho, Illinois, Louisiana, South Dakota, and Utah. Eight more have enacted strict legislation on abortion since 1973: Connecticut, Indiana, Kentucky, Missouri, Montana, Nebraska, North Dakota, and Pennsylvania. He lists the following states as solidly pro-choice: Alaska, New York, Washington, Wisconsin, New Hampshire, Hawaii, California, Maryland, Massachusetts, Michigan, New Jersey, North Carolina, Oregon, Rhode Island, and Vermont.

118. See Rosenberg, *Hollow Hope*.
119. See Tushnet, "Rights."
120. See Glendon, *Abortion and Divorce*.
121. *Ibid.*, 46.
122. Ginsburg, "Some Thoughts on Autonomy," 375.