ABORTION UNDER STATE CONSTITUTIONS

A State-by-State Analysis

SECOND EDITION

Paul Benjamin Linton

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Dedication

This book is dedicated to the memory of my late friend, Thomas J. Marzen, Esq., who, in the almost twenty years that I knew him, was a constant source of encouragement, insight, advice and, not the least, humor.
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When we think of Constitutional Law, we typically think only of the United States Constitution. Indeed, turn to the typical college or law school text on Constitutional Law, and you will find a collection of cases from just one Court, the United States Supreme Court.

Yet the state courts make Constitutional Law all the time. And, often, what the state courts say is different from what the United States Supreme Court says. Of course, the United States Supreme Court long ago decided that it is the supreme expositor of what the United States Constitution means. But state courts have their own state constitutions, which they may interpret to grant more rights or different rights than what the federal constitution offers. As Justice Brennan remarked over thirty years ago, “state courts no less than federal are and ought to be the guardians of our liberties.”¹ State jurists² and commentators³ have echoed this refrain.

The law governing abortions, like other laws, is subject to the state constitutions as well as the federal constitution. Lawyers who engage in the litigation in the trial level know that state constitutions matter. In the area of abortion law, the Supreme Court recently has taken to writing decisions that are less expansive and require that litigants have standing instead of hypothesizing circumstances that may never occur.⁴ The modern Court does not embrace facial attacks.⁵ This restraint creates a partial vacuum, which state courts rush to fill.

². E.g., Stanley Mosk, The New States Rights, 10 Calif. L. Enforcement 81, 81 (1976). Stanley Mosk was Justice of the California Supreme Court at the time he wrote this article.
Consequently, litigants, whether they embrace or oppose a right to abortion, are turning to state constitutions. Not only do state courts interpret their constitutions without the need to follow federal law, they also need not follow federal law of standing, case or controversy, and other procedural restrictions.\(^6\)

We cannot understand what state courts may do in the future regarding abortion unless we know what they are doing now. To find that, we must turn to Paul Linton’s new book, Abortion Under State Constitutions: A State-by-State Analysis. He is specially qualified to write this book, for he has labored in this area for decades, publishing a dozen articles on abortion and related topics, such as sex discrimination, equal rights amendments under state law, the history of abortion regulation, and abortion case law.

Law review articles sometimes refer to abortion law under state constitutional provisions, but they discuss the state constitutional issues only in passing, not systematically. This book is the first full-length treatment of this issue in book form, and it meets a longstanding need by canvassing and analyzing the law of every State. Paul Linton’s book is comprehensive in scope, thorough in research, and detailed in analysis. Mr. Linton covers all plausible (and even some implausible) grounds on which a litigant might assert an abortion right under various state constitutional provisions.

Only a dozen state courts, by Mr. Linton’s count, explicitly recognize a constitutional right to abortion based only on state law and independent of federal law. Since the Supreme Court decided Roe v. Wade in 1973, several States (in Arkansas, Colorado and Rhode Island) have adopted new state constitutions (or constitutional amendments) that do not embrace Roe. For example, Rhode Island added the following language to Article I, §2, of the Rhode Island Declaration of Rights: “Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof.”

Abortion is a controversial topic. Right to Life supporters are on one side while Abortion Rights groups are on the other. Everyone else is at some point in the continuum between these two sides. It is difficult to approach this topic with intellectual distance and objectivity. Mr. Linton manages this feat, although he is presently Special Counsel for the Thomas More Society (Chicago, Illinois), the former general counsel of Americans United for Life, and, for two decades, has submitted amicus briefs in the landmark Supreme Court cases. His book is not a brief arguing for a particular position. Instead, it of-

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The Good Book tells us that there is nothing new under the sun. When it comes to abortion litigation, under the present state of the law, there is probably no argument that some litigant has not raised in some state court, and, as Mr. Linton explains in his Introduction, he discusses them all, plus others that litigants may raise in the future. His goal is to provide an informed judgment about what state courts are likely to do, after examining the state constitution text, its history, interpretation and the historical and contemporary treatment of abortion and the rights of unborn children outside the context of abortion, such as laws governing fetal homicide, wrongful death, health care laws, property law, etc.

The law’s movement is sometimes difficulty to predict—and those who make them tend to offer evidence of their fallibility. But, that does not mean that we should not try. The law is not random. Even if we cannot predict with confidence what a court will do, we should be able to predict with some confidence the arguments that a court will find more persuasive. Mr. Linton excels in exploring these arguments.

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PREFACE

Abortion under State Constitutions, which has been favorably reviewed by law professors, research librarians and reference librarians, and has been acquired by many law libraries and research libraries, remains the only comprehensive treatment of arguments for and against the recognition of abortion as a state constitutional right. The law, of course, is dynamic, not static. In the last four years, although no state supreme court has recognized a state right to abortion, abortion advocates have filed state constitutional challenges to abortion regulations in Illinois and Oklahoma. And in Alaska, a case challenging a citizen-initiated parental notice law tests the limits of the broad abortion right previously recognized in that State. At the same time, the legislatures of Florida and Tennessee have proposed amendments to their state constitutions which, if approved by the voters, would overturn earlier decisions recognizing a state right to abortion. These developments, along with a number of other factors, warrant a second edition.

In this edition, new materials—court decisions and/or legal commentary—have been incorporated into the discussion of state equal rights amendments, unenumerated rights (or retained rights) provisions and state privacy theory, as well as one of the introductory chapters (Federal Floors and State Ceilings). Individual chapters have been edited to include, among other changes, a fuller description of a State’s pre-Roe abortion statute (New Mexico), a State’s religion clauses (Oregon), a State’s statement of interests in protecting unborn human life (Utah), and the possible sources of the right to abortion recognized by a state supreme court (Vermont). Where it was appropriate, the analysis of a given state constitutional provision has been rewritten for greater clarity (e.g., the privacy and equal rights guarantees of the Washington State Constitution). Citations have been updated throughout the text and notes and, where necessary, corrected, and topical headings have been changed in some instances to describe more accurately the state constitutional provisions discussed. This edition also includes two new features—an appendix which contains the text of every state constitutional provision cited or quoted in the book, as well as a topical index to facilitate cross-references to the same (or similar) provisions.

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in different state constitutions. It is the author’s hope that these features will make the second edition even more helpful as a reference work for judges, lawyers, legislators and others interested in the issue of abortion as a state constitutional right.
Acknowledgments

This book could not have been written without the support and assistance of others. Principal funding for the research and writing of the first edition was provided by the Thomas More Society, Chicago, Illinois. Their Board of Directors, formerly chaired by Jennifer Craigmile Neubauer, and their President and Chief Counsel, Thomas Brejcha, had the vision to see the need for this book and the analysis it provides. I very much appreciate their support. Appreciation is also due to Denise Mackura, the former director of the Center for Life and Hope, who arranged for the Center to provide a mechanism by which interested individuals and organizations were able to contribute financially to the work. Ms. Mackura is now the President of the Human Family Research Center. Principal funding for the preparation of the second edition was provided by a generous contribution from the Helen Brach Foundation, along with the Thomas More Society.

Individual chapters have been reviewed by government attorneys, attorneys in private practice, law professors and retired state supreme court justices. I appreciate their suggestions. I particularly want to thank Michael Moses, Associate General Counsel, Office of the General Counsel, National Conference of Catholic Bishops. Michael kindly offered to read much of the manuscript of the first edition and his thoughtful, measured comments greatly improved the tone, the substance and the style of the entire book. I also thank Diane Pietrzak for her meticulous review of some early chapters and helpful suggestions on style and organization.

Most of the research for this book, both the first and second editions, was done at three Chicago law libraries—the Cook County Law Library, Northwestern University School of Law and DePaul University College of Law. The Cook County Law Library is an extraordinary public law library that has extensive (and relatively complete) collections of out-of-date, as well as current, state statutes, and state session laws, which needed to be consulted on a regular basis in the course of researching this book. I appreciate the friendliness of their entire staff and, in particular, the assistance of one of their reference librarians, Montell Davenport, in helping me find materials in their collections. Northwestern University’s Law School library is beautifully situated on Lake Shore
Drive overlooking Lake Michigan immediately north of downtown Chicago. I found their library to be especially useful in researching texts on state constitutional law and state constitutional convention proceedings. Special thanks are due to Marcia Lehr and Pegeen Bassett, who helped me locate materials in the law school’s collections as well as referring me to other libraries which had materials that were not available at Northwestern. Both Northwestern and DePaul make their law libraries available to practitioners who are neither students nor alumni of their schools. I also benefitted from using the collections at the Newberry Library, a research library in Chicago. Finally, the staff of the reference and inter-library loan departments of my local public library (the Northbrook Public Library) was able to obtain materials for me from out-of-State libraries. I appreciate their help, as well.