Abortion under State Constitutions

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A State-by-State Analysis

Third Edition

Paul Benjamin Linton

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Dedication

This edition is dedicated to the memory of my parents.

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Preface

Abortion under State Constitutions, which has been favorably reviewed by law professors, research librarians and reference librarians, remains the only comprehensive, book-length treatment of arguments for and against the recognition of abortion as a state constitutional right. The first edition of this book was published in 2008, the second edition in 2012. Since the second edition was published, there have been significant developments in state constitutional law that warrant publication of a third edition. In the past eight years, state constitutional challenges to abortion regulations have been considered and decided by the Supreme Courts of Alaska, Florida, Illinois, Iowa, Kansas, North Dakota and Oklahoma. All of those decisions are discussed and evaluated in this edition. The voters in three States–Alabama, Tennessee and West Virginia–have approved state constitutional amendments neutralizing their state constitutions as a source of abortion rights, prohibiting public funding of abortion and (in Alabama) enunciating a statement of public policy recognizing the rights of unborn children. The amendments in Tennessee and West Virginia overturned earlier decisions of their state supreme courts recognizing a state right to abortion (in the case of Tennessee) or mandating public funding of abortion (in the case of West Virginia). In addition to the foregoing developments, this edition highlights case law and statutory changes in a number of other States that may have a bearing on whether the state supreme court would recognize a state right to abortion, as well as noting the repeal of pre-*Roe* abortion statutes in Colorado, Delaware, Massachusetts, New York and Vermont, the repeal of Rhode Island's post-*Roe* statute prohibiting abortion and the enactment of statutes in Arkansas, Kentucky, Missouri and Tennessee that would criminalize abortion upon the overruling of *Roe v. Wade*.

The research and analysis for each State has been reviewed and, where appropriate, updated and corrected. This edition also includes, like the second edition, 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 in different state constitutions. These features should facilitate use of this edition 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 and third editions was provided by generous contributions from the Thomas More Society and the Helen Brach Foundation.

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, for all three 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 the library director, 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 state constitutional law texts and state constitutional convention proceedings. Special thanks are due to Marcia Lehr and Pegeen Bassett, both of whom are now retired, 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. DePaul University's College of Law library houses a complete series of monographs on state constitutions which I consulted on

a regular basis. 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 the Northbrook Public Library was able to obtain materials for me from out-of-State libraries. I appreciate their help, as well.

Abortion under State Constitutions

Introduction

The United States Supreme Court's decision in *Roe v. Wade*,[1] recognizing a federal constitutional right to abortion, has understandably overshadowed efforts to persuade state courts to recognize an equivalent right on state constitutional grounds. The Court, after all, effectively nullified the abortion laws of all fifty States and permitted abortion for any reason before viability,[2] and, arguably, for virtually any reason after viability, as well.[3] Given the scope and impact of the Supreme Court's decision in *Roe*, and the Court's subsequent invalidation of statutes and ordinances requiring parental consent,[4] spousal consent,[5] detailed informed consent,[6] short waiting

1. 410 U.S. 113 (1973).

2. *Id.* at 162–65. Viability is that stage of pregnancy when the unborn child is capable of sustained survival outside of the mother's womb, with or without medical assistance. The unborn child usually attains viability between the twenty-third and the twenty-fourth week of pregnancy.

3. *Roe* held that, after viability, "the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." 410 U.S. at 164–65. In *Roe*, the Court did not define the scope of the mandated health exception. In the companion case of *Doe v. Bolton*, 410 U.S. 197 (1973), however, the Court held that whether an abortion is "necessary" is a medical judgment that "may be exercised in the light of all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient. *All these factors may relate to health*." *Id.* at 192 (emphasis added); *see also Roe*, 410 U.S. at 165 (stating that *Doe* and *Roe* "are to be read together"). Although the Supreme Court has not yet considered the constitutionality of a statute prohibiting (subject to narrow exceptions) post-viability abortions (and the statute at issue in *Doe* did not make a distinction between pre- and post-viability abortions), at least three lower federal courts have held that the broad and open-ended definition of "health" in *Doe* limits the authority of the States to restrict post-viability abortions. *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 206–10 (6th Cir. 1997) (striking down statute that prohibited post-viability abortions except for narrow physical health reasons); *Margaret S. v. Edwards*, 488 F. Supp. 181, 196 (E.D. La. 1980) (striking down statute that prohibited post-viability abortions unless the procedure was necessary "to prevent permanent impairment to [the pregnant woman's] health"); *Schulte v. Douglas*, 567 F. Supp. 522, 525–26 (D. Neb. 1981), *aff'd per curiam*, *sub nom. Women's Services, P.C. v. Douglas*, 710 F.2d 465 (8th Cir. 1983) (striking down statute that prohibited post-viability abortions unless the procedure was "necessary to preserve the woman from an imminent peril that substantially endangers her life or health"). *See also American College of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283, 298–99 (3d Cir. 1984) (stating in *dictum* that had Pennsylvania attempted to prohibit post-viability abortions performed for psychological or emotional reasons, such a limitation would have been unconstitutional under *Doe v. Bolton*), *aff'd*, 476 U.S. 747 (1986). *But see Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 850–51(1992) (characterizing as "rare" those circumstances in which pregnancy is a danger to a woman's life or health); *Voinovich v. Women's Medical Professional Corp.*, 523 U.S. 1036 (1998) (Thomas, J., dissenting from denial of certiorari) (distinguishing *Doe* and stating that *Doe* does not articulate the relevant constitutional standard for a ban on post-viability abortions).

4. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 72–75 (1976); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 439–42 (1983).

5. *Danforth*, 428 U.S. at 67–72.

6. *City of Akron*, 462 U.S. at 442–49; *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 759–65 (1986).

periods[7] and a variety of other measures regulating the practice of abortion,[8] it is not surprising that abortion litigation under state constitutions has received so little attention, both in the public square and in the legal community. And yet, even before *Roe* was decided, statutes prohibiting abortion had been challenged in state court, usually on federal grounds, but sometimes on state grounds, too, with mixed results.[9] The pace of such litigation accelerated dramatically after the Supreme Court began to uphold some modest limitations on abortion, including statutes restricting public funding of abortions (or the availability of public facilities for the performance of abortions)[10] and statutes requiring, subject to a valid judicial bypass mechanism,

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7. *City of Akron*, 462 U.S. at 449–51; *Thornburgh*, 476 U.S. at 759–65.

8. *Danforth*, 428 U.S. at 75–79 (striking down statute prohibiting saline amniocentesis method of abortion); *City of Akron*, 462 U.S. at 431–39 (striking down ordinance requiring all abortions after the first trimester to be performed in hospitals); *Planned Parenthood Ass'n of Kansas City, Missouri, Inc. v. Ashcroft*, 462 U.S. 476, 481–82 (1983) (striking down statute requiring all abortions after the first twelve weeks of pregnancy to be performed in hospitals); *Thornburgh*, 476 U.S. at 768–71 (striking down statute imposing standard of care for post-viability abortions).

9. Prior to *Roe*, state reviewing courts in fifteen States considered state and/or federal constitutional challenges to their abortion statutes in twenty separate opinions. For the most part, those challenges were rejected and the statutes upheld. *See Nelson v. Planned Parenthood Center of Tucson, Inc.*, 505 P.2d 580 (Ariz. Ct. App. 1973); *Cheaney v. State*, 285 N.E.2d 265 (Ind. 1972), *cert. denied for want of standing of petitioner*, 410 U.S. 991 (1973); *State v. Abodeely*, 179 N.W.2d 347, 354–55 (Iowa 1970), *appeal dismissed*, *cert. denied*, 402 U.S. 936 (1971); *Sasaki v. Commonwealth*, 485 S.W.2d 897 (Ky. 1972), *vacated and remanded*, 410 U.S. 951 (1973); *State v. Campbell*, 270 So.2d 506 (La. 1972); *State v. Scott*, 255 So.2d 736 (La. 1971); *State v. Shirley*, 237 So.2d 676, 678 (La. 1970); *State v. Pesson*, 235 So.2d 568, 573–74 (La. 1970); *Kudish v. Board of Registration in Medicine*, 248 N.E.2d 264 (Mass. 1969); *Commonwealth v. Brunelle*, 171 N.E.2d 850 (Mass. 1961); *Spears v. State*, 257 So.2d 876 (Miss. 1972) (*per curiam*); *Rodgers v. Danforth*, 486 S.W.2d 258 (Mo. 1972), *vacated and remanded*, 410 U.S. 949 (1973); *State v. Kruze*, No. 72-11 (Ohio March 10, 1972), *vacated and remanded*, 410 U.S. 951 (1973); *State v. Munson*, 201 N.W.2d 123 (S.D. 1972), *vacated and remanded*, 410 U.S. 950 (1973); *Thompson v. State*, 493 S.W.2d 913, 917–20 (Tex. Crim. App. 1971), *vacated and remanded*, 410 U.S. 950 (1973); *but see People v. Barksdale*, 503 P.2d 257 (Cal. 1972) (striking down the California Therapeutic Abortion Act); *People v. Belous*, 458 P.2d 194 (Cal. 1969) (striking down nineteenth-century statute prohibiting all abortions except those necessary to save the life of the pregnant woman); *State v. Barquet*, 262 So.2d 431 (Fla. 1972) (same); *Beacham v. Leahy*, 287 A.2d 836 (Vt. 1972) (same). *See also People v. Nixon*, 201 N.W.2d 635, 640–41 & n. 17 (Mich. Ct. App. 1972) (upholding physician's conviction for abortion but suggesting in *dictum* that the prohibition could not constitutionally be applied to the performance of an early abortion by a licensed physician in a hospital), *remanded*, 389 Mich. 809 (1973).

10. *Beal v. Doe*, 432 U.S. 438 (1977) (federal Medicaid statute does not require States to pay for nontherapeutic abortions); *Maher v. Roe*, 432 U.S. 464 (1977) (Constitution does not require States participating in Medicaid program to pay for nontherapeutic abortions); *Poelker v. Doe*, 432 U.S. 519 (1977) (upholding municipal policy prohibiting the performance of abortions in city hospitals except when there was a threat of grave physiological injury or death to the pregnant woman); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding Hyde Amendment prohibiting the use of federal funds to pay for abortions except those necessary to save the life of the pregnant woman); *Williams v. Zbaraz*, 448 U.S. 358 (1980) (upholding Illinois statute containing the same restriction); *Webster v. Reproductive Health Services*, 492 U.S. 490, 507–11 (1989) (upholding statute prohibiting public employees from performing abortions and prohibiting the use of public facilities for the performance of abortions except those necessary to save the life of the pregnant woman).

parental consent or notice.[11] Following these decisions, more than two dozen lawsuits were brought in state courts challenging, on state constitutional grounds alone, statutes and regulations restricting public funding of abortion and statutes requiring parental consent or notice. And, despite the fact that such statutes had been upheld by the Supreme Court, most that were challenged in state court were struck down.[12] After the Supreme Court, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, modified *Roe v. Wade*, at least with respect to its impact on the regulation of abortion,[13]

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11. *Bellotti v. Baird*, 443 U.S. 622 (1979) (setting forth, in context of decision striking down state parental consent statute, criteria under which such statutes would be upheld); *H.L. v. Matheson*, 450 U.S. 398 (1981) (upholding Utah's parental notice statute); *Planned Parenthood Ass'n of Kansas City, Missouri v. Ashcroft*, 462 U.S. at 490–93 (upholding Missouri's parental consent statute); *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (upholding Minnesota's parental notice statute); *Ohio v. Akron Center for Reproductive Rights*, 497 U.S. 502 (1990) (upholding Ohio's parental notice statute); *Casey*, 505 U.S. at 899–900 (upholding Pennsylvania's parental consent statute); *Lambert v. Wicklund*, 520 U.S. 292 (1997) (upholding Montana's parental notice statute).

12. Public funding restrictions were struck down in *State of Alaska, Dep't of Health & Human Services v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904 (Alaska 2001); *Simat Corp. v. Arizona Health Care Cost Containment System*, 56 P.3d 28 (Ariz. 2002); *Committee to Defend Reproductive Rights v. Myer*s, 625 P.2d 779 (Cal. 1981); *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247 (Ind. 2003) (limited partial invalidity); *Moe v. Secretary of Administration & Finance*, 417 N.E.2d 387 (Mass. 1981); *Women of the State of Minnesota v. Gomez*, 542 N.W.2d 17 (Minn. 1995); *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982); *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998); *Planned Parenthood Ass'n, Inc. v. Dep't of Human Resources of the State of Oregon*, 663 P.2d 1247 (Or. Ct. App. 1983), *aff'd on other grounds*, 687 P.2d 785 (Or. 1984); *Women's Health Center of West Virginia, Inc. v. Panepinto*, 446 S.E.2d 658 (W. Va. 1993) (overturned by state constitutional amendment). In addition to the foregoing decisions, two state supreme courts held that quasi-public, non-denominational hospitals could not refuse to make their facilities available for the performance of elective abortions. *Valley Hospital Ass'n v. Mat-Su Coalition for Choice*, 948 P.2d 963 (Alaska 1997); *Doe v. Bridgeton Hospital Ass'n*, 366 A.2d 641 (N.J. 1976). Funding restrictions were upheld in *Renee B. v. Florida Agency for Health Care Administration*, 790 So.2d 1036 (Fla. 2001); *A Choice for Women, Inc. v. Florida Agency for Health Care Administration*, 872 So.2d 970 (Fla. Dist. Ct. App. 2004): *Doe v. Dep't of Social Services*, 487 N.W.2d 166 (Mich. 1992); *Hope v. Perales*, 634 N.E.2d 183 (N.Y. 1994): *Rosie J. v. North Carolina Dep't of Human Resources*, 491 S.E.2d 535 (N.C. 1997); *Fischer v. Dep't of Public Welfare*, 502 A.2d 114 (Pa. 1985); and *Bell v. Low-Income Women of Texas*, 95 S.W.3d 253 (Tex. 2002). In addition to these reviewing court decisions, funding restrictions were challenged in unreviewed trial court decisions in half a dozen other States with mixed results (where relevant, those decisions are discussed in the respective state analyses). Statutes mandating parental consent or notice (subject to a judicial bypass mechanism) were struck down in *State v. Planned Parenthood of Alaska*, 171 P.3d 577 (Alaska 2007); *American Academy of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997); *In re T.W.*, 551 So.2d 1186 (Fla. 1989); *North Florida Women's Health and Counseling Services, Inc. v. State*, 866 So.2d 612 (Fla. 2003) (later overturned by state constitutional amendment); and *Planned Parenthood of Central New Jersey v. Farmer*, 762 A.2d 620 (N.J. 2000). Parental consent or notice statutes were upheld in *Hope Clinic for Women v. Flores*, 991 NE 2d 745 (Ill. 2013); *Planned Parenthood League of Massachusetts, Inc. v. Attorney General*, 677 N.E.2d 101 (Mass. 1997) (limited to one-parent consent); and *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645 (Miss. 1998).

13. *Casey* overruled, in part, the Court's earlier decisions in *City of Akron* and *Thornburgh*, upheld a detailed informed consent requirement, a twenty-four hour waiting period, a requirement that the physician, not his agent, apprise the woman considering an abortion of specific information relating to the abortion, as well as a parental consent statute. 505 U.S. at 881–87, 899–900. *Casey* is notable for three doctrinal changes from *Roe*. First, in *Casey*, the Court rooted the right to abortion in the "liberty" language of the Fourteenth Amendment, *Casey*, 505 U.S. at 846–53, not, as in *Roe*, in an

lawsuits were brought in state courts challenging the same kind of informed consent and waiting periods that had been upheld in *Casey*. Only one of those lawsuits succeeded, however.[14]

State challenges to abortion regulations have been brought with two objectives in mind: First, and most immediately, to invalidate statutes and administrative rules that would otherwise survive (and in many instances *had* survived) federal constitutional review. Second, to establish a right to abortion on *state* constitutional grounds that would outlive the overruling of *Roe v. Wade*. With few exceptions, state lawsuits that succeeded in the first effort typically succeeded in the second. Indeed, prevailing on the second argument usually was the condition necessary of prevailing on the first.[15] As of this writing, more than one-fourth of the state supreme courts in the United States have recognized, expressly or by implication, a right to abortion under their state constitution that is separate from, and independent of, the right to abortion recognized in *Roe*.[16]

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implied right of privacy. *Roe*, 410 U.S. at 153. Second, unlike *Roe*, 410 U.S. at 152–56, the Court in *Casey* did not characterize the right to abortion as "fundamental." Third, in reaffirming *Roe*, the Court never held that *Roe* had been correctly decided as a matter of original constitutional interpretation. *See, e.g.*, 505 U.S. at 871 ("the immediate question is not the soundness of *Roe*'s resolution of the issue [the weight to be given the State's interest in protecting the "potentiality" of human life], but the precedential force that must be accorded to its holding"). Instead, the Court relied heavily on the rule of *stare decisis* (the doctrine that courts should follow their own precedents) and the perceived need to protect its "institutional integrity." *Id.* at 854–69.

14. *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000) (overturned by state constitutional amendment). Similar challenges have been rejected in seven other States. *Planned Parenthood Arizona, Inc. v. American Ass'n of Pro-Life Obstetricians & Gynecologists*, 257 P.3d 181 (Ariz. Ct. App. 2011); *State v. Presidential Women's Center*, 937 So.2d 114 (Fla. 2006); *Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973 (Ind. 2005); *Mahaffey v. Attorney General*, 564 N.W.2d 104 (Mich. Ct. App. 1997); *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645 (Miss. 1998); *Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc. v. Nixon*, 185 S.W.3d 685 (Mo. 2006); *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570 (Ohio Ct. App. 1993). In *Planned Parenthood of the Heartland v. Reynolds*, 915 N.W.2d 206 (Iowa 2018), a majority of the Iowa Supreme Court struck down, on state due process and equal protection grounds, a statute requiring a seventy-two hour waiting requirement (*Casey*, as noted, involved a twenty-four waiting requirement).

15. *But see Simat Corp. v. Arizona Health Care Cost Containment System*, 56 P.3d 28 (Ariz. 2002) (striking down, on the basis of the equal privileges and immunities provision of the state constitution, art. II, §13, restrictions on public funding of abortion, without deciding whether the Arizona Constitution confers a right to abortion); *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247 (Ind. 2003) (partially invalidating, on the basis of the equal privileges and immunities clause of the state constitution, art. I, §23, restrictions on public funding of abortion, without deciding whether the Indiana Constitution confers a right to abortion); *Women's Health Center of West Virginia, Inc. v. Panepinto*, 446 S.E.2d 658 (W.Va. 1993) (striking down, on the basis of the "common benefit" provision of the state constitution, art. III, §3, restrictions on public funding of abortion, without deciding whether the West Virginia Constitution confers a right to abortion) (overturned by state constitutional amendment).

16. *State v. Planned Parenthood of Alaska,* 35 P.3d 30 (Alaska 2001); *State of Alaska, Dep't of Health & Human Services v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904 (Alaska 2001); *Valley Hospital Ass'n v. Mat-Su Coalition for Choice*, 948 P.2d 963 (Alaska 1997); *Committee to Defend Reproductive Rights v. Myer*s, 625 P.2d 779 (Cal. 1981); *In re T.W.*, 551 So.2d 1186 (Fla. 1989); *Planned Parenthood of the Heartland v. Reynolds*, 915 N.W.2d 206 (Iowa 2018); *Hodes & Nauser v. Schmidt*, 440 P.3d 461

The purpose of this book is to provide a comprehensive legal analysis of the status of abortion as a state constitutional right in all fifty States. With respect to the minority of state supreme courts that already have recognized a state right to abortion, the analysis is *descriptive*, setting forth the relevant case law and summarizing the court holdings. With respect to the overwhelming majority of state supreme courts that have *not* addressed this issue, the analysis is intended to be *predictive*, offering an informed judgment as to whether a given state supreme court would likely recognize a state right to abortion. The need for such an analysis, which has never been undertaken by anyone on either side of the abortion debate, should be obvious.[17] Regardless of whether *Roe*, as modified by *Casey*, remains the law of the land, the authority of the States to *regulate* abortions consistent with federal constitutional doctrine will continue to be litigated as a state constitutional issue. And, if *Roe* were overruled, the authority of the States, under their state constitutions, to *prohibit* abortion would become an immediate and pressing issue.

The reader may be interested in the methodology that underlies the research and analysis contained herein. The point of departure was a review of all of the state court cases, both trial courts and reviewing courts, that have considered state constitutional challenges to abortion statutes and regulations, as well as related arguments that have been raised in federal courts. Those decisions, regardless of outcome, yielded a rich harvest of state constitutional provisions that have been held (or have been alleged) to support a state right to abortion, including, as one familiar with constitutional law would expect, guarantees of due process of law, privacy, inherent and natural rights, unenumerated (or retained) rights, equal protection and equal rights, and prohibiting unequal privileges and immunities. Court decisions addressing asserted abortion rights claims have also involved provisions that one unfamiliar with the case law might not expect, such as those guaranteeing free exercise of religion and rights of conscience, free speech, a right to a remedy for personal injuries and the right of the people to abolish or alter the form of government; emphasizing the importance of a frequent recurrence to fundamental principles; and prohibiting the establishment of a religion, involuntary servitude and unreasonable searches and seizures. The case law interpreting each of these provisions was reviewed for each State, along with the relevant constitutional history (where available). In some States, this included as many as a

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(Kan. 2019); *Moe v. Secretary of Administration & Finance*, 417 N.E.2d 387 (Mass. 1981); *Women of the State of Minnesota v. Gomez*, 542 N.W.2d 17 (Minn. 1995); *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645 (Miss. 1998); *Armstrong v. State,* 989 P.2d 364 (Mont. 1999); *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982); *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998); *Hope v. Perales*, 634 N.E.2d 183 (N.Y. 1994); *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000) (overturned by state constitutional amendment); and, arguably, *Beacham v. Leahy*, 287 A.2d 836 (Vt. 1972), though the basis for the court's decision is unclear.

17. One law review article published several years ago presents, in a highly abbreviated form, some of the arguments discussed herein, but without attempting to develop the arguments in depth, much less evaluate the likely counter-arguments. *See* Scott A. Moss and Douglas M. Raines, *The Intriguing Federalist Future of Reproductive Rights*, 88 Boston U. Law Rev. 175 (2008).

dozen or more distinct constitutional provisions. There is no argument discussed in this book that has not been raised at some time in a state or federal court.

In addition, for each State where there is no state supreme court opinion recognizing a state right to abortion, the history of the State's treatment of abortion, both pre-*Roe* and post-*Roe*, is surveyed. This research required the review of hundreds of abortions statutes, some dating back to the early nineteenth century, and an even greater number of state court decisions applying and/or interpreting these statutes. In each of the foregoing States (where the state supreme court has not recognized a state constitutional right to abortion), research was also undertaken to ascertain what rights, if any, the law has extended to unborn children outside the context of abortion, including criminal law, tort law, health care law, property law and guardianship law. Does a given State make it a crime to cause the death of (or injury) to an unborn child (apart from a legal abortion)? In States that have retained capital punishment, does the State suspend imposition of a death sentence during a woman's pregnancy? Does the State recognize a statutory cause of action for the wrongful death of an unborn child? Or a common law cause of action for prenatal injuries? Does the State recognize wrongful life and wrongful birth causes of action? Do the State's laws on advance directives (living wills and durable powers of attorney for health care) limit their implementation during a woman's pregnancy? Do children conceived before but born after the death of a decedent qualify as the heirs of an intestate (a person who dies without a will) or the beneficiaries under a will of a person who dies testate (with a will)? And may guardianship proceedings be brought on behalf of (or a guardian *ad litem* appointed for) an unborn child?

Finally, a few words about the structure of the book. Following this Introduction is Part I, consisting of three preliminary chapters addressing the relationship between state and federal constitutional rights (Chapter 1); a review of state constitutional provisions guaranteeing freedom of religion and prohibiting the establishment of a religion that are interpreted in a manner that is consistent with the Free Exercise and Establishment Clauses of the First Amendment (Chapter 2); and a brief consideration of three of the more unusual arguments that have been raised (in state or federal courts) against statutes prohibiting or regulating abortion, based on constitutional provisions prohibiting involuntary servitude, guaranteeing freedom of speech and prohibiting unreasonable searches and seizures (Chapter 3).

Part II, the principal part of the book, provides detailed analyses of the constitutions of all fifty States, describing the existing case law on abortion rights claims in the minority of States whose supreme courts have addressed such issues, and predicting, on the basis of the research and analysis described in the preceding paragraphs, how state supreme courts in the remaining States (the overwhelming majority) would likely resolve such claims. Each state chapter begins with a short summary, indicating whether the state supreme court has recognized a state constitutional right to abortion and, if not, whether the court would likely recognize such a right in the future. In addition to indicating whether the State may *prohibit* abortion under the state constitution (assuming that *Roe*, as modified by *Casey*, is overruled), the summary

also indicates whether the State may *regulate* abortion within current federal constitutional limits. The summary is followed by the analysis section, which describes the pre-*Roe* abortion laws and whether they have been repealed; identifies possible sources of an abortion right under the state constitution; and provides an in-depth review of the relevant legal materials with respect to each provision of the state constitution discussed. Each state analysis ends with a brief conclusion, offering an informed judgment as to whether, under the state constitution, the State would have the authority to *prohibit* abortion in the future and whether it presently has the authority to *regulate* abortion to the extent permitted by the federal constitution. Part II is followed by a Conclusion recapitulating the results of the foregoing analysis.

This book has been written so that, for the most part, a reader interested in the law of a particular State need refer only to the analysis for that State and not to any analysis that appears elsewhere in the book. With the exception of the specific arguments discussed in Chapters 2 and 3, each state analysis is intended to be self-contained.[18] The decision to make each state analysis "stand on its own" results in a certain amount of unavoidable repetition from State to State with respect to similar constitutional arguments. With a few minor modifications adopted for stylistic reasons (*e.g.*, the italicization of all case names), the citation format generally follows that of The Bluebook[:] A Uniform System of Citation (19th ed.).

18. Where appropriate, Chapters 2 and 3 are cross-referenced in the individual state chapters.