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THE SURPRISING RESILIENCE OF STATE OPPOSITION TO ABORTION: THE SUPREME COURT, FEDERALISM, AND THE ROLE OF INTENSE MINORITIES IN THE U.S. POLITICS SYSTEM

GERALD N. ROSENBERG*

INTRODUCTION

In 1973, in *Roe v. Wade*,¹ the U.S. Supreme Court found a right in the U.S. Constitution for a pregnant woman, in consultation with her doctor, to terminate an unwanted pregnancy. In the forty plus years since the decision, the Court has repeatedly upheld that basic right.² In this period over 53 million legal abortions have been performed in the United States.³ In 2011, the most recent year for which reliable and complete data are available, the Guttmacher Institute reports 1.06 million legal abortions were performed in the United States.⁴ Yet, despite forty years of this constitutional right, and its use by tens of millions of women, opposition remains. Indeed, legislative opposition is growing. The Guttmacher Institute reports that more abortion restrictions were enacted in just the years 2011–2013 than in the entire previous decade.⁵ From Texas to the Dakotas and from Arkansas and Arizona to Idaho, legislation has been enacted creating obstacles to women seeking abortion, including prohibiting abortion after fewer weeks of pregnancy.⁶ Why is it that state

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1. 410 U.S. 113, 164 (1973).

2. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Stenberg v. Carhart*, 530 U.S. 914, 946 (2000) (written by Stevens, J.) (“[D]uring the past 27 years, the central holding of *Roe v. Wade* has been endorsed by all but 4 of the 17 Justices who have addressed the issue.”).

3. GUTTMACHER INST., FACTS ON INDUCED ABORTION IN THE UNITED STATES (July 2014), available at www.guttmacher.org/pubs/fb_induced_abortion.pdf.

4. *Id.*

5. GUTTMACHER INST., AN OVERVIEW OF ABORTION IN THE UNITED STATES (Jan. 2014), available at https://www.guttmacher.org/presentations/ab_slides.html.

6. Heather D. Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers—And the Women They Serve—in the Crosshairs*, 17 GUTTMACHER POL’Y REV. INST. 9, 11, 12 (2014), available at <http://www.guttmacher.org/pubs/gpr/17/1/gpr170109.pdf>; see also *Abortion Restrictions in States*, N.Y. TIMES, June 17, 2013, <http://www.nytimes.com/interactive/2013/06/18/us/politics/abortion-restrictions.html?smid=pl-share>.

governments continue to put obstacles in the way of women exercising their constitutional rights? What explains this combination of a four-decades-old constitutional right, its continual use by millions of women, and continued and even growing legislative opposition to it?

In this article, I explore this seeming conundrum. I argue that it can be understood as the coming together of three strands of American political design: (1) the inability of the U.S. Supreme Court to change people's minds about controversial issues, including abortion; (2) the federal system's disproportionate rewarding of intense minorities, giving them more legislative influence than their numbers suggest; and (3) the coalition between the Republican Party and religious social conservatives. Thus, despite the fact that support for legal abortion has remained steady or has grown since 1973 and that opposition to it is small and shrinking, access to legal abortion remains contested.

THE DATA

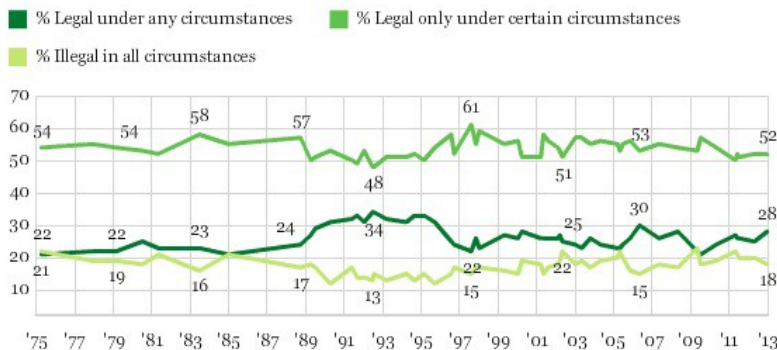
In December 2012 and January 2013, in recognition of the 40th anniversary of *Roe*, both Gallup and Pew undertook major surveys of public opinion on abortion. As Figure 1 shows, Gallup finds that views on the legality of abortion have remained essentially stable over the period. In 1975, for example, 75% of respondents told Gallup that abortion should be legal in "certain" or "any" circumstances. Almost forty years later, in late 2012, nearly the same

FIGURE 1⁷

GALLUP POLL, VIEWS ON LEGALITY OF ABORTION, 1973–2013

Degree to Which Abortion Should Be Legal

Do you think abortions should be legal under any circumstances, legal only under certain circumstances, or illegal in all circumstances?



GALLUP

7. Lydia Saad, *Majority of Americans Still Support Roe v. Wade Decision*, GALLUP, Jan. 22, 2013, <http://www.gallup.com/poll/160058/majority-americans-support-roe-wade-decision.aspx>.

percentage, 80%, responded similarly.⁸ Responses have ranged in a narrow band, from a high of 83% in the late 1990s and again in 2006, to a low of 75% in 1975 and 76% in the early 2000s.⁹ In terms of opposition, the data show a similar, consistent pattern. In 1975, 21% of respondents told Gallup that abortion should be illegal in all circumstances.¹⁰ In late 2012, there was only a difference of 3 percentage points, with 18% of respondents telling Gallup that abortion should be illegal in all circumstances.¹¹ Here, too, the range has been fairly narrow, reaching a high point of 22% in the late 1990s and early 2000s and a low point of 13% in the early 1990s.¹²

In its January 2013 survey, Pew asked respondents for their views on whether *Roe* should be overturned. By a margin of better than two to one (63% to 29%), respondents preferred not overturning *Roe* to overturning it.¹³ This 34 percentage point margin represents growing support for *Roe* over time. In 1992, Pew reported a 26 percentage point difference between support and opposition (60% to 34%) growing to a 31 percentage point gap (62% to 31%) in 2003.¹⁴

Gallup asked the same question in late 2012. Its results are roughly similar to those of Pew.¹⁵ Like Pew, Gallup found support for overturning *Roe* from 29% of respondents in 2012, and opposition from 53%.¹⁶ While the data show some variation in support for *Roe* over time, in summarizing the data, Gallup researcher Lydia Saad wrote:

In the broadest sense, Americans' reaction to *Roe v. Wade* has been consistent for the past few decades. A majority have always opposed overturning the decision, while roughly a third favor doing so.¹⁷

Overall, public opinion data suggest mostly consistent majority support for legal abortion along with mostly consistent, but substantially lower, opposition to it. If anything, opposition to legal abortion has been dropping. Thus, the increase in legislative opposition to legal abortion cannot be explained by growing public opposition.

8. *Id.* Although Figure 1 shows 80% support in the year 2013, Gallup took its survey from December 27th to December 30th, 2012. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Roe v. Wade at 40: Most Oppose Overturning Abortion Decision*, PEW RES. CTR., Jan. 16, 2013, <http://www.pewforum.org/2013/01/16/roe-wade-at-40/>.

14. *Id.*

15. Saad, *supra* note 7. Interestingly, Gallup included a "No Opinion" category which grew from 11% in 1990 to 18% in 2012. *Id.*

16. *Id.*

17. *Id.*

WHAT EFFECT DID *ROE* HAVE ON ABORTION VIEWS?

If abortion views have been largely stable since 1975, what happened in the wake of *Roe* in 1973? Did the Supreme Court's decision change the views of Americans about abortion? Gallup and Pew were not consistently asking questions about abortion pre-*Roe*. However, there were some survey questions from time to time. They show that in the years prior to *Roe*, particularly from 1967–1970, there was major growth in support for legal abortion. Relying on Gallup data, Blake found that support for elective abortion increased approximately two and a half times from 1968 to 1972.¹⁸ By 1972, at least 40% or more of respondents to a National Opinion Research Center (NORC) survey approved of abortion in each of six circumstances, including abortion for “discretionary” reasons such as a single woman not wishing to marry the man and married women not wishing to have more children.¹⁹ Thus, in the words of one study, “[b]y the time the Supreme Court made its ruling, there was strong public support behind the legalization of abortion.”²⁰

Not much has changed since. As the earlier discussion documented, there has been no rapid or large change in Americans' support of abortion choice after the Court's action. As Blake writes, “[n]one of our time series on public views regarding abortion indicates that the Supreme Court decisions had an important effect on opinion.”²¹ Summarizing the data in the years since *Roe v. Wade*, Luks and Salamone conclude, “no decision of the Supreme Court seems to have directly affected the trajectory or structure of public opinion on abortion rights.”²²

Why has *Roe v. Wade* not influenced the views of Americans about abortion? Is it something about the issue, the Court, or both? The answer is both. The lack of impact of the Supreme Court's abortion decisions on public opinion is not unique. In general, the data suggest that the Court lacks the ability to change deeply held beliefs. More specifically, in examining the influence of Supreme Court decisions on the views of Americans in fourteen substantive areas including desegregation, rights of the accused, school prayer, abortion, gay rights, and the war on terror and civil liberties, Persily et al. find

18. Judith Blake, *The Supreme Court's Abortion Decisions and Public Opinion in the United States*, 3 POPULATION & DEV. REV. 45, 49–50 (1977).

19. Donald Granberg & Beth Wellman Granberg, *Abortion Attitudes, 1965–1980: Trends and Determinants*, 12 FAM. PLAN. PERSP. 250, 252 (1980).

20. Helen Rose Fuchs Ebaugh & C. Allen Haney, *Shifts in Abortion Attitudes: 1972–1978*, 42 J. MARRIAGE & FAM. 491, 493 (1980).

21. Blake, *supra* note 18, at 57.

22. Samantha Luks & Michael Salamone, *Abortion, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* 101 (Nathaniel Persily et al. eds., 1980); Charles Franklin & Liane Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751, 753 (1989) (finding *Roe* did not change views on abortion in the aggregate, but did further polarize the views of partisans on either side of the issue).

few effects.²³ Writing in the introduction, Persily summarizes the findings: “in the vast majority of the cases reviewed here, Supreme Court decisions had no effect on the overall distribution of public opinion.”²⁴

Examples of the lack of Supreme Court influence on public opinion are legion. To provide just two examples, consider flag burning and prayer in school. In *Texas v. Johnson*²⁵ and *United States v. Eichman*,²⁶ the Supreme Court twice held that burning the American flag was a form of protected political dissent. Yet, when asked by Gallup in August 1998 whether they believed that “the physical act of burning the U.S. (United States) flag is an appropriate expression of freedom of speech as guaranteed by the First Amendment,” not even one-quarter of respondents agreed while nearly three-quarters (74%) disagreed.²⁷

Similarly, in *Engel v. Vitale*²⁸ and *Abington School District v. Schempp*,²⁹ the Supreme Court held that requiring or allowing prayer in public schools violated the Constitution.

Majorities have never supported these decisions. In 1985, more than twenty years after the decisions, NORC’s *General Social Survey* reported 55.6% of respondents in support of *required* reading of the Lord’s Prayer or Bible verses in school.³⁰ Subsequent to that survey, the Supreme Court found constitutional infringements in prayers at public school graduations³¹ and in student-initiated prayer at high school football games.³² A decade later, the public remained strongly unpersuaded. In 2010, 80% of respondents agreed that “[s]tudent speakers should be allowed to offer a prayer at public school events.”³³ And in 2014, more than half a century after the original prayer

23. Luks & Salamone, *supra* note 22, at 8.

24. *Id.*

25. 491 U.S. 397, 399 (1989).

26. 496 U.S. 310, 312 (1990).

27. ROPER CTR. FOR PUB. OP. RESEARCH, FLAG SURVEY: DO YOU BELIEVE THE PHYSICAL ACT OF BURNING THE U.S. (UNITED STATES) FLAG IS AN APPROPRIATE EXPRESSION OF FREEDOM OF SPEECH AS GUARANTEED BY THE FIRST AMENDMENT, OR NOT? (Aug. 1998), *available at* http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html.

28. 370 U.S. 421, 424 (1962).

29. 374 U.S. 203, 205 (1963).

30. John C. Green & James L. Guth, *The Missing Link: Political Activists and Support for School Prayer*, 53 PUB. OP. Q. 41, 41 (1989).

31. *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

32. *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 301 (2000).

33. ROPER CTR. FOR PUB. OP. RESEARCH, STATE OF THE FIRST AMENDMENT SURVEY: STUDENT SPEAKERS SHOULD BE ALLOWED TO OFFER A PRAYER AT PUBLIC SCHOOL EVENTS. . . . STRONGLY AGREE, MILDLY AGREE, MILDLY DISAGREE, STRONGLY DISAGREE (July 2010), *available at* http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html.

decisions, 61% of respondents supported daily prayers in public schools.³⁴ As Gash and Gonzales summarize decades of survey data, “public opinion has remained solidly against the Court’s landmark decisions declaring school prayer unconstitutional.”³⁵

In addition, in order for the Court to change Americans’ views, people need to know that the Court issued a decision. Although it may seem obvious to readers of this article that everyone knows about *Roe*, the data do not support this. For example, in March 1982, nearly a decade after *Roe*, and two years into the Reagan administration with its explicit and vocal campaign to overturn *Roe*, CBS and the *New York Times* asked a national sample the following question:

Does the U.S. Supreme Court permit or does it forbid a woman to have an abortion during the first three months of pregnancy, or haven’t you been following this closely enough to say?³⁶

About half of respondents (49%) replied that they had not been following the issue closely enough to have an opinion!³⁷ That is better than the 10% who said that Supreme Court decisions forbid abortion!³⁸ The remaining 41% said that the Supreme Court decisions permit abortions.³⁹ In 1986, thirteen years after *Roe*, another national poll asked the following question: “*Roe v Wade* was a landmark Supreme Court case which dealt with . . . ?”⁴⁰ A whopping 45% of respondents said they did not know or provided no answer (Row what? Wade where?).⁴¹ Again, perhaps this is marginally better than the 16% of respondents who “knew” that *Roe* dealt with the rights of a person accused of a crime or the 9% who “knew” it dealt with racial segregation in schools.⁴² Only 30% of respondents, not even one-third, were able to correctly state that *Roe* dealt with abortion.⁴³ This is an incredible finding. It means that thirteen years after *Roe*,

34. Rebecca Riffkin, *In U.S., Support for Daily Prayer in Schools Dips Slightly*, GALLUP, Sept. 25, 2014, <http://www.gallup.com/poll/177401/support-daily-prayer-schools-dips-slightly.aspx>.

35. Alison Gash & Angelo Gonzales, *School Prayer*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 77 (Nathaniel Persily et al. eds., 1980).

36. ROPER CTR. FOR PUB. OP. RESEARCH, CBS NEWS/N.Y. TIMES POLL: DOES THE U.S. (UNITED STATES) SUPREME COURT PERMIT OR DOES IT FORBIT A WOMAN TO HAVE AN ABORTION DURING THE FIRST THREE MONTHS OF PREGNANCY, OR HAVEN’T YOU BEEN FOLLOWING THIS CLOSELY ENOUGH TO SAY? (Mar. 1982), *available at* http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html.

37. *Id.*

38. *Id.*

39. *Id.*

40. ROPER CTR. FOR PUB. OP. RESEARCH, KNOWLEDGE OF THE U.S. CONSTITUTION (Oct. 1986), *available at* http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html.

41. *Id.*

42. *Id.*

43. *Id.*

most Americans—more than two-thirds—did not know what it was about. It is hard to talk about a decision influencing public opinion if two-thirds or more of the public is not aware of it.

Finally, by 1998, twenty-five years after the decision, there was a majority, albeit a bare one, that knew that the Supreme Court had issued an opinion permitting abortion. In January 1998, CBS and the *New York Times* re-asked their 1982 question quoted above in a national poll. Although more than a third of respondents said they had not followed the issue closely enough to say, and 4% responded that Court decisions forbid abortion, 55% correctly responded.⁴⁴ Given the data I just presented, this result is grounds for jubilation. But it still means that nearly half of all Americans did not know about *Roe* in 1998. And data from the Pew survey in 2013 shows that the majority of respondents between the ages of eighteen and twenty-nine, the age range in which women are most likely to undergo an abortion, do not know what *Roe* dealt with.⁴⁵ A full third of these respondents said that *Roe* dealt with issues other than abortion and another 24% responded that they did not know.⁴⁶

These data show that regarding abortion, as in other issues about which Americans have strong feelings, Supreme Court decisions do not change views. In part, this is a result of the fact that it can take decades for Americans to become aware of Supreme Court decisions, even important and controversial ones. Thus, public opinion data show that Americans' views of abortion were not changed by the Court's decision in *Roe*.

WHY IS LEGISLATIVE OPPOSITION TO *ROE* INCREASING?

This discussion leaves the question of why legislative opposition to *Roe* is increasing. In a democracy, consistent, longstanding, and high popular support for a constitutional right, along with its use by tens of millions of citizens, should translate into legislative support. Why, then, are states acting to limit access to abortion—to interpose themselves between a constitutional right and its exercise by their citizens? The answer, I believe, is that opposition is concentrated in a few demographic groups which hold their beliefs intensely. In addition, they reside in states where legislative districts make incumbents safe enough to cater to their minority voters. Who are these voters?

44. ROPER CTR. FOR PUB. OP. RESEARCH, CBS NEWS/N.Y. TIMES: DOES THE U.S. (UNITED STATES) SUPREME COURT PERMIT OR FORBID A WOMAN TO HAVE AN ABORTION DURING THE FIRST THREE MONTHS OF PREGNANCY, OR HAVEN'T YOU FOLLOWED THIS CLOSELY ENOUGH OVER THE YEARS TO SAY? (Jan. 1998), available at http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html.

45. *Age and Awareness of Roe v. Wade, Roe v. Wade at 40: Most Oppose Overturning Abortion Decision*, PEW RES. CTR., Jan. 16, 2013, <http://www.pewforum.org/2013/01/16/roe-v-wade-at-40/>.

46. *Id.*

To start the analysis, there are only small differences in views of abortion based on gender. More than half of both men and women support legal abortion. Pew reports that in 2012 and 2013, 55% of women and 53% of men believed that abortion should be legal in all or most cases.⁴⁷ Alternatively, 38% of women and 40% of men believed that abortion should be illegal in all or most cases.⁴⁸ Similarly, among every age group under sixty-five, more than 50% believe that abortion should be legal in all or most cases.⁴⁹ Among those over sixty-five, respondents are evenly split, 45% saying that abortion should be legal in all or most cases and 45% believing it should be illegal in all or most cases.⁵⁰ So, neither gender nor age, those over sixty-five excepted, is highly correlated with views on abortion.

It is with education and religion that stark differences emerge. Starting with education, among those with college or postgraduate education, there is a whopping 34 percentage point difference between support (64%) and opposition (30%) to abortion rights—support by better than two to one.⁵¹ Among those with some college education, 57% say that abortion should be legal in all or most cases compared to 37% who say it should be illegal in all or most cases, a difference of 20 percentage points.⁵² In stark contrast, among those with only a high school education or less, fewer than half support abortion rights, with slightly more respondents (47%) opposing than favoring (46%) abortion rights.⁵³ Unlike gender and age, education is strongly correlated with views on abortion.

Religion is even more strongly correlated with views on abortion. Pew placed respondents in eight groups by their religious affiliation. Support for abortion varies dramatically across the groups. In five of the eight groups, including white Catholics, more than 50% believe that abortion should be legal in all or most cases.⁵⁴ Even among white Catholics there was a 12 percentage point difference between support for keeping abortion legal in all or most cases (53%) and opposition (41%).⁵⁵ The three religious groups among which majorities say abortion should be illegal in all or most cases include Hispanic Catholics, Mormons, and white, evangelical Protestants.⁵⁶ The largest of these groups—white, evangelical Protestants—opposes abortion by a ratio of better

47. *Public Opinion on Abortion Slideshow*, PEW RES. CTR., Jan. 16, 2013, available at <http://www.pewforum.org/2013/01/16/public-opinion-on-abortion-slideshow/>.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Public Opinion on Abortion Slideshow*, *supra* note 47.

54. *Id.*

55. *Id.*

56. *Id.*

than two to one, with 64% saying that abortion should be illegal in all or most cases compared to 31% who believe it should be legal in all or most cases.⁵⁷ This is a gap of 33 percentage points! In another Pew study, researchers found that views on abortion are correlated with attendance at religious services. Among those who attend religious services weekly or more, 50% would like to see *Roe* overturned.⁵⁸ In contrast, among those who attend religious services less often, only 17% would like to see *Roe* overturned.⁵⁹

A final set of characteristics that are correlated with views on abortion are income and geographic location. Gallup reports that opposition to abortion is more pronounced among those with low incomes who live in the South and the Midwest.⁶⁰ Indeed, in investigating which groups of Americans consider themselves “pro-life” in December 2012, Gallup found majorities among those over fifty years old who lived in towns or rural areas in the South or Midwest,⁶¹ who lacked a college education, who had household incomes of less than \$30,000, who were Protestant, and who considered themselves politically conservative.⁶² Importantly, politically, by a ratio of more than two to one, they identified as Republicans.⁶³ Thus, opposition to abortion is concentrated among older Americans, with a high school or less education, with lower incomes, who are evangelical Protestants, who attend church weekly or more often, who live in the South or the Midwest, and who identify as Republicans.

Historically in the United States, the Republican Party was the party of abortion reform and women’s rights. It supported the Equal Rights Amendment and abortion reform, typically in opposition to Democrats. In 1967, for example, a major abortion reform bill was signed by Republican California Governor Ronald Reagan.⁶⁴ One of the first abortion repeal bills was signed by Republican Governor Nelson Rockefeller in New York in 1970.⁶⁵ But in the 1980s this partisan alignment began to change. Today, Democrats are 34 percentage points more supportive of abortion being legal in all or most cases than Republicans.⁶⁶ While Democrats support abortion rights by close to three to one (69% to 25%), a 44 percentage point gap, and independents support abortion rights by 18 percentage points (56% to 38%), Republicans strongly

57. *Id.*

58. *Age and Awareness of Roe v. Wade*, *supra* note 45.

59. *Id.*

60. Lydia Saad, *Public Opinion About Abortion—An In-Depth Review*, GALLUP, Jan. 22, 2002, <http://www.gallup.com/poll/9904/Public-Opinion-About-Abortion-InDepth-Review.aspx>.

61. *Id.*

62. *See* Saad, *supra* note 7.

63. *See id.*

64. Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions about Backlash*, 120 YALE L. J. 2028, 2031–33 (2011).

65. *Id.* at 2047–48 n.69.

66. *Public Opinion on Abortion Slideshow*, *supra* note 47.

oppose abortion.⁶⁷ There is a 24 percentage point gap between opposition to abortion (59%) and support for it (35%) among Republicans.⁶⁸

What makes this partisan difference in views of abortion politically important is that opponents of abortion hold their views more intensely than do supporters. Gallup routinely asks voters which issues are important to them. Typically, abortion does not rank very high. From 1984 to 2000, for example, the percentage of Americans indicating that abortion was a top issue for them in choosing a president ranged from 7% to 14%.⁶⁹ However, voters who are anti-abortion place greater weight on the issue than do voters who support abortion rights. Gallup reports that more than four of ten extremely pro-life Americans (41%) say they would only vote for a candidate who shares their views, compared with 23% of extremely pro-choice Americans.⁷⁰ Conversely, close to a third of extremely pro-choice Americans (30%) say abortion is not a major issue to them, compared to just 10% of extremely pro-life Americans.⁷¹

The result of this differential in the importance of abortion gives Republicans a small, but robust, advantage in presidential elections. As Table 1 shows, in presidential elections from 1984 to 2000, opposing abortion gave Republicans a net advantage of between 1.9 and 3.4 percentage points. As we all learned in the 2000 election, this can be all the difference in the world.

TABLE 1⁷²

VOTE CHOICE AMONG THOSE CITING ABORTION AS MOST OR ONE OF THE
MOST IMPORTANT ISSUES (BASED ON EXIT POLL SURVEYS)

Presidential Election	% Choosing Abortion	Voted Rep.	Voted Dem.	Net Republican Advantage
2000	14	58	41	+2.4
1996	9	60	34	+2.3
1992	12	55	36	+2.3
1988	7	63	36	+1.9
1984	8	71	28	+3.4

67. *Id.*

68. *Id.*

69. Saad, *supra* note 60.

70. *Id.*

71. *Id.*

72. *Id.*

This dynamic plays out powerfully on the state level as well. In the period running from January 2010 through the 2014 election, twenty-nine states enacted laws restricting access to abortion. These range from requiring a woman to undergo an ultrasound before having an abortion⁷³ to requiring that doctors who perform abortions have admitting privileges at local hospitals,⁷⁴ to prohibiting abortion after a certain number of weeks of pregnancy, typically twenty,⁷⁵ among other restrictions. Indeed, more restrictions on abortion were enacted in the 2011–2013 period than in the entire preceding decade!⁷⁶

These states, of course, are not a random sample. As the public survey data suggest, they are predominantly Southern and Midwestern. Fourteen of the states that have enacted restrictions on abortion—nearly half of all the states that have so acted—are either Southern or border states.⁷⁷ An additional eight states that have enacted abortion restrictions since 2010 are Midwestern.⁷⁸ Among the remaining seven states are the two with the largest percentages of Mormons: Utah and Idaho.

In addition, and importantly, the states that have acted to restrict abortion are overwhelmingly controlled by Republicans. To start, after 2010 there was a sea change in partisan control of state legislatures. In 2010, prior to the election, Democrats controlled both houses of the state legislatures in twenty-seven states, compared to fourteen states controlled by Republicans and eight states where control was mixed.⁷⁹ Adding control of the governorship, there were only eight states in which Republicans held the governorship as well as both houses of the legislature, compared to sixteen states where Democrats controlled both and twenty-four where party control was divided.⁸⁰ However,

73. Arizona, Florida, Indiana, Iowa, Kansas, Louisiana, North Carolina, Oklahoma, Texas, Virginia, and Wisconsin. *See* Boonstra & Nash, *supra* note 6, at 9, 13.

74. Alabama, Indiana, Kansas, Louisiana, Mississippi, North Dakota, Oklahoma, Tennessee, Texas, and Wisconsin. *See id.*

75. Alabama, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Louisiana, Mississippi, North Dakota, Oklahoma, and Texas. Arkansas enacted legislation prohibiting abortions later than twelve weeks after a women's last period. *See Abortion Restrictions in States*, N.Y. TIMES, June 17, 2013, <http://www.nytimes.com/interactive/2013/06/18/us/politics/abortion-restrictions.html?smid=pl-share>.

76. Boonstra & Nash, *supra* note 6, at 9.

77. Alabama, Arkansas, Florida, Georgia, Kansas, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia. *See id.* at 11.

78. Indiana, Iowa, Michigan, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin. *See id.*

79. *See 2010 State and Legislative Partisan Composition Prior to the Election*, NAT'L CONF. OF STATE LEGISLATURES, Nov. 1, 2010, http://www.ncsl.org/documents/statevote/2010_Legis_and_State_pre.pdf. "Nebraska is not included in this count and the counts that follow as its legislature is officially non-partisan." *Id.*

80. *Id.* (noting that, because Governor Crist of Florida became an independent, Florida is not counted as having a Republican governor).

after the 2010 Census, and the elections that followed, the partisan landscape looked very different. As of June 6, 2012, Republicans controlled the state legislatures in twenty-six states.⁸¹ In twenty-one of those states, the governor was a Republican as well.⁸²

Republican control of the governorship and both houses of the state legislature made an enormous difference. In nineteen of those states, legislation was enacted restricting access to abortion! In only two Republican-controlled states, Maine and Wyoming, were no legislative restrictions on abortion enacted. Of the seven states not fully controlled by Republicans which enacted legislation restricting access to abortion, Democratic governors had vetoes overridden in the four states of Arkansas, Missouri, New Hampshire, and North Carolina.

After the 2012 elections, Republicans controlled both legislative houses in twenty-seven states.⁸³ In twenty-three of them the governor was a Republican as well.⁸⁴ Republicans added control of the legislature in Alaska and the governorship in North Carolina to their prior control. Unsurprisingly, both Alaska and North Carolina enacted restrictions on abortion. Overall, in 2013 and 2014 through the November election, twenty-four states enacted abortion restrictions. Nineteen of those states were Republican-controlled. Among the five split states that enacted legislation in 2013 and 2014, governors had vetoes overridden in Arkansas (twice), Michigan (twice), and Missouri.⁸⁵

Overall, it is clear that legislative restrictions on abortion access enacted between 2011 and the 2014 election were almost entirely driven by Republican-controlled state governments and Republican legislatures in states where the governor was a Democrat. Only in one Democratic-controlled state, Arkansas, were abortion restrictions enacted. This is in line with the public opinion literature on partisan views of abortion. However, it flies in the face of majority support for abortion access found in public opinion surveys. That is, if majorities support access to abortion, why are states restricting it?

It is possible, of course, that the actions of these state governments faithfully reflected popular views in the states that acted. If so, this suggests that states continue to exercise the power to interpose themselves between citizens and their constitutional rights. It is yet another example of the

81. *2012 State and Legislative Partisan Composition*, NAT'L CONF. OF STATE LEGISLATURES, June 6, 2012, http://www.ncsl.org/documents/statevote/2012_legis_and_state.pdf.

82. *Id.*

83. *2014 State and Legislative Partisan Composition*, NAT'L CONF. OF STATE LEGISLATURES, June 9, 2014, http://www.ncsl.org/documents/statevote/legiscontrol_2014.pdf.

84. *Id.*

85. See Saad, *supra* note 7 (stating that other bills were enacted without vetoes in Arkansas and Missouri, and that Iowa (Republican governor, split legislature) and Montana (Democratic governor, Republican legislature) also passed abortion restrictions).

obstacles federalism puts in the way of implementing constitutional rights throughout the country.

However, it is also possible that the legislation reflects the intense preference of a minority of Republican activists combined with the ability of Republican legislatures to gerrymander safe Republican districts in the wake of the 2010 Census. If this were the case, then Republican state legislators would be free to enact abortion restrictions that lacked statewide popular support in the knowledge that they would be electorally secure.

There is some evidence that this is indeed the case. The evidence comes from constitutional amendments and referenda put on state ballots. Since *Roe v. Wade* was decided in 1973 through the November 2014 election, there have been thirty-nine state ballot measures on abortion.⁸⁶ The overwhelming majority were anti-abortion and the majority have been defeated. Only eleven of the thirty-nine have been passed by the voters.⁸⁷ However, four of the eleven were pro-choice.⁸⁸ These include restoring public funding for abortion in Colorado (1984) and codifying *Roe v. Wade* in Nevada (1990), Washington (1991), and Maryland (1992).⁸⁹ Examining those measures that restrict abortion, there is one that restricts public funding for abortion (Arkansas, 1988), four that require parental notification for abortions performed on minors (Colorado, 1998; Florida, 2004; Alaska, 2010; Montana, 2012),⁹⁰ and one that empowers the state legislature to enact abortion restrictions and declares, in part, that “nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion.”⁹¹ That leaves one amendment, South Dakota’s Amendment 6 in 2006, which requires extended discussion.

South Dakota is hardly a hotbed of abortion. In 2008, there were only two abortion providers in the state.⁹² The Guttmacher Institute reports that 850 abortions were performed in South Dakota that year, giving the state an abortion rate about one-quarter of the U.S. abortion rate.⁹³ Politically, in 2006 and 2008, Republicans controlled both houses of the legislature and the

86. *Brief History of Abortion Related Initiatives and Referenda*, W. STATES CTR., July 2012, <http://www.westernstatescenter.org/tools-and-resources/Tools/brief-history-of-abortion-related-initiatives>.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Proposed Constitutional Amendment No. 1 for the November 4, 2014 General Election Ballot*, TENN. SECRETARY OF STATE, available at <http://www.tn.gov/sos/election/amendments/Proposed%20Constitutional%20Amendment%201.pdf>.

92. Rachel K. Jones & Kathryn Kooistra, *Abortion Incidence and Access to Services In the United States, 2008*, 43 PERSP. ON SEXUAL & REPROD. HEALTH 41, 45 (2011).

93. *Id.* at 44. See also GUTTMACHER INST., STATE FACTS ABOUT ABORTION: SOUTH DAKOTA (2014), available at http://www.guttmacher.org/pubs/sfaa/south_dakota.html.

governorship. Despite the small number of abortions, in 2006 the South Dakota legislature enacted a law banning all abortions except those undertaken to protect a woman's life or health (HB 1215).⁹⁴ Pro-choice organizers then collected signatures under the state's veto referendum laws, putting the new bill before the voters in the Abortion Ban Referendum.⁹⁵ The voters vetoed the law, with 56% voting against it and 44% supporting it.⁹⁶ One might have thought that elected officials and anti-abortion activists would have heard the voice of the people and dropped the attempt to limit abortion. However, undeterred, anti-abortion activists again tried to prohibit most abortions. In 2008, Initiated Measure 11 asked voters to amend the state constitution to ban all abortions in the state except for those performed because of rape or incest, or to protect a woman's life or health.⁹⁷ Doctors who performed an abortion in violation of the initiative's provisions could have been charged with a Class 4 felony, which in South Dakota carries a maximum punishment of ten years in jail and a \$20,000 fine.⁹⁸ Once again the voters rejected the limits on abortion (55% to 45%).⁹⁹

The South Dakota experience suggests that anti-abortion activists both lack majority support and, in conjunction with Republican elected officials, are able to persuade Republican-controlled legislatures to enact legislation and pass constitutional amendments restricting abortion. This suggestion finds additional support from Mississippi, a state not known for its pro-choice activism. In 2011, there were only two abortion providers in the state and 99% of Mississippi counties, home to 91% of Mississippi women, had no abortion clinic.¹⁰⁰ The Guttmacher Institute reports that there were 2,200 abortions performed in Mississippi in 2011, a rate that was barely 22% of the national abortion rate.¹⁰¹ Politically, Republicans controlled both houses of the state

94. 2006 S.D. HB 1215, available at <http://legis.sd.gov/sessions/2006/1215.htm>.

95. 2006 South Dakota Ballot Question Attorney General Explanations, S.D. SECRETARY OF STATE, available at https://sdsos.gov/elections-voting/election-resources/election-history/2006/2006_ballot_question_attorney_general_explanations.aspx.

96. Ballot Measures Database, NAT'L CONF. OF STATE LEGISLATURES, available at <http://www.ncsl.org/research/elections-and-campaigns/ballot-measures-database.aspx> (select State: South Dakota; Topic: Abortion; Year: 2006).

97. 2008 South Dakota General Election Data, S.D. SECRETARY OF STATE, available at https://sdsos.gov/elections-voting/election-resources/election-history/2008/2008_general_information_ballot_question_attorney_general_explanations_full_text.aspx.

98. *Id.*

99. Ballot Measures Database, *supra* note 96 (select State: South Dakota; Topic: Abortion; Year: 2008).

100. GUTTMACHER INST., STATE FACTS ABOUT ABORTION: MISSISSIPPI, <http://www.guttmacher.org/pubs/sfaa/mississippi.html> (cautioning that "[s]ome of these women were from other states, and some Mississippi residents had abortions in other states, so this rate may not reflect the abortion rate of state residents").

101. *Id.*

legislature and the governorship. They enacted close to half a dozen laws limiting access to abortion. In November 2011, voters were faced with a citizen-initiated constitutional amendment, Initiative 26,¹⁰² which defined personhood as starting at conception. If accepted, it would have made abortion illegal in the state. However, it was decisively defeated by the voters, 58% to 42%.¹⁰³

In November 2014, two more states tried to ban abortion by constitutional amendment. In Colorado, Amendment 67, a citizen-initiated constitutional amendment, defined “‘person’ and ‘child’ in the Colorado criminal code and the Colorado wrongful death act to include unborn human beings.”¹⁰⁴ The measure was defeated with 65% of the vote.¹⁰⁵ This was the third time anti-abortion activists had placed a personhood amendment on the Colorado ballot. They fared even worse the first time, in 2008, when Amendment 48, a citizen-initiated constitutional amendment defining the term “person” in the Colorado Constitution to include “any human being from the moment of fertilization,”¹⁰⁶ was placed on the ballot. It was defeated with 73% of the vote.¹⁰⁷ In 2010, Colorado Initiative 62 applied the term “person” in the Colorado Constitution “to every human being from the beginning of the biological development of that human being.”¹⁰⁸ It was defeated with 71% of the vote.¹⁰⁹

The second state that tried to ban abortion by constitution in 2014 was North Dakota. Fully under the control of Republicans, the state enacted various abortion restrictions in the years 2011–2013. These included HB 1456 in 2013, banning abortion after a fetal heartbeat is heard, generally about six weeks after

102. *Initiative #26*, MISS. SECRETARY OF STATE, available at <http://www.sos.ms.gov/Initiatives/Definition%20of%20Person-PW%20Revised.pdf>

103. *Ballot Measures Database*, *supra* note 96 (select State: Mississippi; Topic: Abortion; Year: 2011).

104. LEGISLATIVE COUNCIL OF THE COLO. GEN. ASSEMB., 2014 STATE BALLOT INFORMATION BOOKLET 1–6, available at <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application/pdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1252034105888&ssbinary=true>.

105. *Ballot Measures Database*, *supra* note 96 (select State: Colorado; Topic: Abortion; Year: 2014).

106. *Amendment 48: Definition of Person*, COLO. GEN. ASSEMB., available at <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application/pdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1252034105888&ssbinary=true>.

107. *Id.*

108. LEGISLATIVE COUNCIL OF THE COLO. GEN. ASSEMB., 2010 STATE BALLOT INFORMATION BOOKLET, available at <http://www.colorado.gov/cs/Satellite%3Fblobcol=urldata%26blobheader=application%252Fpdf%26blobkey=id%26blobtable=MungoBlobs%26blobwhere=1251658319927%26ssbinary=true>.

109. *Id.*

a woman's last menstrual period.¹¹⁰ Then, in 2014, the legislature sent a constitutional amendment to the voters. Measure 1 proposed to add a new section to Article I of the North Dakota Constitution: "The inalienable right to life of every human being at any stage of development must be recognized and protected."¹¹¹ If passed by the voters, it would end virtually all abortions in North Dakota.

There was every reason to think the voters would approve the constitutional amendment. They had given Republicans control of both houses of the state legislature and the governorship. In 2011 there was only one abortion clinic in the state.¹¹² That year, the most recent year for which the Guttmacher Institute reports data, only 1,250 abortions were performed in North Dakota—about half of the U.S. rate.¹¹³ And, in 1972, the year before *Roe v. Wade*, North Dakota voters had decisively rejected an initiative to legalize abortion, with 77% of voters saying no.¹¹⁴ Yet, when the votes were counted in November 2014 on Measure 1, the citizens of North Dakota decisively rejected the measure by 28 percentage points, voting it down 64% to 36%.¹¹⁵

A final example that illustrates public support in the face of intense minority opposition comes from the city of Albuquerque, New Mexico. In November 2013, voters in Albuquerque rejected a ballot question that sought to ban abortions after twenty weeks of pregnancy. The ballot measure was rejected by 55% of the voters.¹¹⁶ This vote is particularly telling for two reasons. First, Hispanics account for nearly half of the residents in Albuquerque and, overall, Hispanic Catholics oppose abortion.¹¹⁷ Second, 2013 was an off-year election, meaning that turnout was low.¹¹⁸ Indeed, only about 25% of Albuquerque's registered voters went to the polls.¹¹⁹ Given the higher intensity level with which anti-abortion voters hold their views, one

110. H.B. 1456, 63rd Legis. Assemb. Reg. Sess. (N.D. 2013), available at <http://www.legis.nd.gov/assembly/63-2013/documents/13-0304-02000.pdf?20141117225851>.

111. *Measures on the November 4, 2014 Ballot*, N.D. SECRETARY OF STATE, available at <https://vip.sos.nd.gov/PortalListDetails.aspx?ptlPKID=4&ptPKID=1>.

112. GUTTMACHER INST., STATE FACTS ABOUT ABORTION: NORTH DAKOTA (2014), available at http://www.guttmacher.org/pubs/sfaa/pdf/north_dakota.pdf.

113. *Id.*

114. *Ballot Measures Database*, *supra* note 96 (select State: North Dakota; Topic: Abortion; Year: 1972).

115. *Id.* (select State: North Dakota; Topic: Abortion; Year: 2014).

116. Fernanda Santos, *Albuquerque Voters Defeat Anti-Abortion Measure*, N.Y. TIMES, Nov. 20, 2013, http://www.nytimes.com/2013/11/20/us/albuquerque-voters-defeat-anti-abortion-referendum.html?_r=0.

117. *Id.*

118. *Id.*

119. *Id.*

would expect them to be disproportionately overrepresented in a low-turnout election.¹²⁰

CONCLUSION

State action to limit the exercise of constitutional rights is alive and well in the twenty-first century. Despite consistent majority support for access to abortion, states are increasingly interposing state laws between constitutional rights and their citizens' exercise of them. The analysis above shows that abortion remains controversial in the United States not because opposition to it is large or growing. Rather, it remains controversial for two structural reasons inherent in the U.S. political system. First, abortion remains controversial because of the inability of the Supreme Court to change people's views on controversial subjects. Second, it remains controversial because the U.S. federal system rewards minorities who hold their views intensely. In the case of abortion, anti-abortion activists have joined forces with the Republican Party to enact legislation on the state level that restricts access to abortion even though that legislation often lacks majority support. The analysis reminds us that in a federal system the exercise of constitutional rights inevitably depends on state action. And, as has happened repeatedly throughout U.S. history, states can and do act in opposition to national majorities and even majorities in their own state.

120. *Id.*

