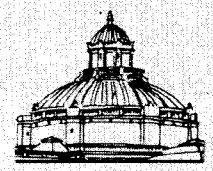
Issue Brief

Order Code IB88007

ABORTION: LEGISLATIVE CONTROL

Updated March 18, 1988



by

Thomas P. Carr

American Law Division

Congressional Research Service

CONTENTS

ABORTION: LEGISLATIVE CONTROL

SUMMARY

In 1973 the U.S. Supreme Court held that the Constitution protects a woman's decision whether or not to terminate her pregnancy, Roe v. Wade, 410 U.S. 113, and that a State may not unduly burden the exercise of that fundamental right by regulations that prohibit or substantially limit access to the means of effectuating that decision, Doe v. Bolton, 410 U.S. 179. But rather than settling the issue, the Court's rulings have kindled heated debate and precipitated a variety of governmental actions at the national, State and local levels designed either to nullify the rulings or hinder their effectuation. These governmental regulations have, in turn, spawned further litigation in which resulting judicial refinements in the law have been no more successful in dampening the controversy. Thus, as the previous Congresses have been, the 100th continues to be a forum for proposed legislation and constitutional amendments aimed at limiting or prohibiting the practice of abortion.

Within the decade after Roe v. Wade was decided almost 500 bills relating to abortion in some way were introduced in Congress. The greater number of these proposals have sought to restrict the availability of abortions, although a few measures have been introduced seeking to make abortions more widely available.

Constitutional amendments proposed since 1973 relating to abortion have generally fallen into two categories: the "State's rights" or State option type of amendment and the so-called right to life, or human life amendment, proposal. S.J.Res 3, a proposed amendment stating that "a right to abortion is not secured by this Constitution," was debated on the Senate floor during the 98th Congress, but was defeated in June of 1983.

Bills that have sought to prohibit abortion by statute include S. 158 (97th Congress), which would have declared as a congressional finding of fact that human life begins at conception and would have allowed States, according to its sponsors, to enact laws protecting human life. A modified version of S. 158, S. 1741, was placed on the Senate calendar but never acted upon. A similar bill was H.R. 618, introduced during the 98th Congress. H.R. 618 was not moved out of committee.

Since Roe v. Wade Congress has attached abortion funding restrictions to numerous appropriations bills. The greatest focus has been on restricting Medicaid abortions under the annual appropriations for the Department of Health and Human Services. The series of restrictions is popularly known as the Hyde Amendments.

In addition to funding limitations contained in appropriations bills, since 1970 abortion restrictions have been attached to substantive legislation, including P.L. 91-572, P.L. 93-45, P.L. 95-355, P.L. 95-555, P.L. 96-76, and P.L. 97-35.

ISSUE DEFINITION

In 1973 the U.S. Supreme Court held that the Constitution protects a woman's decision whether or not to terminate her pregnancy, Roe v. Wade, and that a State may not unduly burden the exercise of that fundamental right by regulations that prohibit or substantially limit access to the means of effectuating that decision, Doe v. Bolton. The issue of a woman's right to an abortion, however, is far from settled. Since 1973, there have been Federal and State legislative actions designed either to nullify the rulings or hinder their effectuation. Subsequent litigation challenging this legislation has led to further judicial refinements. The 100th Congress, as its predecessors have been, continues to be a forum for proposed legislation and constitutional amendments aimed at limiting or prohibiting the practice of abortion.

BACKGROUND AND ANALYSIS

As a result of the 1973 Supreme Court decision Roe v. Wade, there has been a considerable increase in legislative action regarding abortion. Within 10 years after Roe v. Wade was decided almost 500 bills relating to abortion in some way were introduced in Congress. In contrast, there were only 10 bills on the subject introduced in the entire decade preceding the decision.

By far the greater number of these proposals have sought to restrict the availability of abortions, although a few measures have been introduced seeking to make abortions more widely available. Proponents of more restrictive abortion legislation have employed a variety of legislative initiatives to achieve this end, with varying degrees of success. These various types of legislative measures are described below.

Constitutional Amendments

Since 1973, a series of constitutional amendments have been introduced in each Congress in an attempt to overrule the Court's decision in Roe v. Wade. These amendments have generally fallen into two categories: The "State's rights" or State option type of amendment and the so-called right to life, or human life amendment, proposal.

The "States' rights" amendment would result in abortion standards that would vary from State to State. Some States might prohibit abortions entirely; others could have no restrictions at all. In effect, such an amendment would restore to the States the same control over abortion rights that existed prior to the Supreme Court's decision in Roe v. Wade. This option is not as popular as it once was.

In the 97th Congress, S.J.Res. 110, the "Human Life Federalism Amendment," was introduced on Sept. 21, 1981, by Senator Hatch. It provided: "A right to abortion is not secured by this Constitution. The Congress and the several States have the concurrent power to restrict and

prohibit abortions, provided, that a law of a State which is more restrictive than a law of Congress shall govern."

In the 98th Congress a similar proposal, S.J.Res. 3, was introduced, subcommittee hearings were held, and the full Judiciary Committee voted 9-9 to send the amendment to the Senate floor without recommendations. As reported, S.J.Res. 3 included an amendment introduced by Senator Eagleton that eliminated the enforcement language and declared simply, "A right to abortion is not secured by this Constitution." By adopting Senator Eagleton's suggestion, the subcommittee established its intent to remove Federal institutions from the policymaking process with respect to abortion and reinstate State authorities as the decisionmakers for this sensitive issue.

S.J.Res. 3 was considered in the Senate on June 27 and 28, 1983. Notably, this was the first time in history that a constitutional amendment on abortion was actually debated on the Senate floor. During the debate, Senator Hatch managed the proposal, and Senator Packwood led the opposition to the constitutional amendment. Senator Hatch emphasized that S.J.Res. 3 would return the matter of regulation of abortion to the States and restore the status quo existing prior to Roe v. Wade. In short, S.J.Res. 3 would overrule the Supreme Court's 1973 decision which essentially had nationalized the matter of regulating the practice of abortion. Senator Helms opposed the measure because he felt that it did not go far enough, and therefore decided to register his objection by voting "present." Senator Packwood opposed S.J.Res. 3 for different reasons. He was intent upon preserving the Supreme Court's decision in Roe v. Wade and argued that this ruling did not allow for abortion on demand. He also referred to the Supreme Court's recent decisions in City of Akron, Ashcroft, and Simopoulos, in which the Court reaffirmed its holding and rationale in Roe v. Wade. In addition, Senator Packwood took issue with Senator Hatch's position that S.J.Res. 3 would simply reverse Roe v. Wade and its progeny and return the matter of regulating abortion to the States.

S.J.Res. 3 required a two-thirds vote or 67 to pass the Senate since super-majorities of both Houses of Congress must approve a constitutional amendment before it can be submitted to the States. On June 28 in a roll call vote of 50-49 the measure was defeated, with Senator Helms voting "present."

[For a review of the full debate on S.J.Res. 3, see 129 Congressional Record: S9076, et seq., daily ed., June 27, 1983; 129 Congressional Record: S9265, et seq., daily ed., June 28, 1983.]

In the second category of constitutional amendments, the typical "right to life" or "human life" amendment would create a new right in the unborn (personhood) which the Supreme Court has declared is not guaranteed in the Constitution.

Presently, the Fifth and the Fourteenth Amendments prohibit only the Federal and State governments from depriving anyone of life without due process of law. Some "right to life" amendments would also extend the prohibition to include private individuals as well. The proposed

amendments utilize a variety of terms to define the time the right attaches: "conception," "moment of fertilization," "at any state of biological development." Some "right to life" amendments permit medical procedures required to prevent the death of the mother; others provide no exceptions.

Bills that Seek to Prohibit Abortion by Statute

As an apparent alternative to the thus far unsuccessful efforts to achieve congressional passage of a constitutional amendment to prohibit or limit the practice of abortion, opponents of abortion have introduced a variety of bills designed to accomplish the same objective without resorting to the complex process of amending the Constitution. Authority for such action is said to emanate from Section 5 of the Fourteenth Amendment, which empowers the Congress to enforce the due process and equal protection guarantees of the amendment "by appropriate legislation." One such bill, S. 158, introduced during the 97th Congress, would have declared as a congressional finding of fact that human life begins at conception, and would, it was contended by its sponsors, allow States to enact laws protecting human life, including fetuses. It would also make it more difficult to test the constitutionality of State laws prohibiting abortions by withdrawing jurisdiction of the lower Federal courts to review these State laws. An appeal to the U.S. Supreme Court from the decision of a State's highest court would still be allowed, in some instances on an expedited basis.

Hearings held on S. 158 were marked by controversy over the constitutionality of the declaration that human life begins at conception, which contradicts the Supreme Court's specific holding in Roe v. Wade, and over the withdrawal of lower Federal court jurisdiction over suits challenging State laws enacted pursuant to the Federal legislation.

The subcommittee approved a modified version of S. 158, and that bill, S. 1741, was placed on the Senate calendar but was never acted upon.

During the 98th Congress, Representative Hyde introduced a similar bill, H.R. 618, that contained additional details. The bill would have prohibited Federal involvement in the performance of abortion, except when the life of the mother would be endangered if the child were carried to term, and included the following activities within the scope of its proscription: (1) performance of an abortion by a Federal agency; (2) use of appropriated funds to perform or reimburse or refer for abortion; (3) promotion or assistance in the performance of abortion abroad; (4) contracting for insurance which pays or reimburses for abortions; (5) discrimination against an individual on the basis of that person's opposition to abortion; and (6) the withholding from a handicapped infant of nutritional sustenance or medical or surgical treatment by an institution receiving Federal assistance. The bill also provided for expedited Supreme Court review of State laws restricting abortions or infanticide whenever such laws have been invalidated by a lower court. A discharge petition was filed Mar. 23, 1983, in an effort to move the bill out of committee, but no additional action was taken in the 98th Congress.

Hyde-Type Amendments to Appropriation Bills

Since Roe v. Wade Congress has attached abortion funding restrictions to numerous appropriations bills. Although the Foreign Assistance Act of 1973, P.L. 93-189, was the first such enactment, the greatest focus has been on restricting Medicaid abortions under the annual appropriations for the Department of Health and Human Services (HHS) (formerly Health, Education, and Welfare or HEW).

The following series of restrictions is popularly referred to as the Hyde Amendments.

The first version of the Hyde amendment was attached to the FY77 Labor/HEW Appropriation Act, P.L. 94-439. As originally offered by Representative Hyde, the proposal would have prohibited the funding of all abortions. A compromise amendment offered by Representative Conte was eventually agreed to, providing that:

> "None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term."

In subsequent years the Hyde amendments were sometimes reworded to include exceptions for rape and incest or long lasting physical health damage to the mother. However, since the 97th Congress the language has been identical to the original enactment, allowing only an exception to preserve the life of the mother.

The Hyde amendment process has not been limited to the annual Labor/HHS appropriation. Beginning with P.L. 95-457, the Department of Defense appropriation acts have contained Hyde-type abortion limitations. Notably, this recurring prohibition was eventually codified and made permanent by P.L. 98-525, the Department of Defense Authorization Act of 1984.

Beginning with P.L. 96-93, the District of Columbia Appropriations Acts have contained restrictive abortion provisions. In recent years there have been efforts to expand the prohibitions to District funds as well as the Federal funds appropriated. Thus far these efforts have failed.

In 1981, the Hyde amendment process was extended to embrace the Treasury/Postal Service Appropriations Act, prohibiting the use of Federal Employee Health Benefits to pay for abortions. This provision has been re-enacted in each subsequent year.

The latest extension of the Hyde amendment process prohibits Department of Justice funding of abortions except where the life of the mother is endangered, or in cases of rape. First enacted as part of the FY87 Continuing Resolution, P.L. 99-591, this provision has been re-enacted as part of the FY88 spending bill, P.L. 100-202.

Substantive Legislation

In addition to funding limitations contained in appropriations bills, since 1970 abortion restrictions have been attached to substantive legislation.

P.L. 91-572, the Family Planning Services and Population Research Act of 1970, bars the use of funds for programs in which abortion is a method of family planning.

P.L. 93-45, the Health Programs Extension Act of 1973, prohibits judges or public officials from ordering recipients of Federal funds to perform abortions or sterilization procedures if doing so is contrary to a recipient's religious beliefs or moral convictions. Additionally, discrimination against personnel for participation or lack of participation in abortion or sterilization procedures is prohibited.

The Legal Services Corporation Act of 1974, P.L. 93-355, prohibits lawyers in federally funded legal aid programs from providing legal assistance for procuring non-therapeutic abortions and prohibits legal aid in proceedings to compel an individual or an institution to perform an abortion, assist in an abortion, or provide facilities for an abortion.

P.L. 95-555, the Pregnancy Disability Amendment to Title VII of the Civil Rights Act of 1964, provides that employers are not required to pay health insurance benefits for abortion except to save the life of the mother, but does not preclude employers from providing abortion benefits if they choose to do so.

The Public Health Service Act Amendments of 1979, P.L. 96-76, bars recipients of Federal funds from denying admission or otherwise discriminating against any applicant for training or study because of the applicant's reluctance or willingness to counsel, suggest, recommend, assist, or participate in performing abortion or sterilization contrary to or consistent with the applicant's religious beliefs or moral convictions.

Finally, Title IX of the Budget Reconciliation Act of 1981, P.L. 97-35, relating to Health Services and Facilities, permits grants or payments only to programs that do not provide abortions, abortion counseling or referral, or subcontract with or make payments to any person providing services, except counseling for a pregnant adolescent if the adolescent and her parents or guardian request such referral.

LEGISLATION

In the 100th Congress, as in past Congresses, several constitutional amendments with respect to abortion have been introduced. In the House, they include H.J.Res. 20, 21, 35, 59, 68, 87, 99, 103 and 104; in the Senate, S.J.Res. 27, 29, 31, 32 and 36.

Notably, a number of statutory prohibitions related to the funding of abortion services have been introduced in both the House and the Senate. These measures are an attempt to codify the Federal abortion funding prohibitions which have been attached to numerous appropriations bills in past Congresses.

H.R. 720, introduced by Representative Dornan, H.R. 1729, introduced by Representative Hyde, and S. 381, introduced by Senator Humphrey, all contain prohibitions on the use of any appropriated funds to perform abortions.

H.R. 1552, introduced by Representative Dornan and S. 274, introduced by Senator Humphrey, would prohibit abortions in Federal penal and correctional institutions.

S. 267, introduced by Senator Humphrey, would prohibit the use of Legal Services Corporation funds for legal procedures or litigation relating to abortion.

In addition, several bills seek to amend the Internal Revenue Code with respect to abortion. H.R. 786, introduced by Representative Bliley, would deny a taxpayer's personal exemption deduction for a child who lives temporarily after an abortion. H.R. 1591, introduced by Representative Dornan, would deny the deduction of medical expenses incurred for certain abortions. Finally, H.R. 719, introduced by Representative Dornan, and S. 264, introduced by Senator Humphrey, would deny tax-exempt status to organizations which directly or indirectly perform or finance abortions.

Of particular note is H.R. 1729, the President's Pro-Life Bill of 1987, introduced by Representative Hyde and endorsed by President Reagan. The measure would permanently ban the use of Federal funds to perform abortions, except where the life of the mother would be endangered. Additionally, it would deny Federal family planning funds under title X of the Public Health Service Act to organizations that provide abortions or abortion referrals.

At the close of the first session of the 100th Congress, 13 regular appropriations were incorporated into the FY88 Continuing Resolution, P.L. 100-202. Abortion restrictions were applied to funds for the Department of Health and Human Services, Judiciary, Treasury/Postal Service, District of Columbia, Foreign Assistance and the Legal Services Corporation.

FOR ADDITIONAL READING

Erstreicher, Samuel. Congressional power and constitutional rights: Reflections on proposed human life legislation. 68 Virginia law review, 1982: 33-458.

Galebach, Stephen H. A human life statute. 7 Human life review, Winter 1981: 5-33.

Lenow, Jeffrey, L. The fetus as a patient: Emerging rights as a person? 9 American law journal of law & medicine, Spring 1983: 1-29.

Martyn, Ken. Technological advances and Roe v. Wade: The need to rethink abortion law. 29 U.C.L.A. law review, June-August 1982: 1194-1215.

Milby, T.H. The new biology and the question of personhood: Implications for abortion. 9 American journal of law & medicine, Spring 1983: 31-41.

Mohr, James C. Abortion in America: The origins and evolution of national policy, 1800-1900. Oxford, Oxford University Press, Inc., 1978.

Rhoden, Nancy K. The new national dilemma: Live births from late abortions. 72 Georgetown law review, June 1985: 1451-1509.

U.S. Library of Congress. Congressional Research Service. Abortion: An historical perspective, 1973-1986, by Marsha Cerny. [Washington] 1986. 45 p.
CRS Report 86-2317 LTR

----- Abortion: Judicial control [by] Karen J. Lewis. [Washington] 1988. (Updated regularly)
CRS Issue Brief 88006

----- Constitutional authority to enact a human life statute; a constitutional analysis of S. 158 [by] Karen J. Lewis and Morton Rosenberg. Washington, Apr. 17, 1981.