THE REAGAN ADMINISTRATION AND HUMAN RIGHTS

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Abortion Policy

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INTRODUCTION

Roe v. Wade.[1] No student of the political process can hear the name of this case without conjuring up the debate that has raged since the U.S. Supreme Court rendered its momentous decision on January 22, 1973. On that date, a majority of the Court, in effect, struck down all restrictive state abortion laws.

Much has been written about the events leading up to Roe. Many of those accounts have credited the loosely formed coalition of diverse prochoice groups with setting the stage for the 1973 decision. To some degree, this is true. Beginning in the mid-1960s, a strong prochoice movement gained momentum, attracting new constituencies yearly. And this movement faced little organized opposition. Most commentators, in fact, were quick to point out that a true prolife movement did not begin until the 1973 decision catalyzed abortion foes to act.[2] Thus, in part, up until 1973, the scales were unbalanced; the prochoice forces clearly had the upper hand.

Other factors contributing to the prochoice movement's victory in Roe v. Wade, however, were present in 1973. They included: (1) The zero population growth ethos. At that time many believed that the earth's resources were insufficient to support the rapidly growing population. For some, therefore, it was not taboo to view legalized abortion as a way in which to control further growth. (2) Media exposure. A major aspect of the

abortion movement emphasized by the media was the inability of the poor to obtain safe abortions. Regular attention was given to the horrors of back alley abortions, increasing sympathy for the cause. (3) The growth of the women's rights movement. As the women's movement gained increasing clout in the United States, so too did its demands for reproductive freedom, which included a woman's right to choose. Into the early 1970s, in fact, abortion on demand came to be one of its major goals. (4) Medical advances. In the early 1970s, a plethora of studies indicated that properly performed abortions were less risky to a woman's health than carrying a pregnancy to term. Thus, science or safety could no longer be used to justify restrictive laws. (5) Public opinion. Public opinion polls taken a year before Roe v. Wade indicated that most Americans favored abortions in some circumstances, although it is probable that the electorate would not have gone as far as the Supreme Court did in giving women nearly unqualified rights during the first two trimesters of pregnancy. For these and probably many more reasons, legal abortion became a reality in 1973.

The purpose of this chapter is not to retrace old ground, particularly when that story has been so well told. Rather, it is to look beyond Roe and to examine the status of the abortion issue in the context of the Reagan administration--a particularly significant concern given President Reagan's professed total commitment to reversing Roe and the fact that he has been stymied in his efforts even though all of the elements for policy change were in place at the time of his election. An additional goal of this chapter, then, is to examine why the Reagan administration has been unable to reverse abortion policy.

To accomplish our goals, we trace the status of abortion from 1973 to 1980 and then from 1980 to 1984. We do this by examining each of the five elements noted as essential for policy change: public opinion, interest groups, the Congress, the Supreme Court, and the executive branch. Our analysis reveals that by the time Ronald Reagan took office in early 1981, the elements considered crucial for policy change weighed in his favor. Public opinion leaned toward the prolife position, the prolife movement was invigorated, the Senate was controlled by Republicans, and the Supreme Court in several recent decisions had indicated its willingness to limit Roe. Even though all the elements for policy change were propitious

in 1980, however, by 1984 the prolife movement had lost much of its luster. As we shall see, this can be explained, in part, by the largely symbolic nature of the Reagan administration's support for change in abortion policy.

ABORTION POLICY, 1973 TO 1980

Public Opinion

Almost all models of the policy process begin with the assumption that public opinion shapes (directly or indirectly) the way in which public officials perceive and act on issues. Attitudes toward abortion in the United States have been the object of a great deal of analysis. One study has found that the Supreme Court's decision had some discernible impact on public opinion: favorable attitudes uniformly increased, leading one to suspect that institutional support legitimized the issue. Also, the number of respondents indicating that they did not know how they felt about the issue decreased. Finally, once this notable change in attitude occurred, little variation in public opinion can be discerned through 1980. Even though some have suggested that the public is growing increasingly conservative, there are simply no statistically significant differences over the years following Roe v. Wade.[3]

Did the fact that the public held relatively stable views necessarily imply that the electorate was polarized between the prolife and prochoice camps? The answer to this question is clearly no. The majority of the electorate did not fit squarely on either side of the issue, believing neither that abortion should be eliminated totally nor that it should be available on demand. One empirical study by Judith Blake and Jorge H. Del Pinal suggests, however, that this had greater repercussions for the prochoice camp because

> People who equivocate, who wish to fine-tune the justifications for abortion, apparently are more negative than positive in their views about legalizing abortion. In fact, it may be fair to say that these respondents are "closet negatives."[4]

If this finding aptly described the U.S. electorate through 1980, then it would seem that the prolife movement had public opinion on its side as Ronald Reagan entered office. Even though the U.S. public clearly did not favor total elimination of abortion, it did favor some governmental restriction of the right. This can be seen even more clearly in the public's response to questions concerning limitations on governmental funding of abortions and parental and spousal consent requirements prior to abortion procedures. Again, according to Blake and Del Pinal,

> . . . although out-and-out negativism toward legalized abortion is rare, so is support for basic planks in the prochoice platform. Even respondents who endorse all four justifications for abortion (health, child defect, financial stress, and elective abortion) undergo enormous attrition in numbers approving when they are asked about Medicaid for abortion, abortion without the husband's or parents' consent, or abortion past the first trimester.[5]

This finding correlates remarkably with how public officials responded to the abortion issue through 1980. As we shall see in the following sections, government officials acted to mirror public opinion, limiting or restricting federal funds for abortion and in some instances embracing regulations requiring parental consent.

Interest Groups

A second element for which most models of public policy account is the role of interest groups. Whether as direct or indirect forces on governmental decision making, the relative strength of one set of groups over another can be critical to policy outcome.

When the Supreme Court announced its decision in Roe v. Wade, a severe disequilibrium existed between the right to life and prochoice sides of the abortion debate. At this time, the right to life side was largely represented by the Roman Catholic Church and small fragmented organizations, whereas the prochoice position was ably represented by a well-organized coalition of diverse interests. An illustration of this discrepancy in strength can be seen in groups filing amicus curiae briefs in Roe v. Wade.

The prochoice side heavily outweighed the opposition. However, by the time the Supreme Court decided Planned Parenthood of Central Missouri v. Danforth,[6] which involved consent provisions, equilibrium had been achieved. In short, the period between 1973 and 1980 was a time of remarkable growth for a previously fragmented movement.

The Prolife Movement

Many have noted the significance of Roe v. Wade as the catalyst for the formation of the prolife movement. Although this cannot be questioned, the seeds of the movement were planted by the U.S. Supreme Court as early as 1965. In that year, in response to another Supreme Court case, Griswold v. Connecticut,[7] involving the constitutionality of a state law regulating the sale of contraceptive devices, the Catholic Church "earmarked" $50,000 for an antiabortion campaign to be jointly administered by the Family Life Division of the U.S. Catholic Conference and the National Conference of Catholic Bishops.[8] Yet, beyond the church's involvement in the abortion issue, no strong national groups existed to buttress its efforts. After Roe v. Wade, in response to what it considered to be a devastating loss, the Family Life Division created what is now the largest prolife group in the United States--the National Right to Life Committee (NRLC). NRLC is now separate from its creator, but the two retain close ties. As Connie Paige has noted, "the Roman Catholic Church created the Right to Life movement. Without the church the movement would not exist as such today."[9]

Leaders of the NRLC and the Catholic Church realized, however, that the only way to forge a broad-based movement would be to separate the two entities. And to foster the image that they were separate, they installed prominent non-Catholics in leadership positions and aligned with "more progressive" organizations, including those opposed to capital punishment. The first chairwoman of the board of the NRLC, in fact, was Marjory Mecklenburg, a Methodist. She had a long history of dedication to the prolife platform, cofounding Minnesota Citizens Concerned for Life, a highly successful state group. Within a short time, however, Mecklenburg's advocacy of teenage pregnancy programs caused a rift in the organization and she resigned to form American Citizens Concerned for Life.

Interestingly, she was succeeded by yet another non-Catholic, Dr. Mildred Jefferson, a black physician. Under the leadership of these women and with the help of Judy and Paul Brown, who later were dubbed Mr. and Mrs. Antiabortion America, a movement came into being.[10]

Under Judy Brown's supervision, the NRLC began to coordinate its activities with state and local prolife groups and later with more broad-based New Right organizations.[11] It was the ties that Brown, in part, forged with direct mail wizard Richard Viguerie that propelled prolife issues onto the national scene. The two movements enjoyed a symbiotic relationship; the New Right saw the antiabortion position as compatible with its agenda and as a way of broadening its base, while prolife forces gained financial and political support, publicity, and the opportunity to have an impact on a national level.

Together and individually, the right to life and New Right movements embarked on a concerted course of political action designed to affect all arenas of government. At the congressional level, the goal of the prolife/New Right leadership was passage of a human life amendment to ban all abortions. When it became clear that they lacked sufficient support to get an amendment out of committee, they looked to other ways to restrict abortions. Their most important victory during this era was annual passage of a restriction on the use of federal funds for Medicaid abortions, known as the Hyde Amendment.

Annual passage of funding restrictions during this period was an incredible accomplishment given the liberal makeup of the U.S. Senate. Intense pressure was brought to bear on recalcitrant senators, and senatorial targets of the political wrath of the prolife movement were quick to point out the effectiveness of this strategy. Senator Hubert Humphrey (D-Minn.) called the Hyde Amendment a "no win type of vote,"[12] while another prochoice representative, Senator Robert Packwood (R-Ore.) noted, "They are a very significant force. To politicians, they are a frightening force. They are people who are with you 99 percent of the time, but if you vote against them on this issue, it doesn't matter what you stand for."[13]

After prolife forces were successful in obtaining passage of the Hyde Amendment, they moved into the executive arena to press for the drafting of narrow Health, Education and Welfare (HEW) regulations to implement the provisions of the Hyde Amendment. When the Secretary of

HEW issued regulations permitting funding of abortions performed as a result of rape or of incest as long as the incident was reported to the proper authorities within 60 days, prolife groups were highly critical, calling the regulations "a rather blatant carrying out of a loophole to allow abortion on demand."[14]

Prolife leaders were perhaps more successful in convincing Jimmy Carter to establish several commissions charged with investigating and encouraging alternatives to abortion. One of them even sought to hire Marjory Mecklenburg as a consultant.[15]

Although the prolife/New Right movements were making some headway on the national level, their major targets at the time were state and local governments, where their strength continued to lie. During this era, the NRLC alone had "almost 2,000 chapters in all 50 states and the District of Columbia with an estimated 11 million members in its affiliated state or prolife local groups."[16] Thus, it is not surprising that, as was the case prior to Roe v. Wade, prolife organizations were able to convince a number of localities to pass restrictive legislation. This time, however, prolife groups backed up their efforts with concerted litigation.

An excellent illustration of this involved a heavily lobbied for Missouri law that contained parental and spousal consent requirements. The law was immediately challenged by Planned Parenthood of Central Missouri, which claimed that Roe implicitly prohibited spousal consent. Rather than allow experienced prochoice forces to ramrod them through the courts, the prolife side retaliated. Not only did they have an ardent prolife supporter, Attorney General John Danforth, on their side to argue for the constitutionality of the state law, they also filed amicus curiae briefs in numbers to support the legislation for which they had lobbied.

Even with this tremendous show of support, prolife forces lost the case on the merits. The Court struck down the consent requirements. Yet, to many on both sides of the issue, Planned Parenthood signaled a judicial retreat from Roe because the Court left open the possibility that some state regulations would be permissible. According to Frank Susman, the attorney who represented Planned Parenthood,

> The first step back from Wade . . . came in 1976 with the Supreme Court's decision in Planned Parenthood. . . . The Court held that the statement in Roe v. Wade which provided that a woman could secure an abortion in the first trimester by the State did not really mean there could be no regulation, but apparently meant that the Due Process Clause would forbid substantive regulation.[17]

Taking their cue from the Court, prolife forces then went on to press for other kinds of restrictive state and local laws and ordinances. One of the most successful examples of these ordinances was passed in Akron, Ohio, in 1978. Among its provisions were mandatory parental consent for minors under 15, prohibitions on saline abortions and nonemergency abortions performed in municipal hospitals, and mandatory hospitalization for women seeking abortions past the twelfth week.

It is clear from these ordinances and others that the Supreme Court's 1973 decision not only served to mobilize a group of committed individuals but to create a movement that quickly went on to enjoy some success. This movement, when combined with the New Right, invaded all arenas and levels of government in search of policy change.

The Prochoice Movement

The 1973 decision was obviously a cause célèbre for the prochoice movement. Unlike prolife activists, who came into their own after Roe, the prochoice coalition was comprised of older, better established organizations that saw Roe as the culmination of several years of hard work. As early as 1962, the American Civil Liberties Union (ACLU) endorsed model penal laws that would have decriminalized abortion. By the late 1960s, the ACLU's efforts were joined by those of several other organizations, including the newly formed National Abortion Rights Action League (NARAL), now the largest prochoice group in the United States. They and others lobbied heavily for liberal state laws and then initiated litigation throughout the United States in an effort to get a favorable national resolution from the Supreme Court.[18]

Their tremendous victory in Roe v. Wade was tempered by the recognition of these organizations that a

judicial victory would produce a strong conservative backlash. ACLU attorney Judith Mears summed up this trepidation, noting:

> Unfortunately the Supreme Court's abortion decisions no more resolve that issue than its 1954 decision in Brown v. Board of Education resolved the issue of racial segregation in public schools. . . . The questions left unanswered by Roe and Doe are, to an important extent, medical questions. If we are to avoid the disheartening prospect of history repeating itself à la Brown with twenty years of legislative and litigative battles, we must have the cooperation and active assistance of physicians who can assert the primacy of their medical judgment.[19]

Recognition of the problem, however, did not necessarily mean that action to prevent erosion of Roe was quickly forthcoming. Although prochoice forces went into legislative corridors to prevent passage of restrictive legislation, they often found themselves back in the courtroom defending principles enunciated in Roe. Perhaps the best representative of this litigation mentality was the ACLU's creation of the Reproductive Freedom Project, an institution formed specially to litigate against restrictive abortion provisions and to compile a docket of pending cases throughout the United States.

Even though the ACLU and NARAL, in particular, saw the importance of defending Roe in court and in the legislative arena, other organizations that were part of the prochoice coalition directed their energies elsewhere. For example, the National Organization for Women (NOW), a group that had strongly endorsed a woman's right to choose in 1968, was largely preoccupied with the ERA ratification struggle. Another group that had been part of the Roe coalition and now was preoccupied elsewhere was the American Medical Association (AMA). Once a right to choose was guaranteed, the AMA went off to fight other battles, including one against national health insurance.

Thus, while it would be unfair to say that the prochoice movement was ineffective, for example, no human life amendment was passed, it had lost some of its fervor

as the energies of important constituent groups were diverted to other issues. Perhaps more important, prochoice groups continually found themselves taking defensive positions against the heavy artillery of the prolife movement.

The Congress

A third key element in all policy models, of course, is the policymakers, including the U.S. Congress. To make or to change policy, members of Congress must sort through the pressures that daily come to bear on decision making. The abortion issue was no different. Within eight days of the U.S. Supreme Court's 1973 ruling, several versions of a human life amendment were proposed by various members of Congress at the urgings of prolife activists. But during the course of 1973 and in the several years that followed, no constitutional amendment even came close to passing in either house of Congress.

Before the election of Ronald Reagan in 1980, however, prolife proponents convinced Congress to enact a number of restrictive abortion-related statutes. The most controversial of these involved federal funding of abortions. Proposals to restrict the use of federal funds for abortion were originally made in 1974, though it was not until 1976 that both houses of Congress agreed to language suggested by conferees. Actually passed as a rider to the Departments of Labor/HEW budget authorizations, the Hyde Amendment stated that no federal funds could be spent for abortion "except where the life of the mother would be endangered if the fetus were carried to term." President Gerald Ford vetoed this provision, claiming that Congress presented him with the

> dilemma of offending the voting groups who benefit by these government programs or offending those primarily concerned with certain restrictions embodied in the bill. I agree with the restrictions on the use of federal funds for abortion. . . . My objection to this legislation is based purely and simply on the issue of fiscal integrity.[20]

Just one day later, however, both the House and the Senate overwhelmingly voted to override the veto. Even known

prochoice supporters, including Representative Bella Abzug (D-N.Y.), voted to override the veto because authorization for both departments was at stake.

The Hyde Amendment represented a major triumph for prolife activists, yet one that is puzzling given the Democratic makeup of both houses of Congress at the time. Members of Congress were fully aware that Medicaid dollars had been used for more than 300,000 abortions in the last fiscal year and that this measure would severely restrict the ability of low-income women to obtain abortions.

Why then did the Hyde Amendment pass? As indicated by the willingness of even the most liberal members of Congress to vote to override the Ford veto, many simply saw passage of the budget as critical. The Labor/HEW appropriations bill had been held up 11 weeks by debate on the abortion funding provision, and the functioning of important governmental programs was threatened. Abzug and others had worked hard to get social welfare programs increased, and now all was threatened by the rider.

Second, even though many members supported the Supreme Court's 1973 decision, fiscal considerations led many to view the rider as a way to cut $45 million from the budget. After all, 1976 was an election year and cutting the budget was a major priority.

Finally, a great deal of internal and external pressure was placed on Congress. Prolife groups and their supporters in the House in particular were not only unwilling to compromise but promised to make voting on this issue a litmus test of support for the prolife position.

Even though a federal district court immediately enjoined implementation of the Hyde Amendment, that injunction later was lifted in light of three 1977 Supreme Court funding decisions. And, since that time, the Hyde Amendment has continued to be renewed by Congress with only slight modifications.

Clearly those individuals who fought for passage of the amendment year after year intended it to be a first step toward elimination of legalized abortion. Even though they could not secure passage of a constitutional amendment, many thought the amendment and judicial acceptance of its strictures would severely curtail the number of abortions performed each year.

Studies, however, quickly revealed that the most significant piece of antiabortion legislation to come out of the Congress appeared to have little effect on the abortion rate per se. The Hyde Amendment simply was not restricting abortions.[21] Yet, during this period, more restrictive legislation--and in particular, any kind of constitutional amendment--was simply not feasible given the Democratic makeup of the Senate.

By 1980, however, the situation in Congress had changed dramatically. Using issues such as abortion and school prayer, conservative coalitions handily defeated many liberal members of the Congress who sought reelection. Such victories, especially in the Senate where the majority now was Republican, seemingly cleared the way for adoption of further restrictive legislation.

The Supreme Court

Although some traditionalists object to references to the Supreme Court as a participant in the policy process, its important role in many key areas cannot be ignored. This is particularly true in the abortion controversy in which the Supreme Court was the first national institution to map out far-reaching policy. Even in the aftermath of Roe v. Wade, through the landslide election of Ronald Reagan in 1980, the Supreme Court has continued to play a major role in setting abortion policy.

Between 1973 and 1980, the majority of abortion cases heard by the Supreme Court involved consent and funding. Consent was the first issue to reach the Court after Roe. Because Roe v. Wade did not address the issue of whether parental or spousal consent could be regulated, prolife activists saw this as a possible way to limit the scope of the 1973 decision. Thus, as early as 1974, they were able to convince several state legislatures to enact stringent consent requirements into law. By 1976, the first case to challenge these laws arrived at the Supreme Court. In Planned Parenthood of Central Missouri v. Danforth, the Court refused to narrow its holding in Roe, striking down Missouri's law that required the written consent of a woman's spouse or the parents of an unmarried minor.[22] Writing for the Court, Justice Harry Blackmun, the author of Roe v. Wade, noted that since the states were prohibited from regulating abortion in the first trimester, the state also was prohibited from delegating that responsibility to husbands or parents. But, Blackmun went on to say, "We emphasize that our holding

section 3(4) [parental consent] invalid does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy."[23]

It was not long before this phrase came back to haunt prochoice activists who considered Planned Parenthood to be a major victory. The next consent case that came to the Court was Bellotti v. Baird[24] in 1979. Often referred to as Bellotti II, this suit involved a Massachusetts statute requiring that unmarried women under the age of 18 must secure parental consent prior to an abortion. The legislation provided that, "If one or both parents refuse such consent . . . the abortion may be obtained by order of a judge of the superior court for good cause shown."

In 1976, the Supreme Court remanded Bellotti v. Baird for reconsideration in light of Planned Parenthood. When a district court struck down the law as unconstitutional, Bellotti II then returned to the U.S. Supreme Court in 1979 and the justices affirmed the decision of the lower federal court. Once again, however, the Court refused to rule decisively on whether requiring parental consent itself was unconstitutional. According to Justice Lewis Powell, the Court was "not persuaded that as a general rule, the requirement of obtaining both parents' consent unconstitutionally burdens a minor's right to seek an abortion. The abortion decision has implications far broader than those associated with most other kinds of medical treatment."[25] Powell's opinion for the Court, then, while rendering the Massachusetts law unconstitutional, did not prohibit other states from adopting parental consent requirements. In this regard, both sides claimed victory--prochoice activists actually won the case, but prolife forces won the principle as well as the right to lobby further for state consent provisions.

Prolife efforts after Bellotti II paved the way for the last case of the period, H.L. v. Matheson[26] in 1981. In H.L. the Court was asked to decide whether a Utah law requiring a physician to "notify, if possible," the parents of a minor seeking an abortion fell within the cracks of Planned Parenthood and Bellotti II. And, indeed, according to the Court, prolife forces had finally hit upon the correct formula for limiting Roe. Writing for the five-person majority of the Court, Chief Justice Warren Burger noted that "The Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions. To the contrary, state action encouraging childbirth, except in the most urgent circumstances is 'rationally related to the legitimate governmental objective of protecting potential life.'"[27]

A second issue that the Court, like Congress, has addressed is funding. Although it took several Supreme Court decisions to secure a definitive ruling on consent, the Court immediately took a hard line position on federal funding of abortions. In fact, prochoice activists never received a favorable ruling from the Court during this period.

The first of the series of these defeats came in 1977 in Maher v. Roe,[28] Beal v. Doe,[29] and Poelker v. Doe.[30] Maher involved a Connecticut welfare department regulation that restricted Medicaid funding to "medically necessary" abortions performed during the first trimester. In a six-to-three decision, the Supreme Court upheld the constitutionality of Connecticut's regulation, noting that "The State unquestionably has a 'strong and legitimate interest in encouraging normal childbirth.'"[31]

While Poelker involved publicly financed hospitals, Beal also dealt with the Medicaid program. At issue in Beal, however, was Title XIX of the Social Security Act. According to Title XIX, states participating in the program must establish "reasonable standards" to determine for which procedures to provide financial assistance. Pennsylvania, a state participating in the federal Medicaid program, excluded all but "medically necessary" abortions from coverage under its program. In yet another six-to-three decision, the Court ruled that,

> when Congress passed Title XIX in 1965, non-therapeutic abortions were unlawful in most States. In view of the then prevailing state law, the contention that Congress intended to require--rather than permit--participating States to fund non-therapeutic abortions requires far more proof than respondents have offered.[32]

In addition to upholding state authority to limit funding for abortion services for the indigent, on the same day that Maher and Beal were decided, the Court dealt prochoice forces another blow in Poelker v. Doe, which involved the right of publicly funded hospitals to refuse to

provide abortion services. In a per curiam opinion, the Court stressed that it found "no constitutional violation in the city of St. Louis' choice "to provide publicly financed hospital services for childbirth without providing corresponding services for non-therapeutic abortions."[33]

Although the Court discouraged prochoice groups with its three 1977 decisions, two 1980 decisions, Harris v. McRae[34] and Williams v. Zbaraz,[35] were perhaps more devastating to the prochoice movement because of their finality. At issue in Harris was the constitutionality of the Hyde Amendment.

After the amendment's passage in 1976, prochoice forces immediately sought and obtained an injunction in U.S. district court. The Supreme Court, however, vacated the district court decision for reconsideration in light of its 1977 decisions. In August 1977, the district court lifted the injunction, and the original Hyde Amendment went into effect.

In 1980, prochoice groups brought an amended suit, McRae v. Harris, to the same district court where the earlier injunction had been obtained. That district court found that the Hyde Amendment's exclusion of medically necessary abortions from the Medicaid program was a violation of the First and Fifth Amendments.

Anticipating further legal challenge, the district court stayed its order for 30 days to allow the government to appeal the decision to the U.S. Supreme Court. This appeal was granted, and the justices heard oral argument on April 20, 1980. On June 20 of the same year, the Court upheld the constitutionality of the Hyde Amendment. Writing for the majority, Justice Potter Stewart noted emphatically that the Court "cannot overturn duly enacted statutes simply because they may be unwise, improvident or out of harmony with a particular school of thought."[36] Thus, like Congress, the Court appeared to be growing more conservative and responsive to the growing wave of pressure.

The Executive Branch

Many studies of highly volatile issues such as abortion have indicated that presidential action is critical for policy change. Between 1973 and 1980, three presidents attempted to wrestle with the abortion issue. All "personally

opposed abortion," yet none took the requisite initiative for policy change. In other words, for the most part rhetoric outweighed action.

Soon after Richard Nixon's second inauguration, the Supreme Court announced its decision in Roe v. Wade. While the significance of the decision was immediately apparent to some, the death of Lyndon Johnson on the day the decision was handed down, coupled with the announcement two days earlier of the end to the Vietnam war and the escalating Watergate charges, perhaps explains why no public comments concerning Roe were forthcoming from the White House: the president was understandably preoccupied with other matters. However, as early as April 3, 1971, Nixon had publicly stated his opposition to abortion as a method of birth control.[37] And, one year later, he reinforced this position by rejecting the recommendation of his own Commission on Population Growth that restrictive abortion laws be liberalized.

Regardless of Nixon's stated policy preferences, when Roe v. Wade was docketed for argument before the Supreme Court, his administration took no action, even though it is not unusual for an administration to present its position to the Court in the form of an amicus curiae brief. Perhaps the president believed that the Supreme Court, which by the time Roe was decided included four of his appointees, would share his views. Ironically, of course, Harry Blackmun, Nixon's second appointment to the Court, wrote the strong majority opinion.

After Roe, there was no effort by the Nixon administration to restrict its scope. No policy statements were forthcoming and no support was given to proposals pending in Congress.

The trend established by Nixon of verbal opposition to abortion yet failure to act was adopted by his successor, Gerald Ford. When Ford took office in 1974 he made no public statements about the issue. In fact, it was not until his wife publicly voiced her support for Roe that Ford was forced to comment. At that time he made known his support for a "local option amendment to the U.S. Constitution," which would have allowed the states to regulate abortion policy.[38] Later, when abortion became an issue during the 1976 campaign, he reiterated this posture, noting, however, that "there are instances when abortion should be permitted: the illness of a mother; of rape or any other unfortunate things that might happen. So there has to be some flexibility."[39]

Even though Ford voiced his support for a local option amendment, he took absolutely no action on behalf of this idea or any others designed to restrict Roe. In fact, if anything, Ford could be considered prochoice. For example, he vetoed the appropriations legislation that contained the Hyde Amendment in part because of fiscal reasons and in part because he thought that Congress was putting him in a difficult position in an election year. And, like Richard Nixon, Gerald Ford sent no representatives of his Justice Department into the Supreme Court to argue for the constitutionality of state abortion laws, which he presumably favored given his support of a local option amendment. Planned Parenthood v. Danforth, for example, presented Ford with the perfect opportunity to demonstrate his support for the concept. Yet, Ford sent no representatives to the Supreme Court.

Most surprising of all may have been the contrast Ford drew between himself and his challenger for the 1976 Republican nomination, Ronald Reagan. In interviews and in speeches Ford portrayed Reagan as an extremist on the issue while noting his own compassion for women.

Unlike Ford, Jimmy Carter repeatedly refused to support any kind of constitutional amendment. Yet, unlike Reagan, Carter could never be considered a spokesperson for one side of the abortion debate. In fact, somewhat ironically, although he supported, in concept, a woman's right to choose, he probably did more than Nixon or Ford to provide federally encouraged alternatives to abortion. Carter, for example, adamantly opposed the use of federal funds for abortion, a position advocated in the Democratic Party platform on which he ran. It was the Carter administration, in fact, that successfully defended the constitutionality of the Hyde Amendment in the Supreme Court. Conversely, Carter urged the expenditure of federal funds for programs to encourage alternatives to abortion. One program backed by the Carter White House was designed to provide money to families that adopted "hard to place children." In fact, "a fledgling teenage pregnancy program" established by Carter tried to hire Marjory Mecklenburg of American Citizens Concerned for Life as a consultant.[40]

Thus, what is particularly interesting is that by the end of 1980, President Carter had established within the executive branch a variety of programs designed to encourage alternatives to abortion. It seems then that

even the most moderate of presidents serving during this era was reaching out to appease the growing ranks of conservatives on this issue.

ABORTION AND THE 1980 ELECTIONS

The factors leading to Ronald Reagan's landslide victory over Jimmy Carter are numerous, still speculative, and beyond the scope of this study. There is some agreement, however, that the contrast between Carter's and Reagan's stances on abortion, as well as that of their respective party platforms, played a critical role. Reagan was the first serious presidential contender to state without hesitation or equivocation his support for a human life amendment. Given our findings of a favorable climate of public opinion for such a stance and the growing momentum of the prolife movement, Reagan's complete embrace of the movement's ideals was a successful election strategy. And, once Reagan was elected, many believed that radical changes would be forthcoming. Clearly, there were strong reasons for this speculation as the elements critical for policy change seemingly fell into the prolife camp.

Yet, what seemed to be inevitable never really happened. Why? Two responses can be offered. First, as was the case with other chief executives who opposed abortion, the Reagan administration spoke largely to appease prolife supporters but failed to act; or second, the Reagan administration simply was ineffective. To sort out the answers to these questions, the following sections analyze President Reagan's actions concerning the abortion issue. Special attention is given to the key elements considered earlier in this chapter.

RONALD REAGAN AND ABORTION, 1980-1984

There is strong agreement among scholars that presidents can initiate policy change in a number of ways. First and perhaps most immediate are the appointments that a president makes during his term of office. None of President Reagan's highly visible appointments were drawn from the ranks of the prolife movement. But clearly certain members of the administration who were later to play a role in the abortion controversy were staunch supporters

of the prolife position. Among these were U.S. Solicitor General Rex E. Lee, an elder in the Mormon Church and former dean of Brigham Young University Law School; U.S. Surgeon General C. Everett Koop, author of The Right to Live, The Right to Die, which "drew links between communism and abortion";[41] Marjory Mecklenburg, head of the Office of Adolescent Pregnancy; and William Olson, a prolife activist attorney, Acting Chair of the Legal Services Corporation Board.

On top of the fact that none of these appointments was highly visible, Reagan made the mistake of initially alienating prolife forces with his nomination of Sandra Day O'Connor to the Supreme Court. Because O'Connor was reported to have supported prochoice legislation while she was an Arizona state legislator, prolife activists immediately expressed their outrage at her appointment. They were especially angry because they had earlier succeeded in obtaining passage of a plank in the Republican party platform guaranteeing presidential appointment of jurists who strongly supported the prolife position. In essence, Reagan negated much of the good will he had built up through his nomination of O'Connor, his most visible appointment. This was a particularly hard blow for prolife forces who blamed the Court for their problems; O'Connor's appointment simply was feared as adding to them.[42]

A second way in which a president can initiate policy change is to propose legislation and lobby for its passage. When Reagan took office in 1981, there was only one legislative plan that would have satisfied his prolife supporters--a total ban on abortions. Within several months of his taking office, however, the prolife movement was plagued by a devastating split over tactics. One side, led by Senator Jesse Helms (R-N.C.) and Representative Henry Hyde (R-Ill.), favored legislation defining a fetus as a person and therefore entitled to all the rights and privileges guaranteed by the U.S. Constitution.[43] Senator Orrin Hatch (R-Utah) and his supporters, who included a number of prolife groups such as the NRLC and the National Conference of Catholic Bishops, favored instead a constitutional amendment as the most expedient way to overrule Roe. After some debate, they settled on "A right to an abortion is not secured by this constitution" as their phraseology.

The split between Helms/Hyde and Hatch first came into the public eye in 1982 when the Senate Judiciary Committee voted ten to seven for a slightly different version of the Hatch amendment. Even though this was the first time that a congressional committee had acted favorably on antiabortion legislation, Helms resorted to procedural manipulations to prevent the amendment from coming to a vote in the Senate. Instead, he tried to secure passage of legislation banning abortions, believing that there were simply not enough votes in the Senate to secure passage of an amendment. Liberal senators then began a filibuster; and, on September 15, the Senate finally voted 47 to 46 to kill Helms' proposal.

In 1983, the debate began anew. This time the Senate Judiciary Committee split evenly on the Hatch amendment. Generally, when proposed legislation fails to receive a positive vote in the Judiciary Committee, it is not reported to the floor of the full Senate for a vote. In this instance, however, Senator Joseph Biden (D-Del.), who had voted in 1982 but not in 1983 for the Hatch amendment, suggested sending the amendment to the Senate. Finally, on June 6, 1983, the Senate defeated the amendment 49 to 50, falling 18 votes short of the necessary total. Interestingly, Jesse Helms voted "present" and not in favor of the amendment.

Was the defeat of legislation defining life or the human life amendment Ronald Reagan's fault? To answer this question, we must examine what Ronald Reagan did in this period. Unquestionably, he was faced with a very difficult situation; his prolife constituency was divided over which strategy to use. Rather than entering the fray, Reagan chose instead to give public support to whichever proposal was pending. In 1982, he and his staff pressured the Senate to adopt the Helms proposal, whereas in 1983, he voiced his strong support for the human life amendment.[44]

What the president clearly failed to do was to take any leadership role in this debate. He simply voiced repeatedly his support for any measure that would restrict Roe, noting his desire "to restore legal protections for the unborn whether by statute or by constitutional amendment."[45] No doubt the president could have done what other presidents have done when confronted with congressional disagreement over tactics. He could have summoned competing prolife factions to the White House and used the power of his office to secure a single, unified course of action. But even though he attended a 30-minute "11th hour" strategy

meeting between White House staffers and antiabortion leaders at the close of the 1982 filibuster, he did little to reconcile competing factions. He simply left this task up to White House staffers, who admitted that "the issue doesn't burn in the hearts of most people around here."[46] Thus, while Reagan's support for the general goals of the prolife movement is beyond question, he took little direct action to further their most desired goals.

A final way in which a president can expedite policy change is through judicial action. The Reagan administration took advantage of its one opportunity--at least at the level of the Supreme Court--to advocate the prolife position. The case was Akron v. Akron Center for Reproductive Health[47] in which the ACLU Reproductive Freedom Project, in cooperation with the local ACLU affiliate, challenged a series of restrictive Akron ordinances. Akron generated a tremendous amount of publicity from the beginning, and debate became particularly volatile when the case was accepted for review by the Supreme Court.

The importance of the issues at stake probably stems from a number of factors: it was the first time since 1973 that the Supreme Court would reexamine a range of abortion restrictions. Earlier, the Court had limited its review to narrower issues. To decide Akron, it appeared that the Court would be forced to reexamine its entire abortion policy.

Also, Akron was the first abortion case in which Justice Sandra Day O'Connor would participate. Many were anxious to see whether O'Connor was as prochoice as her prolife critics had portrayed her prior to her confirmation proceedings. Finally, Akron represented a true test of strength for the respective sides of the issue. Prochoice organizations filed amicus curiae briefs in numbers attesting to the weight of public, legal, and scientific opinion on their side. Prolife activists followed suit, viewing Akron as a culmination of their efforts to place pressure on the Court.[48] As Linda Greenhouse of the New York Times noted,

> A key part of the antiabortion movement's strategy during the past few years has been to "send the Supreme Court a message." According to this scenario, continual efforts to amend the Constitution and to strip the Court of its jurisdiction to decide abortion cases would keep the pressure on Justices who have grown increasingly weary and conservative, eventually persuading them to reconsider their 1973 decision that established a constitutional right to abortion.[49]

Unlike other Republican presidents who had not, for whatever reason, sent representatives into the Supreme Court in abortion litigation, Reagan's solicitor general, Rex E. Lee, filed a very controversial amicus curiae brief in Akron. It was the first time that the Justice Department had filed an amicus curiae brief in an abortion case not involving construction of a federal statute.[50] Lee's brief, which was cleared by Attorney General William French Smith and presidential advisors James Baker and Edwin Meese, left little doubt about where the Reagan administration stood on the subject of abortion. Even though it did not specifically call for the justices to overrule Roe, Lee claimed that "the time has come to call a halt" to judicial limitations on state regulation of abortion.[51] In essence, Lee asked the Court to defer to the judgment of state legislators on this issue. His position on this point was so strong, in fact, that during oral argument, Justice William Brennan asked Lee whether his brief necessitated the overruling of Marbury v. Madison,[52] the 1803 case in which the Court had first enunciated the principle of judicial review.

Even though Reagan was the first president to use his Justice Department to advance the prolife position, in the final analysis "the decision was a legal embarrassment for the Reagan administration."[53] In a six-to-three opinion, the Court struck down the vast majority of the ordinances at stake and used the decision as an opportunity to reaffirm unwaveringly the principles enunciated in Roe. Writing for the majority, Justice Powell asserted:

> These cases come to us a decade after . . . Roe v. Wade. . . . [A]rguments continue to be made . . . that we erred in interpreting the Constitution. Nonetheless, the doctrine of stare decisis, while perhaps never entirely persuasive on a Constitutional question, is a doctrine that demands respect in a society governed by the rule

of law. We respect it today, and reaffirm Roe v. Wade.[54]

Perhaps the only positive aspect of Akron for the Reagan administration was that Justice O'Connor dissented from the majority opinion. At this time, however, it is unclear whether she dissented because she opposed abortion or was deeply committed to states' rights. Nevertheless, prolife activists were devastated by this defeat.

CONCLUSION

By the end of 1983, the Akron decision, coupled with congressional defeat of the human life amendment, had left prolife forces at a new low, at least when compared with their situation at the time of Reagan's initial election. Again, then, we must ask whether the Reagan administration was ineffective or whether his campaign promises were largely rhetoric. At this point, the answer to this question seems clear: the Reagan administration has taken numerous symbolic stances on abortion rather than effective concrete action:[55] he failed to appoint prolife leaders to visible administration positions; he failed to unify the prolife leadership concerning strategies; and while his Justice Department filed what some have called a significant show of support for the prolife position in Akron, its rhetoric failed to influence the Court. In the wake of the 1984 elections, the administration again began to take highly public actions on the issue. President Reagan, for example, spoke by telephone hook-up to prolife activists who were demonstrating in Washington, D.C., to mark the twelfth anniversary of Roe v. Wade.

Perhaps what is most interesting is that even though his administration's actions have been largely symbolic--aimed in 1980 at mobilizing prolife voters and in 1984 at retaining their loyalty--there is no doubt that Ronald Reagan is the strongest opponent of abortion that the prolife movement could reasonably expect to occupy the presidential office. Given this fact, coupled with our findings that elements important in the policy process in 1980 leaned toward changes in abortion policy, we must conclude that the prolife forces have missed their best opportunity for success and that reversal of Roe is unlikely in the near term.

NOTES

1. 410 U.S. 113 (1973).
2. Andrew H. Merton, Enemies of Choice (Boston: Beacon Press, 1981), and Connie Paige, The Right to Lifers (New York: Summit Books, 1983).
3. Helen Rose Fuchs Ebaugh and C. Allen Haney, "Shifts in Abortion Attitudes: 1972-1978," Journal of Marriage and the Family 42 (August 1980): 491-99.
4. Judith Blake and Jorge Del Pinal, "Negativism, Equivocation, and Wobbly Assent: Public 'Support' for the Prochoice Platform on Abortion," Demography 18 (August 1981): 315.
5. Ibid.
6. 428 U.S. 52 (1976).
7. 381 U.S. 479 (1965).
8. Paige, Right to Lifers, p. 56.
9. Ibid., p. 51.
10. See Merton, Enemies of Choice, and Paige, Right to Lifers.
11. Richard E. Viguerie, The New Right: We're Ready to Lead (Falls Church, Va.: The Viguerie Co., 1980), chap. 4.
12. Quoted in Martin Tolchin, "Senators Elucidate Shift on Abortion," New York Times, July 1, 1977, 24.
13. Ibid.
14. Quoted in Joseph A. Califano, Governing America (New York: Simon and Schuster, 1981), 84.
15. "Carter Health Program Seeks to Hire Abortion Foe," New York Times, February 8, 1979, 16.
16. National Right to Life Committee, Inc. (mimeographed).
17. Frank Susman, "Roe v. Wade and Doe v. Bolton Revisited in 1976 and 1977--Reviewed? Revised? Revested? or Revolved?" St. Louis University Law Journal 22 (1978): 583.
18. See Lawrence Lader, Abortion II (Boston: Beacon Press, 1973), and Eva Rubin, Abortion, Politics and the Courts (Westport, Conn.: Greenwood Press, 1982).
19. Judith Mears, "Taking Liberties," Civil Liberties Review, Summer 1974, 136.
20. Congressional Quarterly Almanac 1976 (Washington, D.C.: Congressional Quarterly, 1976), 790.
21. According to a Center for Disease Control report, 94 percent of the pre-Roe medically eligible women

received an abortion after passage of the Hyde Amendment. Willard Cates, Jr., "The Hyde Amendment in Action," Journal of the American Medical Association 246 (September 4, 1981): 1109-12.

22. The Court, however, did uphold a provision of the statute that required the woman, herself, to give written consent prior to the procedure.

23. 428 U.S. 75 (1976).

24. 443 U.S. 622 (1979).

25. 443 U.S. at 649 (1979).

26. 450 U.S. 398 (1981).

27. 67 L. Ed. 2d at 400 (1981).

28. 432 U.S. 464 (1977).

29. 432 U.S. 438 (1977).

30. 432 U.S. 519 (1977).

31. 432 U.S. at 478 (1977).

32. 432 U.S. at 447 (1977).

33. 432 U.S. at 521 (1977).

34. 448 U.S. 297 (1980).

35. 448 U.S. 358 (1980).

36. 448 U.S. at 326 (1980).

37. "Nixon Abortion Statement," New York Times, April 4, 1971, 28.

38. "Ford Is Firm for an Amendment to Let States Act on Abortion," New York Times, September 6, 1974, 34.

39. James M. Naughton, "Ford Asserts High Court 'Went Too Far,'" New York Times, February 2, 1976, 1, 53.

40. "Carter Health Program," p. 16. See also David E. Rosenbaum, "White House Backs Subsidy for Adopting Unwanted Children," New York Times, July 9, 1977, 1.

41. Ronald Brownstein and Nina Easton, Reagan's Ruling Class (Washington, D.C.: Presidential Accountability Group, 1982), p. 267.

42. Mike Tulumelo, "O'Connor Quoted Abhorring Abortions," Atlanta Constitution, September 8, 1981, p. 2; and "O'Connor Foes Claim Coverup on Abortion Bill," Atlanta Journal, July 10, 1981, p. 6A.

43. This discussion is derived from issues of Congressional Quarterly Weekly Report (Washington, D.C.: Congressional Quarterly, 1981-83).

44. Francis X. Clines, "Abortion Foes, Hailing Reagan Efforts Plan to Review Stalled Drive, New York Times, September 17, 1982, 19.

45. Francis X. Clines, "Reagan Urges Congress to Nullify Supreme Court's Ruling," New York Times, June 17, 1983, 16.

46. Clines, "Abortion Foes," p. 19.

47. 103 S. Ct. 2481 (1983).

48. Interview with Thomas Marzan, Attorney, Americans United For Life, in Chicago, Ill.

49. Linda Greenhouse, "High Court Clears Up Any Doubts on Abortion," New York Times, June 19, 1983, E7.

50. Stuart Taylor, Jr., "Supreme Court Given Brief on Reagan Abortion Views," New York Times, July 30, 1983, 7.

51. Ibid.

52. 1 Cranch 137 (1803).

53. Greenhouse, "High Court," p. E7.

54. 103 S. Ct. at 2487 (1983).

55. Before the 1980 election, Ellen McCormack, a staunch prolife proponent who, in fact, had run for president in 1976 on a prolife platform, predicted this phenomenon, noting that "Governor Reagan's strong pro-life statements did not result in pro-life policies . . . [while he was governor of California]." Ellen McCormack, Letter to the Editor, "Ronald Reagan Owes Answers on Abortion," New York Times, July 12, 1980, 16.