

FEDERALISM IN Action

Abortion

In 1973, the U.S. Supreme Court ruled in *Roe v. Wade* that state laws prohibiting abortion violated a woman's right to privacy. Since then, pro-life advocates have searched for ways to undo *Roe*. At the heart of the issue for pro-life supporters is the argument that all life is sacred. A secondary issue is whether the national government or the state governments have the power to decide whether or not to allow abortions. Pro-choice advocates argue that privacy rights must be protected at the national level to protect individuals who may face discrimination locally. Indeed, James Madison argued in *Federalist* No. 10 that minority rights are more likely to be protected when a government covers an expanded sphere. Yet critics argue that abortion is a states' rights issue. From this point of view, issues such as abortion that are not directly addressed in the U.S. Constitution are left to state governments, which should adopt policies that reflect their state's cultural preferences.

Supporters of states' rights realized a significant victory when the U.S. Supreme Court ruled in *Webster v. Reproductive Health Services* (1989) that states could place restrictions on abortion. Since then, numerous states have attempted to limit or deny abortions by passing onerous legal requirements on facilities that provide abortions. In 2011 Texas passed a law that required a sonogram at least 24 hours before an abortion. In

2013, the Texas Legislature passed House Bill (HB) 2, which, among other things, required that doctors who provide abortions have admitting privileges at nearby hospitals and that clinics that provide abortions meet the same standards as ambulatory surgical centers. The effect of the law was immediate—nearly half of the abortion providers in the state closed or stopped providing abortions once the requirement that doctors have nearby hospital privileges went into effect. Since most of the remaining facilities would have to undergo multimillion-dollar renovations to meet the standards required of an ambulatory surgical center, only a few clinics are expected to remain open once that requirement also goes into effect. The closure of these clinics disproportionately affects rural and poor Texans. Texans who live in the south and the west have been hit particularly hard, as it can now take them more than five hours to drive to a clinic. The affected clinics are also key providers of contraception, sexually transmitted disease (STD) testing, and cancer screening. The constitutionality of HB 2 was challenged in the courts and eventually the Supreme Court weighed in. In 2016's *Whole Woman's Health v. Hellerstedt* the Supreme Court ruled that the law created an undue burden on a woman's right to an abortion. The Supreme Court specifically struck down the provisions of the law that required abortion providers to meet the same standards as hospitals and the requirement that doctors have nearby hospital admitting privileges.

Abbott criticized the Supreme Court ruling stating that it “erodes states’ law-making authority to safeguard the health and safety of women.” The effect on abortions in Texas, however, has already been significant. Even as the number of abortions nationally has decreased, Texas's abortions have fallen at an even greater rate. Abortions in Texas are down about 25 percent since the 2011 law went into effect.ⁱ Yet there is also preliminary evidence of

a rise in sales of misoprostol, a drug sold over the counter in Mexico that is sometimes used to self-induce an abortion.ⁱⁱ It is also difficult to estimate the number of Texans who are seeking abortions in other states. One doctor at a clinic in New Mexico estimates that more than half of her patients come from Texas.ⁱⁱⁱ In addition, since so many clinics have closed, the wait time for abortions is much longer, which has resulted in an increase in second trimester abortions.^{iv} It is unclear how many of the closed abortion facilities will reopen in the state.

- To what extent is abortion a federalist issue?
- How should government weigh the predominant political culture against minority rights?
- In drafting its restrictions against abortion, does the Texas Legislature have a responsibility to consider the impact of the legislation on women's access to other services offered at these facilities?
- Who wins and who loses when the effects of legislation are felt beyond the specific activity or group a bill was meant to address?

- i. “Vital Statistics Annual Report,” for 2011, 2012, 2013 and Provisional Report for 2014 Texas Department of State Health.
- ii. Erica Hellerstein, “The Rise of the DIY Abortion in Texas: A Pill That Revolutionized Reproductive Rights in Latin America Is Now Gaining Ground on the Black Market in South Texas,” *Atlantic*, June 27, 2014, www.theatlantic.com/health/archive/2014/06/the-rise-of-the-diy-abortion-in-texas/373240 (accessed August 23, 2014).
- iii. Abby Goodnough, “Texas Abortion Law Has Women Waiting Longer, and Paying More,” *New York Times*, March 18, 2016.
- iv. *Ibid.*