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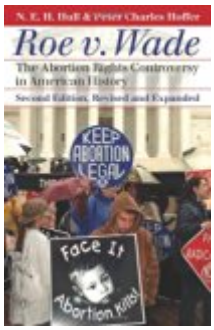

N. E. H. Hull, Peter Charles Hoffer. *Roe v. Wade: The Abortion Rights Controversy in American History, 2nd Edition.* Lawrence: University Press of Kansas, 2010. xiii + 370 pp. $19.95, paper, ISBN 978-0-7006-1754-8.

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Roe v. Wade is one of the few cases where a Supreme Court decision intensified rather than quelled a national debate. Americans came to an uneasy peace even with integration and school prayer; by 2000, no one used either decision as a litmus test for a candidate for public office. Forty years after *Roe v. Wade*, however, abortion defines a political figure and violence against abortion providers remains a constant threat. The decision it most closely resembles is perhaps *Dred Scott*: Abortion opponents argue, as did opponents of slavery, that if the Constitution protects such a right, the Constitution must be changed. In the meantime, opponents have adopted the strategy of chipping away at the 1973 Supreme Court decision. It's fair to say that this strategy has succeeded in cabining *Roe v. Wade* and recent jurisprudence has allowed states to pass restriction after restriction, making abortion for women in many areas of the country all but unavailable.

The bibliography of books on abortion is immense. Nevertheless, Hull and Hoffer's synthesis stands out for the breadth of its synthesis, placing abortion law in legal, political, historical, ideological, and even medical context. This new edition of *Roe v. Wade*, with two new chapters and a revised conclusion and epilogue, updates the book and takes the account to 2010, in a reasonably compact 340 pages. I assign this book in a graduate seminar in women and public policy and its jargon-free and understandable prose make it accessible to students with no background in history, much less legal history.

The history of abortion makes clear that the concept of familial privacy is deeply flawed. Sexual relationships, marriage, child-bearing, child-rearing--all take place within a public framework of legal controls. The question of "who decides?"--one pro-choice catchphrase--when and with whom sexual relations may occur, when and whom a person may marry, who controls the education of a child, under what circumstances parents retain or lose the right of raising their own children, who owns the product of someone's labor, who decides what to purchase--all these so-called private decisions turn on judicial interpre-

tation, usually of state statutes. Deploying the Fourteenth Amendment, the U.S. Supreme Court has wielded federal power to require states to amend family law in many areas, including control of family property, family support, contraception, and sexuality. And we are awaiting the next Supreme Court decision telling both the federal government and the states what relationships they must accept as marriage. Privacy, indeed.

Hull and Hoffer trace the control of the abortion decision from the nineteenth century forward, and an interesting story it is. Once the exclusive domain of women, pregnancy and abortion usually fell below the legal radar. Midwives most often managed pregnancy, and prosecution for abortion of a quick--that is, living--fetus was rare, unless the pregnant woman were harmed. Women started to lose power in the nineteenth century when the profession of medicine rose in public regard. The shift in control over pregnancy from sympathetic midwives to male physicians occurred as doctors asserted both medical and moral authority over pregnancy and abortion. This claim helped to elevate the medical profession and increased their client base, under the guise of protecting women from poorly trained abortionists. When state laws appeared, they focused on the abortionist, not the pregnant woman. Most protected the fetus only after quickening.

Laws became more restrictive after the Civil War, banning abortion at all stages, counting the pregnant women as criminals, and outlawing advertising of abortifacients. After 1870, laws were enforced and practitioner prosecuted. In 1873, Congress forbade the transmission of information about abortion and birth control through the U.S. mail. Advocates for women's rights opposed abortion because they shared the view that motherhood was an exalted position. Radicals developed a collateral line of attack: contraception.

Contraceptive use expanded from 1900 on, with information passed covertly. Margaret Sanger turned the decision concerning birth control over to physicians, who agreed that they should assume that role. The economic pressures of the 1930s engendered more support for birth control and a federal judge exempted doctors from the Comstock Law. The American Medical Association (AMA) reversed its opposition to birth control and the battle gradually became one that sought to enable doctors to practice medicine without state interference. Predictably, abortion continued to occur underground, often by physicians and in other instances by unskilled practitioners, whose work became apparent when it was botched.

Having achieved a virtual monopoly over legitimate abortion, by 1945 doctors altered course and instead of condemning all abortion as immoral, they now sought protection from prosecution under state abortion laws if the abortion were performed by a physician. The campaign was successful and by 1950 only Louisiana and Wisconsin resisted authorizing physician laws. Most allowed doctors considerable latitude but the boundaries were often unclear. Hospitals created guidelines for committees to authorize abortion. The number of abortions declined as a result. In addition, the endorsement of large families after WWII led to fewer women seeking abortion.

Advocates of legal abortion hoped that birth control would lead the way. Under the influence of the Catholic clergy, Connecticut retained a state law prohibiting dissemination of birth control even by doctors. Planned Parenthood and the American Civil Liberties Union (ACLU) finally succeeded in having the U.S. Supreme Court hear the case and in 1965, in *Griswold v. Connecticut*, the majority held that an unenumerated but fundamental constitutional right of marital privacy forbade the state from entering the bedroom of a married couple.

The appearance of a birth control pill in 1960, coupled with the continuing expansion of women's role in the wage labor force, led to wide-scale

approval of what was now called "family planning." Population increases in undeveloped countries instigated support for global birth control programs, with the assent of President Dwight D. Eisenhower and President John F. Kennedy. The Catholic Church expressed its continuing disapproval with the encyclical ***Humanae Vitae*** by Pope Paul VI, published in 1968,but the church's instructions were ignored by most Catholic women.

Initially, the new feminist movement approached advocacy of abortion cautiously but the campaign for legalization had already started with doctors and lawyers. In 1962 the American Law Institute promulgated a model abortion provision: It would permit abortion if two doctors certified that the pregnant women's mental/physical health were endangered, if the child were deformed, or if the pregnancy were the result of rape or incest. The decision would belong not to his woman patient but to the physician who would not have to fear penalties for violating vague state abortion laws. Therapeutic abortion gained advocates as fetal deformities arose from a measles epidemic and the use of thalidomide.

As physicians and attorneys continued to bring cases to nullify state laws, in 1969 feminists formed the National Association for the Repeal of Abortion Laws (NARAL). Lawsuits proliferated concerning both birth control limitations and abortion, and challenges often met with success. Meanwhile, in Texas, two young feminist attorneys, Sarah Weddington and Linda Coffee, created a case that would invalidate the Texas law, which permitted abortion only to save a woman's life. They ultimately brought together an unmarried pregnant woman, Norma McCorvey (soon to be known as Jane Roe) "and all others similarly situated"--turning the case into a class action--and a married couple whose physician had warned against pregnancy (Marsha and David King, to be known as John and Mary Doe). A physician who had often performed abortions, Dr. James Hallford, joined the case; he had been indicted for terminating a pregnancy because the mother had been exposed to rubella. A three-judge panel heard the lawyers' claim that the Texas law violated the parties' right to privacy. Attorneys for the state of Texas argued both that the opposing parties had no standing to challenge the law and that the state was entitled to decide for itself the question of when to protect fetal life. Pro-choice attorneys responded that privacy was a fundamental right, that privacy encompassed a right to decide about pregnancy, and that it was protected by the Ninth Amendment. The Texas law therefore bore no reasonable relationship to any legitimate state purpose (e.g., protecting women or preventing promiscuity). The three-judge district court panel agreed. A concurrent case in Georgia challenged a newly enacted statute modeled on the ALI provision. Other cases occurred in other states with different result: Courts in Louisiana and Ohio, for example, upheld the states' abortion restrictions. Decisions in lower federal courts conflicted enough to legitimate the U.S. Supreme Court's involvement and the Court agreed to hear the appeals from Texas and Georgia.

Feminists' pursuit of abortion rights took place as the women's movement was making gains in prohibiting discrimination on both the state and the federal level in employment, education, access to credit, family law, and jury service. Coffee and Weddington, with an attorney from NARAL, sought to eliminate struggles state by state with a decision by the U.S. Supreme Court, striking all restrictions as trenching on a woman's constitutional right to privacy. Harriet Pilpel, long a lawyer in feminist causes, wrote a brief for the Planned Parenthood Federation of America (PPFA), arguing in favor of safe, legal abortion as a logical result in light of the support of women, physicians, lawyers.

Roe v. Wade was argued twice before the Supreme Court, once in December 1971 and again in October 1972, for the benefit of two newly ap-

pointed justices, Lewis Powell and William Rehnquist. Chief Justice Warren Burger assigned the opinion to Harry Blackmun, once counsel to the Mayo Clinic in his home state of Minnesota, and he was happy to have the extra time to write what would become his most visible legal legacy.

Hull and Hoffer include detailed descriptions of the internal politics on both sides, the two sets of arguments, and the fractious discussions among the justices. The case attracted many amicus briefs, offering many different perspectives, and Justice Blackmun paid special attention to a brief from a group of historians who provided evidence of the long history of legal abortion in the United States.

The Court's opinion in ***Roe v. Wade***, and its companion opinion in the Georgia case, ***Doe v. Bolton***, did not yet sound the clarion that proclaimed the right of a pregnant woman to make her own choice. Instead, it emphasized the right of the physician to practice medicine as he saw fit--to decide when and whether to perform an abortion. The Court accepted three stages of pregnancy, with the state's interest at its lowest level during the first three months and highest during the last trimester, when it could pass some restrictions reflecting its interest in protecting fetal life after viability, but only with an exception for the health of the woman. Seven justices joined Blackmun's opinion, although C. J. Burger wrote separately to say that the decision did not amount to abortion on demand. Douglas insisted that the statutes fell under the constitutional guarantee of privacy (that he had described in ***Griswold***). Stewart posited that the meaning of "liberty" in the Fourteenth Amendment had to change over time. White bitterly dissented, saying that the Court now allowed abortion based on a woman's caprice. Rehnquist also dissented, saying that the state legislatures had the authority to decide this matter. Polls indicated that most Americans endorsed the decision but the Court would refine it in the more than twenty cases it would hear during the next thirty years. In deciding these cases, Justice Blackmun would reveal the evolution in his thinking as his defense of the right of a woman to abort came to overshadow his concern for the physician's right to practice medicine undisturbed.

The holding in ***Roe*** proved to be a gift to the political Right. The "religious Right" became much more involved in temporal politics, focusing on abortion, sexual orientation, sexual conduct outside marriage, and its long-standing interest in prayer in public schools. Abortion became a litmus test on both sides of the political spectrum.

Some feminists, such as Ruth Bader Ginsburg, a professor of law at Columbia, thought the decision went too far and would provoke a backlash. Liberal and conservative lawyers lined up on both sides and the Catholic Church played a leading role, prohibiting Catholic hospitals from performing abortions except to save the life of the mother and supporting the creation of "grassroots" groups. Members of Congress introduced constitutional amendments that would nullify ***Roe***, although they split over its wording.

In 1976, abortion opponents found a successful strategy to limit access to abortion. Representative Henry Hyde (R-IL) attached a rider barring Medicaid funds for abortion, except to save mother's life or in cases of rape or incest. Every Congress since has denied federal funds for abortion. Any federal funding for sex education required that abortion be treated as murder. Republicans realized that they could use abortion against liberal Republicans and in 1978 unseated three important senators: Charles Percy (R-IL), Edward Brooke (R-MA), and Clifford Case (R-NJ).

Abortion opponents persuaded states to pass law after law limiting abortion and the U.S. Supreme Court heard cases brought by both sides. In 1976, the Court in ***Planned Parenthood Federation of America v. Danforth*** struck down spousal and parental consent provisions. In 1977, the Court upheld state laws barring funding for abor-

tion. The Court noted that the poor were not a "suspect class" and therefore states did not have to justify treating poor women differently from those who didn't need help to pay for an abortion. The Court also permitted cities to prevent municipal hospitals from performing abortions.

The election, in 1980, of Ronald Reagan prefigured additional successes for abortion opponents. President Reagan's first Supreme Court appointment, Sandra Day O'Connor, was opposed by both sides. As a state legislator, her record was ambiguous, but most thought she was a vote to overturn ***Roe***. Not satisfied with legal limits on abortion, the anti-abortion movement turned to violence, with organizations formed around charismatic leaders. During Ronald Reagan's term in office, 77 abortion clinics were bombed, 117 burned, 250 received bomb threats, and 224 were vandalized.

Justice O'Connor, it turned out, was not a vote to overturn ***Roe***. Hull and Hoffer distinguish between two ***Roe***s: a formal ***Roe***, with specific restrictions, and a symbolic ***Roe***, which retained the principle that women in fact did have a right to make their own decisions about ending a pregnancy. Under O'Connor's influence, the Court retained the symbolic ***Roe*** but whittled down the formal ***Roe***. By the time she left the Court, abortion was no longer a fundamental right and states could pass regulations unless they posed "undue burdens." The new standard found expression in ***Planned Parenthood Federation of Eastern Pennsylvania v. Casey*** in 1992. The decision permitted Pennsylvania to impose a variety of restrictions, striking only the requirement that a woman inform her husband of her intention to abort as an "undue burden."

Abortion rights activists fared better with a Democrat in the White House. President Clinton lifted federal abortion restrictions and named two supporters to the bench: Ruth Bader Ginsburg and Stephen Breyer to replace Harry Blackmun and Byron White. To deny opponents the opportunity to harass women entering abortion clinics, in 1994 Congress passed the Freedom of Access to Clinic Entrances Act. The U.S. Supreme Court has declined to review the law. Still, during the Clinton years abortion laws became even more Byzantine, with some states passing new "conscience clauses" and consent rules. States routinely refused to follow federal regulations concerning funding for abortion in cases of rape or incest and opponents of abortion were still using violence as a tool. In 1993-94, three physicians were murdered. In 2000, the U.S. Supreme Court voided a Nebraska law outlawing a particular procedure because it didn't contain the standard exception for the health of the mother and in September 2000, the Food and Drug Administration approved RU-486, a medical substitute for a surgical abortion. Pro-choice advocates hoped that it would attract less opposition, but it made no difference.

The election in 2000, in which abortion certainly played a part, placed a Republican president in the White House and again federal law reverted to restricting access to abortion as much as possible. The proportion of pregnancies terminated by abortion showed a slow and steady decline. Violence was also having an effect: Fewer hospitals agreed to abort; fewer doctors chose to abort; medical schools stopped teaching abortion methods; nurses and pharmacists refused to participate in abortion.

President Bush appointed two new justices: John Roberts and Sam Alito, to replace O'Connor, who retired, and Chief Justice Rehnquist, who had died. Although the views of these appointees on abortion were not made explicit during confirmation, their appointments moved the Court to the right, and they are expected to vote to overturn ***Roe***. The U.S. Supreme Court did reverse its position on "partial birth abortion" bans, with Justice Anthony Kennedy now voting with the majority to permit such bans.

In the 2008 campaign, abortion played an important role, with the pro-choice Democratic can-

didate Barack Obama trying to reach out to anti-abortion Democrats while maintaining good faith with pro-choice groups--a difficult endeavor. But once elected, Obama again changed federal rules and permitted abortions in military hospitals, funding for family planning groups overseas, and embryonic stem cell research. Obama's health care plan became embroiled in the abortion debate, with Democrats agreeing to an amendment that would prevent even private insurance companies from offering abortion services. This story has yet to play out.

In their conclusion, Hull and Hoffer offer three reasons for the struggle over abortion coming, as it did, in the 1970s: the increased role of women in waged work; the collision between feminist ideals of morality and traditional ideals of morality; and a media bent on stirring passions. The book takes no overt position on whether abortion should remain a woman's right. The authors assert in a disclaimer at the beginning of the book that they hold differing views on the subject of abortion. Still, their ultimate conclusion, that ***Roe*** persists because it "conform[s] to larger social and cultural realities" (p. 340), leaves this reader to imagine that abortion opponents will contend that the book favors the pro-choice side.

The book's drawbacks are few: Hull and Hoffer occasionally make mistakes--as do we all--and statements for which they offer no examples or evidence. For instance, on page 48, they write that by the end of the nineteenth century states "reversed the gains of the nineteenth century regarding coverture." On page 54, they write that Emma Goldman "was not, like some contemporary feminists, anti-male." Perhaps they could supply the name of the feminists they are labeling here. On page 44, they refer to Jane Addams as a spinster, a locution we don't usually hear these days. On page 73, they repeat the oft-asserted but erroneous datum that the divorce rate rose to 50 percent by the 1970s. On page 93, they assert that Howard Smith added "sex" to Title VII of the 1964 Civil Rights Act "to degrade and defeat it," which, as usual, overlooks both Smith's long-standing support of the ERA and his racist concern that black women might have a cause of action unavailable to white Southern women. On page 95, they conflate women civil rights workers with Betty Friedan and others who started the National Organization for Women (NOW), who were unaware of the conflicts within Students for a Democratic Society (SDS). They also connect an incident from a 1968 war rally in Washington, DC, to the formation of NOW, which had taken place two years earlier, at a government-sponsored conference of state commissions on women, not a conference called by Betty Friedan. On page 109, they write: "In the hands of movement leaders like Friedan, this new worldview of women and the law had abortion as its center," a debatable assertion. Finally, in 1967, President Johnson added "sex" to EO 11246, which applied to federal contractors, not federal offices.

None of these minor errors significantly detracts from the book's achievement as a comprehensive, balanced discussion, with a useful chronology and bibliographical essay, of what is certainly one of the key Supreme Court decisions of the twentieth century.

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