STUDY NOTE
FROM PRE-SCHOOL AIDES TO PRESIDENTS: THEMES AND SCENES
OF THE ABORTION DEBATE

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I. INTRODUCTION

In Linda Smith’s monologue, My Son Has Down Syndrome, Greg expresses his opinion of abortion standing in the unique position of being both an abortion opponent and, statistically speaking, what some today would call an abortion survivor. He is a “high functioning” carrier of an extra chromosome, the discovery of which today leads ninety percent of pregnant mothers to abort. His opinion of the subject of abortion, though expressed in simple terms, carries with it the same logic, emotion, and persuasive appeal that ornaments one opinion of the debate sounded in any number of circles. Indeed, everyone from construction workers to Congressmen has a moral, medical, social, or political opinion on the topic. These themes have been debated just as vigorously in living rooms, barber shops, community centers, and cyber space as they have in the halls of Congress and the courtrooms of the United States. As Greg and his mother share their own voice on the matter, this note examines similar themes as propounded by the mighty voice of the United States Executive Branch.

II. EXECUTIVE ACTION IN THE ABORTION DEBATE

The Executive has exercised its power to influence abortion policy and practice in a number of ways, such as wielding the negotiating power of the presidential veto, forming and enforcing federal regulations, controlling

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appointments to the judicial bench, advocating positions in amicus briefs, and shaping United States foreign policy. This note will focus on three of the mechanisms which have been utilized in advancing the President’s abortion agenda: advocacy in amicus briefs, administrative regulations, and foreign policy.

A. Executive Advocacy: The United States as Amicus Curiae

_Roe v. Wade_ addressed whether the United States Constitution protects a woman’s right to an abortion against state regulation.\(^3\) The Court held that a woman’s right to an abortion is guaranteed by the concept of privacy as protected by the Constitution, and resolved in favor of protecting a woman’s right to an abortion against legislative regulation.\(^4\) The Court indicated, however, that the right to an abortion may be subjected to state regulations based upon the stage of the pregnancy in question, establishing a trimester system.\(^5\)

Not content to watch the Court shape the law of abortion without saying its piece, the Executive Branch entered the debate. Writing for the plurality in _Planned Parenthood v. Casey_\(^6\) in 1992, Justice O’Connor noted that the Executive Branch had played the role of an advocate and took sides by appearing as amicus curiae in _Casey_, as well as in five other cases over the preceding decade, to request that the Court overrule _Roe v. Wade_.\(^7\) These amicus briefs, found in _Hodgson v. Minnesota_,\(^8\) _Webster v. Reproductive Health Services_,\(^9\) _Thornburgh v. American College of Obstetricians and Gynecologists_,\(^10\) _City of Akron v. Akron Center for Reproductive Health, Inc._,\(^11\) and _Planned Parenthood Ass’n of Kansas City, Mo., Inc. v. Ashcroft_,\(^12\) were submitted, not surprisingly, during the administrations of George H.W. Bush and Ronald Reagan, two Republican presidents known for being staunchly pro-life.

These Executive amicus briefs uniformly asserted two salient themes: first, that the right to abortion established in _Roe v. Wade_ was not a “fundamental” liberty interest, and thus was undeserving of heightened protection because “our Nation's history and traditions” have not historically protected that interest from state restriction.\(^13\) Second, each brief also argued that the respective states seeking

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\(^3\) 410 U.S. 113 (1973).
\(^4\) Id. at 154.
\(^5\) Id. at 162–64.
\(^7\) Id. at 844.
\(^8\) 497 U.S. 417 (1990).
\(^12\) 462 U.S. 476 (1983).
to limit abortion had legitimate state interests for doing so, particularly the states’ interest in “maternal health and in unborn and future life.”

At the end of the day, the Executive’s concerns were only partially satisfied. The *Casey* Court explicitly rejected the trimester framework established in *Roe v. Wade*, however, the Court did not overturn the central holding of *Roe*, but replaced the rigid trimester framework with a more workable “undue burden” standard. As such, the fundamental right to an abortion remained, subject to regulations that do not place an undue burden upon that right.

**B. Executive Lawmaking: Administrative Regulations Governing Abortion**

In 1854, the Texas state legislature enacted a criminal abortion statute, which was in effect for over a century. In the intervening century between the enactment of this statute and the Supreme Court’s 1973 decision in *Roe v. Wade*, the American Law Institute proposed a model penal code for state abortion laws, expanding the exceptions to the abortion ban to include instances in which: the physical or mental health of the mother was gravely impaired; the child would likely be born with “grave physical or mental defects;” or the pregnancy resulted from rape or incest. States began adopting the ALI Model Code in the 1960s, and by 1973, such statutes were in effect in the majority of the states. The United

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12006421; see also Brief for the United States as Amicus Curiae Supporting Respondents in No. 88-1125 and Supporting Cross-Petitioners in No. 88-1309 in *Hodgson v. Minnesota*, 497 U.S. 417 (1990), (Nos. 88-1125, 88-1309), 1989 WL 1127347, *7 (noting that “our Nation's history and traditions do not prove that an unemancipated minor has any such right independent of her parents’ consent”); Brief for the United States as Amicus Curiae Supporting Appellants in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), (No. 88-605), 1989 WL 1127640, *6 (noting that “*Roe* rests on assumptions that are not firmly grounded in the Constitution; it adopts an unworkable framework tying permissible state regulation of abortion to particular periods in pregnancy; and it has allowed courts to usurp the function of legislative bodies in weighing competing social, ethical, and scientific factors in reaching a judgment as to how much state regulation is appropriate in this highly sensitive area”).


15 *Casey*, 505 U.S. at 873.

16 *Id.* at 876.

17 *Id.* at 877.


21 *Roe*, 410 U.S. at 118 n.2.
States Supreme Court entered the scene, and in Roe v. Wade, the Court held that a woman’s right to an abortion is guaranteed by the concept of privacy as protected by the Constitution.22

As has already been discussed, the Executive branch was far from silent during this period and the forty years of legislative and judicial lawmaking that have followed, but it has not contented itself with merely making its opinions known via amicus briefs. Rather, the Executive has promulgated administrative regulations in an effort to influence the abortion issue, albeit purportedly within the framework established by the Court and Congress.

One example of this method of Executive involvement is found in 45 C.F.R. §§ 88-88.6, which sports the unlikely title: “Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices” (the Regulation). An eleventh-hour regulation promulgated by President George W. Bush at the close of his second term in office,23 the Regulation aims to lend further protection to “conscience rights” of clinics and physicians unwilling to perform abortion procedures for religious, moral, ethical, or other reasons.24 Though the idea of protecting conscience rights originated much earlier with the Church Amendments,25 the Public Health Service Act,26 and the Weldon Amendment,27 the Regulation adds additional protections and enforcement mechanisms to conscience rights of health care providers. It prohibits discrimination against physicians who indicate their unwillingness to perform abortions if the entity in question receives federal funding, while mandating that states apply the Regulation.28 In addition to protecting physicians, the Regulation also protects the conscience rights of entire entities that do not wish to perform abortions or provide information about abortions.29

The argument that the Regulation goes beyond the authorities upon which it is based illustrates how the Executive can potentially impact the abortion debate outside of the bounds set by Congress and the Court. The Regulation seeks to

22 Id. at 154.
24 45 C.F.R. § 88.1 (2008) (“The purpose of this Part is to provide for the implementation and enforcement of the Church Amendments . . . and the Weldon Amendment . . . . These statutory provisions protect the rights of health care entities/entities, both individuals and institutions, to refuse to perform health care services and research activities to which they may object for religious, moral, ethical, or other reasons.”) (internal citations omitted).
28 See id.
overtly distance itself from any dispute that it affects a woman’s right to obtain an abortion:

The ability of patients to access health care services, including abortion and reproductive health services, is long-established and is not changed in this rule. Instead, this rule implements federal laws protecting health care workers and institutions from being compelled to participate in, or from being discriminated against for refusal to participate in, health services or research activities that may violate their consciences, including abortion and sterilization, by entities that receive certain funding from the Department.30

However, whether the Regulation affects a woman’s right to abort is a subject of much debate. The Regulation was ostensibly promulgated in order to:

(1) [E]ducate the public and health care providers on the obligations imposed, and protections afforded, by federal law; (2) work with State and local governments and other recipients of funds from the Department to ensure compliance with the nondiscrimination requirements embodied in the Church Amendments, PHS Act § 245, and the Weldon Amendment; (3) when such compliance efforts prove unsuccessful, enforce these health care conscience protection laws through the various Department mechanisms currently in existence, to ensure that Department funds do not support morally coercive or discriminatory practices or policies in violation of federal law; and (4) otherwise take an active role in promoting open communication within the health care field, and between providers and patients, fostering a more inclusive, tolerant environment in the health care industry than may currently exist.31

The broad spectrum of entities subject to the regulation represents a potential problem in the abortion context; women seeking abortions may be affected in attempting to acquire an abortion from a hospital within a reasonable distance of their location. The “conscience rights” of the doctors are secured within entities that receive federal funding. Although the Act has already gone through the procedure to become a Federal Regulation, it is yet suspect for the way it impacts, or may impact, a woman’s right to an abortion under Supreme Court abortion jurisprudence.

One critic challenges the regulation as a troubling unilateral exercise of power which runs counter to the Constitution.\textsuperscript{32} Marci Hamilton suggests that the regulation is unconstitutional on three grounds: first, as an improper exercise of federal power by the Executive branch; second, as an improper exercise of federal power as it relates to the states; and third, for breaking down the church and state barrier.\textsuperscript{33} In light of the body of cases addressing the abortion right, the Regulation does not fit neatly within the constitutional rubric. It places the woman’s right to be informed in order to make a life-altering decision on uncertain grounds. Depending upon who the physician or hospital staff member is, a woman may be denied the procedure, as well as any information related thereto. The impact of the regulation is largely conjecture at this point; however, some critics have pointed to the possible ramifications, including the possibility that pharmacists may refuse to dispense contraceptives related to birth control, rape, or unwanted pregnancy.\textsuperscript{34}

Although the Executive Branch cannot dictate Congressional legislation, it does maintain the power to regulate agencies, which in turn may affect Constitutional rights such as abortion. Some argue that because President Bush was ineffective in his attempt to get Congress to draft legislation protecting “conscience rights,” he therefore made use of his power to regulate agencies, developing an administrative rule that would have the same practical effect.

Further enriching the drama of Executive maneuverings in the abortion debate, President Obama followed the lead of nearly all newly-elected presidents by issuing a freeze on all executive orders that had not yet been sent to the Office of the Federal Register as of noon on January 20, 2009.\textsuperscript{35} The Regulation, however, had already been published in the Code of Federal Regulations as of January 20, 2009, and it went into effect on January 18, 2009. Despite surviving the initial freeze, the Regulation is not in the clear yet. President Obama promised to “review all 11th-hour regulations and address them once he [became] president.”\textsuperscript{36} President Obama’s next moves will determine whether the Regulation stays or goes. If the Regulation remains in place, some commentators fear that this

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\textsuperscript{33} See id.

\textsuperscript{34} See id.


promotion of healthcare providers’ conscience rights will compromise the abortion rights of women seeking abortions from entities or individuals with a conscience conflict.  

C. Executive Policies: Declarations and Foreign Policy

In addition to the “hard law” methods of influencing the abortion debate, the Executive has also engaged in policy activities to promote the president’s themes—whatever they may be. A simple but illustrative example of this method of Executive involvement is found in National Sanctity of Human Life Day, which President Ronald Reagan instituted by declaration published in the Federal Register as an annual commemoration of life coinciding with the Roe v. Wade decision. President George H.W. Bush continued the celebratory declaration each year during his two terms. President Bill Clinton, however, elected not to engage in the annual declaration, and the tradition was discontinued for the duration of his two terms. With the advent of another Republican president, President George W. Bush, the tradition was revived.

The Mexico City Policy (the “Policy”) is perhaps the most well-known Executive policy on abortion. The Policy, created by President Ronald Reagan in 1984, made federal funding to non-governmental organizations (NGOs) contingent upon refraining from performing or in any way promoting abortion as a method of family planning in other countries. Opponents of the Policy argue that it inappropriately deprives NGOs of the ability to assist individuals in foreign

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37 See id.
39 See Proclamation No. 5147, 49 Fed. Reg. 1,975 (Jan. 13, 1984) (declaring Sunday, Jan. 13, 1984 “National Sanctity of Human Life Day, 1984”); see also Proclamation No. 5761, 53 Fed. Reg. 1464 (Jan. 14, 1988) (on the fifteenth anniversary of the Roe decision, Ronald Reagan stated, “[i]n the 15 years since the Supreme Court's decision in Roe v. Wade . . . America's unborn have been denied their right to life. Among the tragic and unspeakable results in the past decade and a half have been the loss of twenty-two million infants before birth; the pressure and anguish of countless women and girls who are driven to abortion; and a cheapening of our respect for the human person and the sanctity of human life.”).
41 See Proclamation No. 7863, 70 Fed. Reg. 3273, 3273 (Jan. 14, 2005) (noting the nation’s “significant progress in recent years toward building a culture of life,” citing promotion of “abstinence education, adoption programs, crisis pregnancy programs, and other efforts to help protect life”).
countries to engage in family planning that does not include abortion. Opponents also argue that the Policy “stifles public debate on abortion-related issues, requiring private organizations overseas to choose between continuing their non-U.S. funded efforts to change public policy around abortion in their own countries, or receiving U.S. family planning funds.” For this reason, the Policy is also referred to as the “Global Gag Rule.”

The Policy stayed in effect through the Bush Senior Administration, but it was rescinded by President Bill Clinton in 1993. President Clinton considered the Policy’s conditions as “excessively broad” and “unwarranted,” stating that it “undermined efforts to promote safe and efficacious family planning programs in foreign nations.” President George W. Bush revived the policy on January 22, 2001, and, most recently, President Barack Obama rescinded the policy on January 23, 2009, once again labeling its conditions as “excessively broad” and “unwarranted.”

III. Conclusion

The themes of the abortion debate are sounded in many venues and by many people, from pre-school aides to presidents. The Executive has been active in influencing the debate via many methods, including advocacy as amicus curiae, administrative regulations, and Presidential Policies. It remains to be seen what effect the Obama Administration may have on abortion law and policy, but what is sure is that the Executive will continue to play its part in the drama of the abortion debate.

45 Id.
48 Id.
49 Id.
52 Id.