

Troubling Trend: More States Hostile to Abortion Rights as Middle Ground Shrinks

By Rachel Benson Gold and Elizabeth Nash

Over the last decade, the abortion policy landscape at the state level has shifted dramatically. Although a core of states in the Northeast and on the West Coast remained consistently supportive of abortion rights between 2000 and 2011, a substantial number of other states shifted from having only a moderate number of abortion restrictions to becoming overtly hostile. The implications of this shift are enormous. In 2000, the country was almost evenly divided, with nearly a third of American women of reproductive age living in states solidly hostile to abortion rights, slightly more than a third in states supportive of abortion rights and close to a third in middle-ground states. By 2011, however, more than half of women of reproductive age lived in hostile states. This growth came largely at the expense of the states in the middle, and the women who live in them; in 2011, only one in 10 American women of reproductive age lived in a middle-ground state.

A Seismic Shift

Ever since the Supreme Court handed down *Roe v. Wade*, states seeking to reduce access to abortion services and, more broadly, create a climate hostile to abortion rights have taken a multiplicity of approaches to doing so. In some cases, they have sought to put roadblocks directly in the path of women seeking an abortion by, for example, mandating that women receive biased counseling or imposing parental involvement requirements for minors. In others, states have tried to make it

harder for women to pay for the procedure, by restricting public or private insurance coverage. In addition to these “demand side” restrictions, states have also sought to make it more onerous to provide abortions, by instituting expensive physical plant requirements unrelated to public safety or restricting medically appropriate ways of providing medication abortion.

This article assesses how and where the volume of abortion restrictions has changed over the last decade. To do so, we analyzed whether—in 2000, 2005 and 2011—states had in place at least one provision in any of 10 categories of major abortion restrictions.* The identified categories include

- mandated parental involvement prior to a minor’s abortion;
- required preabortion counseling that is medically inaccurate or misleading;
- extended waiting period paired with a requirement that counseling be conducted in-person, thus necessitating two trips to the facility;
- mandated performance of a non-medically indicated ultrasound prior to an abortion;
- prohibition of Medicaid funding except in cases of life endangerment, rape or incest;
- restriction of abortion coverage in private health insurance plans;
- medically inappropriate restrictions on the provision of medication abortion;
- onerous requirements on abortion facilities that are not related to patient safety;

*Restrictions included for 2000 and 2005 were all in effect. Some restrictions enacted in 2011 are still being litigated.

- unconstitutional ban on abortions prior to fetal viability or limitations on the circumstances under which an abortion can be performed after viability; or
- preemptive ban on abortion outright in the event *Roe v. Wade* is overturned.

Most of these categories include more than one individual restriction. For example, four states require both parental notification and consent before a minor may obtain an abortion; in this analysis, these states would be identified as requiring parental involvement. Similarly, states have taken two entirely different approaches to restricting access to medication abortion, by either banning the use of telemedicine or requiring the use of an outdated protocol for administering the medication that increases both the cost and the side effects the woman may experience. Taken together, these 10 categories include 19 separate restrictions.*

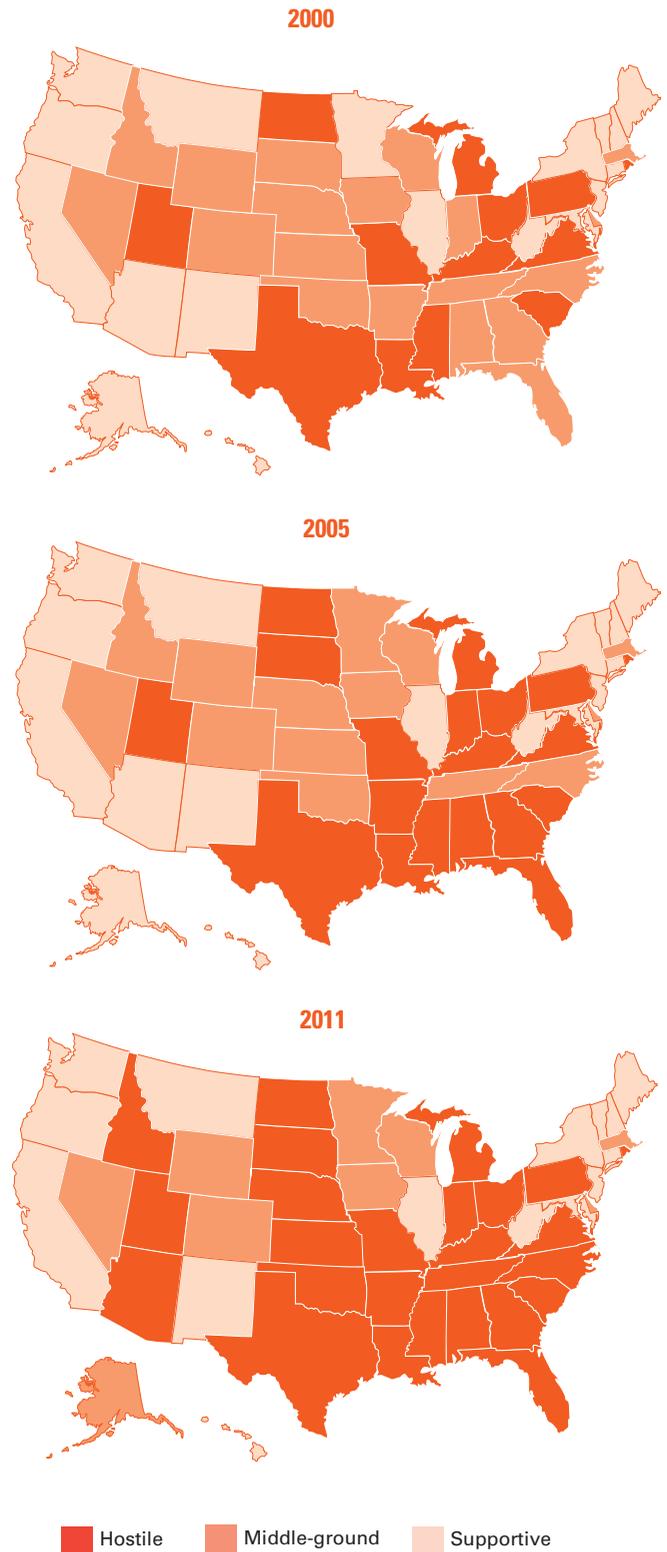
For purposes of this analysis, we consider a state “supportive” of abortion rights if it had enacted provisions in no more than one of these restriction categories, “middle-ground” if it had enacted provisions in two or three categories and “hostile” if it had enacted provisions in four or more.

Overall, most states—35 in total—remained in the same category in all three years (see map); however, of the 15 states that moved from one category to another, every one became more restrictive over the period. Two of the states supportive of abortion rights in 2000 moved to the middle category by 2011, and one had become hostile. Moreover, 12 states that had been

*The 19 individual restrictions include: mandating parental involvement (consent or notification); requiring misleading counseling (informing a woman that the fetus is a person, that a fetus can feel pain, that having an abortion increases the risk of breast cancer or that abortion can impair future fertility); requiring a woman to make two trips to an abortion facility; requiring ultrasound; limiting Medicaid funding for abortion; restricting private insurance coverage (in all private plans, plans sold on exchanges or plans for public employees); limiting medication abortion (telemedicine bans or requiring the use of an outdated protocol); instituting onerous requirements for abortion providers (medically unnecessary physical plant requirements or mandating that physicians have hospital admitting privileges); restricting later abortion (gestational limits or unconstitutional limits on later abortion); and banning abortion immediately if *Roe* is overturned.

SHRINKING MIDDLE GROUND

Between 2000 and 2011, the number of states that were middle-ground in their abortion-related policies dropped from 19 to nine, while the number of states that were hostile to abortion increased from 13 to 26.



2011: A Year for the Record Books

Over the course of 2011, legislators in all 50 states introduced more than 1,100 provisions related to reproductive health and rights. At the end of it all, states had adopted 135 new reproductive health provisions—a dramatic increase from the 89 enacted in 2010 and the 77 enacted in 2009.¹ Fully 92 of the enacted provisions seek to restrict abortion, shattering the previous record of 34 abortion restrictions enacted in 2005 (see chart). A striking 68% of the reproductive health provisions from 2011 are abortion restrictions, compared with only 26% the year before.

Several states adopted relatively new types of abortion restrictions in 2011. Five states (Alabama, Idaho, Indiana, Kansas and Oklahoma) followed Nebraska's lead from the year before and enacted legislation banning abortion at 20 weeks from fertilization (which is equivalent to 22 weeks from the woman's last menstrual period), based on the spurious assertion that a fetus can feel pain at that point in gestation. And for the first time, seven states (Arizona, Kansas, Nebraska, North Dakota, Oklahoma, South Dakota and Tennessee)—all largely rural states with large, scarcely populated areas—prohibited the use of telemedicine for medication abortion, requiring instead that the physician prescribing the medication be in the same room as the patient. Telemedicine is increasingly looked to as a way to provide access to health care, especially in underserved rural areas.

Many states adopted what have become more familiar types of restrictions. Five states (Arizona,

Florida, Kansas, North Carolina and Texas) moved to require that a woman obtain an ultrasound prior to having an abortion, even when there is no medical reason to do so. And several states moved to restrict insurance coverage of abortion, with Kansas, Nebraska, Oklahoma and Utah restricting all private plans and Florida, Idaho, Indiana and Virginia limiting coverage just in the policies that will be available on insurance exchanges, which are slated to start up in 2014 under health reform.

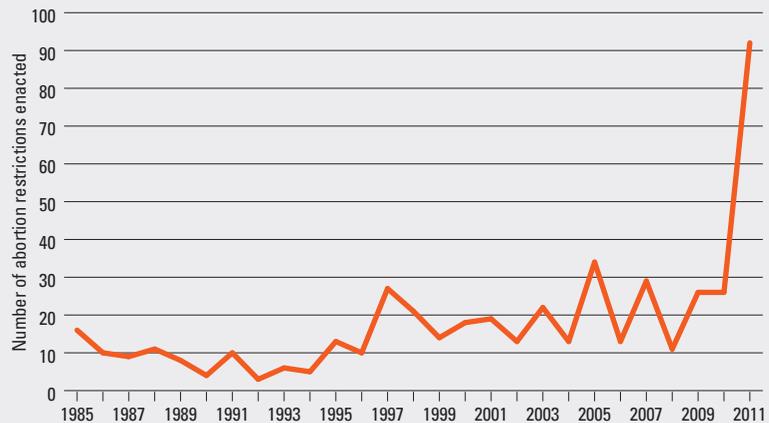
South Dakota, meanwhile, expanded its counseling and waiting period requirement in several ways—making it the most onerous law in the nation. It forces providers to inform patients that some groups of women (based on their “physical, psychological, demographic or situational” characteristics) may be at higher risk of complications. In addition, it lengthened the waiting period

from 24 to 72 hours and required the woman to make a visit to a state-approved crisis pregnancy center during that interval. And, it required the woman to obtain the counseling in person, necessitating two separate trips to the facility—a potentially insurmountable obstacle to obtaining an abortion in a geographically large state that has only one abortion provider who comes in from another state to provide services only one day a week. The measure was quickly enjoined in federal court and is not in effect.

Finally, the most high-profile fight over abortion in 2011 came not in a legislature but at the ballot box, when voters in Mississippi defeated an initiative that would have restricted women's access to both abortion and contraception by defining the term “person” under the state constitution as “every human being from the moment of fertilization.”

SIMPLY UNPRECEDENTED

States enacted 92 provisions restricting abortion in 2011, nearly triple the previous record of 34 in 2005.



Note: This analysis refers to reproductive health and rights-related “provisions,” rather than bills or laws, since bills introduced and eventually enacted in the states may contain multiple relevant provisions. Source: Reference 1.

middle-ground in 2000 had become hostile to abortion rights by 2011.

As a result, the number of both supportive and middle-ground states shrank considerably, while the number of hostile states ballooned. In 2000, 19 states were middle-ground and only 13 were hostile. By 2011, when states enacted a record-breaking number of new abortion restrictions (see box), that picture had shifted dramatically: 26 states were hostile to abortion rights, and the number of middle-ground states had cut in half, to nine.

Although states on the West Coast and in the Northeast remained consistently supportive of abortion rights, the situation was very different elsewhere. A cluster of states in the middle of the country—including Idaho, Indiana, Kansas, Nebraska and South Dakota—moved from being middle-ground states in 2000 to being hostile in 2011. And of the 13 states in the South, only half were hostile in 2000, but all had become hostile by 2011.

Over a third of women of reproductive age lived in states supportive of abortion rights in both 2000 and 2011, 40% and 35%, respectively (see chart, page 18).² However, the proportion of women living in states hostile to abortion rights increased dramatically, from 31% to 55%, while the proportion living in middle-ground states shrank, from 29% to 10%. Altogether, the number of women of reproductive age living in hostile states grew by 15 million over the period, while the number in middle-ground states fell by almost 12 million.

The group of states supportive of abortion rights has been the most consistent of the three clusters, with a core of 15 states that have been part of this group throughout. Nonetheless, this group decreased from 18 to 15 from 2000 to 2011. Arizona moved from supportive to hostile, almost entirely because of the departure of Gov. Janet Napolitano (D), who repeatedly vetoed provisions to limit abortion access, including bills that would have instituted state-directed counseling, mandated a waiting period and made it more difficult for a minor to obtain an

abortion. Since her departure in 2009, the state went from having provisions in one restriction category in 2005 to having provisions in five in 2011. The other two states that had previously been supportive of abortion rights—Alaska and Minnesota—have become middle-ground states. Notably, eight of the states that have remained supportive of abortion rights (California, Connecticut, Hawaii, New Jersey, New Mexico, Oregon, Vermont and Washington) have adopted none of the types of abortion restrictions included in this analysis.

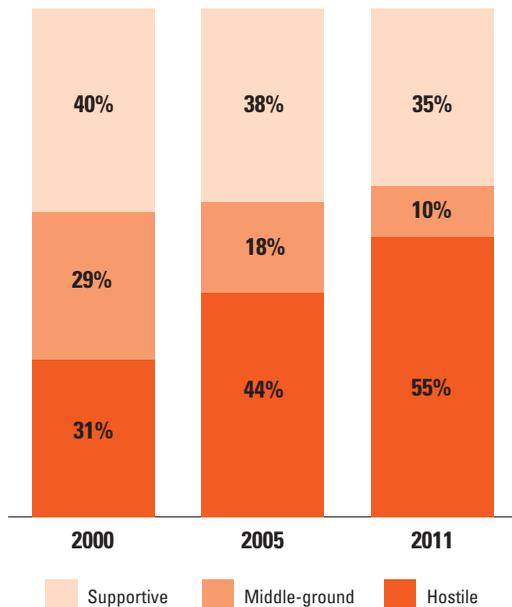
The cohort of states hostile to abortion rights doubled over this same decade. Six states (Indiana, Kansas, Louisiana, Missouri, Oklahoma and Utah) tie for the dubious distinction of “winner,” each having enacted provisions in seven restriction categories; another six states (Florida, Mississippi, Nebraska, North Dakota, Ohio and South Dakota) follow close behind, with provisions in six restriction categories each. The slide to hostile was especially precipitous in Kansas (again, likely reflecting the departure of Gov. Kathleen Sebelius (D) in 2009 who, like Napolitano, stood as a bulwark against antiabortion gains) and Oklahoma, both of which are now among the states most hostile to abortion rights.

Thirteen of the 26 states hostile to abortion rights have been consistently so over the period. An additional six had moved into this category by 2005 and remained there in 2011. But seven states (Arizona, Idaho, Kansas, Nebraska, North Carolina, Oklahoma and Tennessee) moved into this category just since 2005.

As a group, the states hostile to abortion rights were responsible for nearly all of the abortion restrictions enacted in 2011. They include all of the states that in one way or another limited private insurance coverage of abortion, mandated either ultrasound or inaccurate counseling, or restricted the provision of medication abortion. They also include all the states that enacted measures to ban abortion beginning at the “postfertilization age” of 20 weeks. (Medically, the length of a pregnancy is measured in weeks from the estimated first day of the woman’s last menstrual period (LMP); accordingly, measures

BIG SHIFT FOR WOMEN

By 2011, more than half of women of reproductive age (15–44) were living in states that were hostile to abortion, up from less than one-third in 2000.



Source: Reference 2.

banning abortion at or after 20 weeks “postfertilization” would ban abortion at or after 22 weeks LMP.)

In the group of middle-ground states, the sharp erosion has been particularly striking. In 2000, this was the largest cohort, comprising 19 states. By 2005, it had shrunk to 14 and was down to only nine in 2011. All of the states departing this category moved to the group of states hostile to abortion rights, with about half moving by 2005 and the remaining by 2011.

Implications for Advocates

Looking at state abortion policy going forward, the cluster of middle-ground states seems at once particularly precarious and pivotal. In fact, it was the movement of 12 middle-ground states into to the hostile category that tipped the national balance from 2000 to 2011. Shoring up the states remaining in this group may thus be key to stopping the further erosion of abortion rights.

There is no dearth of abortion restrictions proposed in the middle-ground states. In fact, 39 bills that fit into the restriction categories included in this analysis were introduced in 2011 in these states, and another 43 were introduced in just the first six weeks of 2012. But what is somewhat remarkable is the success supporters of reproductive rights in these states have had in blocking or blunting these attacks. For example, a 2011 move to expand Delaware’s parental involvement requirement was defeated by a committee in the House. In addition, onerous restrictions on abortion facilities adopted by the Senate were modified by the House, so that the measure finally signed into law set medically appropriate requirements for all outpatient surgical facilities, not just for those where abortions are performed.

Similarly, in Iowa, abortion opponents introduced fully 15 measures aimed at limiting access to abortion in 2011. At the end of the day, however, only two—a tightening of the state’s public funding policy and a requirement that providers give women the option to have an ultrasound prior to an abortion—became law. A measure that would have placed new requirements on physicians who perform abortions later in pregnancy passed the Senate only to languish in the House. And in the most high-profile of the debates, the Senate refused to even hold a vote on a House-passed measure that would have banned abortions at or beyond 20 weeks’ gestation.

At the same time, middle-ground states are grappling not only with abortion but also with a range of other sexual and reproductive health issues. And, like states supportive of abortion rights—but in sharp contrast to states hostile to abortion rights—middle-ground states are making some noteworthy progress. For example, in just the past four years, Colorado has mandated coverage of contraceptive services and supplies in insurance policies, expanded access to emergency contraception and moved to ensure that students receive comprehensive and medically accurate sex education. Wisconsin has expanded access to comprehensive sex education, authorized health care providers to provide

STI treatment for a patient's partner and, along with Iowa, expanded access to family planning services under Medicaid.

This is not to say that the relatively stable group of states long supportive of abortion rights can be ignored. Every year, they must fend off opponents' attempts to erode access to care—and, in fact, three such states did move into the middle-ground or hostile categories between 2000 and 2011. But what may be more significant is that these states are the most capable of pushing the political envelope. For example, in the opening weeks of Washington State's 2012 legislative session, a bill passed the House that would require private insurance plans that cover maternity care to also provide abortion coverage, unless the

purchaser of the health plan opts out of the coverage. Still, it is equally true that the case for a serious investment of time and resources to prevent further erosion of the critical cluster of middle-ground states—preserving their ability to fend off attacks on abortion rights and make significant proactive progress on a range of other sexual and reproductive health issues—is abundantly clear and compelling.

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