

THE UNCONSTITUTIONALITY OF OHIO’S HOUSE BILL 125: THE HEARTBEAT BILL AS ANALYZED UNDER THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

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I. INTRODUCTION

Pro-life legislation was at the forefront of Ohio’s political agenda for 2011. With newly elected Republican governor John Kasich,¹ a Republican-dominated Ohio House of Representatives,² and a Republican-dominated Ohio Senate,³ several pro-life bills have been considered, debated, and ultimately enacted into law by the Ohio Legislature. These laws have progressively chipped away at a woman’s

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1. *About: John R. Kasich Governor of Ohio*, OHIO.GOV (last visited Sept. 16, 2012), <http://governor.ohio.gov/About/GovernorKasich.aspx>.

2. *Members Displayed by Name*, WELCOME TO THE OHIO HOUSE OF REPRESENTATIVES, OF THE 129TH GENERAL ASSEMBLY (last visited Sept. 16, 2012), http://www.house.state.oh.us/index.php?option=com_displaymembers&Itemid=57.

3. *The Ohio Senate*, THE 129TH GENERAL ASSEMBLY, OHIO SENATE MEMBERS (Sept. 16, 2012) <http://www.ohiosenate.gov/directory.html>.

right to an abortion under the Fourteenth Amendment to the United States Constitution.⁴

Perhaps the most controversial piece of pro-life legislation introduced in 2011 was Ohio's House Bill 125 ("H.B. 125"),⁵ commonly referred to as "The Heartbeat Bill."⁶ If passed into law, H.B. 125 would require physicians to check the fetus of a pregnant woman for a "heartbeat."⁷ If the fetus had any detectable cardiac activity, the physician would be required to inform the woman in writing, and the woman would be required to sign a form acknowledging the fetal cardiac activity.⁸ Additionally, if the fetus is found to have cardiac

4. For example, H.B. 78/S.B. 72, The Viable Infants Protection Act, prohibits an abortion after twenty weeks if the physician determines that the fetus is "viable." S.B. 72, 129th Gen. Assemb., Reg. Sess. (Ohio 2011) (enacted).

H.B. 298/S.B. 201 re-prioritizes federal family planning dollars distributed to state health centers that promote "family planning services." This bill has the practical effect of allocating federal funds to organizations like Planned Parenthood last. See H.B. 298/S.B. 201, 129th Gen. Assemb., Reg. Sess. (Ohio 2011) (enacted). See also *Defund Planned Parenthood*, OHIO RIGHT TO LIFE, <http://www.ohiolife.org/defund-planned-parenthood/> (last visited Sept. 16, 2012).

H.B. 153, signed into law in 2011, bans the performance of abortions in public hospitals and prohibits abortion coverage in insurance plans for public employees. It also requires the Ohio Department of Health to apply for federal abstinence education grants. See Am. Sub. H.B. 123, 129th Gen. Assemb., Reg. Sess. (Ohio 2011) (enacted), available at http://www.legislature.state.oh.us/BillText129/129_HB_153_EN_N.html. For final analysis, see STAFF OF OHIO LEGIS. SERV. COMM., 129TH GEN. ASSEMB., REG. SESS., FINAL ANALYSIS (Comm. Print 2011), available at <http://www.lsc.state.oh.us/analyses129/11-hb153-129.pdf>.

5. Am. Sub. H.B. 125, 129th Gen. Assemb., Reg. Sess. (Ohio 2011), available at http://www.legislature.state.oh.us/BillText129/129_HB_125_PH_Y.pdf.

6. See *Heartbeat Bill*, HEARTBEATBILL.COM, <http://www.heartbeatbill.com> (last visited Sept. 22, 2012) ("We invite you to participate in our most powerful lobbying effort yet—we are going over their heads—directly to God!"); Aaron Marshall, *Ohio Senate Republicans Plan to Move 'Heartbeat' Bill*, CLEVELAND.COM (Nov. 25, 2011, 7:25 PM), http://www.cleveland.com/open/index.ssf/2011/11/senate_republicans_planning_to.html; Darrel Rowland, *Ohio Voters Evenly Split on 'Heartbeat Bill,'* THE COLUMBUS DISPATCH (Jan. 19, 2012, 2:08 PM), available at <http://www.dispatch.com/content/stories/local/2012/01/19/quinnipiac-poll-heartbeat-bill-fracking.html>.

7. H.B. 125 (enacting OHIO REV. CODE § 2919.19(B)(2)) ("'Fetal heartbeat' means cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac . . . (C)(1) Except when a medical emergency exists that prevents compliance with this division, no person shall perform an abortion on a pregnant woman prior to determining if the fetus the pregnant woman is carrying has a detectable fetal heartbeat.").

8. *Id.* (enacting OHIO REV. CODE § 2919.19(D)(2)) ("If the person who intends to perform an abortion on a pregnant woman detects a fetal heartbeat in the unborn human individual that the pregnant woman is carrying, no later than twenty-four hours prior to the performance of the intended abortion, both of the following apply: (a) The person intending to perform the abortion shall inform the pregnant woman in writing that the unborn human individual that the pregnant woman is carrying has a fetal heartbeat and shall inform the pregnant woman. . .to the best of the person's knowledge . . . the statistical probability of bringing the unborn human individual to

activity, the woman would be banned from having an abortion unless it was a medical emergency.⁹

H.B. 125 does not have a rape exception, which means that a woman who conceived through violence would be required to proceed to term as long as the fetus was older than just a few weeks.¹⁰ H.B. 125 also subjects physicians to discipline if they neglect to determine whether the fetus has detectable cardiac activity.¹¹ Naturally, the introduction of such a controversial bill attracted local and national media attention.¹²

Although H.B. 125 poses significant Fourteenth Amendment problems in light of bedrock Supreme Court precedent such as *Roe v. Wade*¹³ and *Planned Parenthood v. Casey*,¹⁴ this Comment analyzes how H.B. 125 violates the Establishment Clause of the First Amendment to the U.S. Constitution.

term . . . (b) The pregnant woman shall sign a form acknowledging that the pregnant woman has received information from the person intending to perform the abortion that the unborn human individual that the pregnant woman is carrying has a fetal heartbeat . . .”).

9. *Id.* (enacting OHIO REV. CODE § 2919.19(C)(1)) (“Except when a medical emergency exists that prevents compliance with this division, no person shall perform an abortion on a pregnant woman prior to determining if the fetus of the pregnant woman is carrying a detectable fetal heartbeat. Any person who performs an abortion on a pregnant woman based on the exception in this division shall note in the pregnant woman’s medical records that a medical emergency necessitating the abortion existed.”).

9. *Id.* (enacting OHIO REV. CODE § 2919.19(A)(6)) (“Cardiac activity means a biologically indefinable moment in time, normally when the fetal heartbeat is formed in the gestational sac.”).

10. *Id.* See also Al Gerhardstein, *Opposition Testimony to HB 125*, PLANNED PARENTHOOD ADVOCATES OF OHIO (Mar. 9, 2011), http://www.ppao.org/Legislation/129th/HB125/HB125_Gerhardstein.pdf.

11. H.B. 125 (enacting OHIO REV. CODE § 2919.19(C)(4)) (“If a physician performs an abortion on a pregnant woman prior to determining if the fetus the pregnant woman is carrying has a detectable fetal heartbeat, the physician is subject to disciplinary action . . .”).

12. See Catherine Candisky, *Ohio House Approves Anti-Abortion Bills*, THE COLUMBUS DISPATCH (June 28, 2011), <http://www.dispatch.com/content/stories/local/2011/06/28/ohio-house-approves-heartbeat-bill.html>; Stephanie Condon, *Abortion battles spring up nationwide as states test the limits of Roe v. Wade*, CBSNEWS (Mar. 21, 2011, 5:00 AM), http://www.cbsnews.com/8301-503544_162-20044823-503544.html; Erik Eckholm, *Anti-Abortion Groups Are Split on Legal Tactics*, N.Y. TIMES (Dec. 4, 2011), http://www.nytimes.com/2011/12/05/health/policy/fetal-heartbeat-bill-splits-anti-abortion-forces.html?pagewanted=all&_moc.semityn.www; Ann Sander, *Abortion Foes Push Fetal Heartbeat Bills in States*, MSNBC (Oct. 12, 2011, 3:31:17 PM), http://www.msnbc.msn.com/id/44879242/ns/politics-more_politics/t/abortion-foes-push-fetal-heartbeat-bills-states/UFaPc45wa20.

13. *Roe v. Wade*, 410 U.S. 113 (1973).

14. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

II. LEGAL LANDSCAPE FOR ABORTION IN OHIO AND UNDER THE FOURTEENTH AMENDMENT

Abortion in Ohio is defined as “the purposeful termination of a human pregnancy by any person, including the pregnant woman herself, with an intention other than to produce a live birth or to remove a dead fetus or embryo.”¹⁵ Absent certain exceptions, after a fetus is viable, abortion procedures are prohibited.¹⁶ And generally after twenty weeks, abortions are prohibited.¹⁷

In an effort to ensure a woman’s choice to have an abortion is informed, Ohio also mandates a specified waiting period for women seeking to have an abortion and requires dissemination of certain information prior to having the procedure. These laws are frequently dubbed “informed consent provisions.”¹⁸ Ohio, and particularly the City of Akron, has been the catalyst for many of the nation’s informed consent provisions.

In 1983, *City of Akron v. Akron Center for Reproductive Health*¹⁹ examined the constitutionality of ordinances designed to prevent a woman from obtaining an abortion absent the recognition of certain information.²⁰ The ordinances mandated that an abortion could only be performed in a hospital setting; required a pregnant woman to wait twenty-four hours prior to having an abortion to deliberate over the decision; required the physician to inform the woman about the development of the fetus, the status of her pregnancy, and physical and emotional complications that may result from pregnancy; and required the physician to give the woman a list of agencies that could assist with adoption and childbirth.²¹ The City of Akron presented two arguments: (1) providing a woman with this information was part of the “informed

15. OHIO REV. CODE ANN. § 2919.11 (West 2012).

16. *Id.* § 2919.17(A).

17. *Id.* § 2919.18(A)(1).

18. Christine L. Raffaele, *Validity of State “Informed Consent” Statutes by Which Providers of Abortions Are Required to Provide Patient Seeking Abortion with Certain Information*, 119 A.L.R.5th 315 (2004).

19. 462 U.S. 416 (1983), *overruled by Casey*, 505 U.S. at 833.

20. *Id.* at 421-23.

21. *Id.* Just four years previously, the United States District Court for the Northern District of Ohio found these Akron ordinances unconstitutional in *Akron Center for Reproductive Health v. City of Akron*, 479 F.Supp 1172 (N.D. Ohio 1979). The district court held unconstitutional the “truly informed consent” provisions of the ordinance, which required the physician to give the pregnant woman a detailed description of the “anatomical and physiological characteristics of the particular unborn child . . .” *Id.* at 1203. The court reasoned that this provision violated the woman’s right to privacy and went “far beyond what is permissible in pursuance of [the State’s] interest.” *Id.*

consent” process because it made her decision to have an abortion more informed, and (2) these ordinances protected the life of the woman.²²

Although the U.S. Supreme Court struck down Akron’s ordinances as unconstitutional,²³ the Court reconsidered similar ordinances in *Planned Parenthood v. Casey*, finding some informed consent provisions constitutional.²⁴ In *Casey*, a twenty-four hour waiting period²⁵ and a statute that required the pregnant woman to receive certain information, including information about adoption and childbirth, were upheld as constitutional.²⁶ Since *Casey*, Ohio has enacted many informed consent provisions designed to “ensure that the woman’s choice is informed” and “designed to . . . persuade the woman to choose childbirth over abortion.”²⁷ After the Court’s decision in *Casey*, Ohio immediately enacted a law requiring the same twenty-four hour waiting period originally at issue in *Akron Reproductive Health*.

In addition to the twenty-four hour waiting period, Ohio has introduced other measures to ensure a woman’s choice is “informed” or “persuaded.”²⁸ Ohio mandates that a pregnant woman receive certain information designed to affect her abortion decision. For example, the woman must receive materials that include information designed to discourage her from having an abortion and to encourage her to pursue “family planning.”²⁹ Furthermore, since *Akron Reproductive Health* and *Casey*, States have found new methods to ensure informed consent prior to an abortion, such as requiring an ultrasound procedure.³⁰ Ultrasounds are commonly used during pregnancy to examine the health of the fetus

22. *Akron Ctr. Reprod. Health*, 462 U.S. at 442.

23. *Id.* at 421-23.

24. *See* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881 (1992). *See also* TRACY A. THOMAS, *JUSTICE & LEGAL CHANGE ON THE SHORES OF LAKE ERIE: A HISTORY OF THE UNITED STATES DISTRICT FOR THE DISTRICT OF OHIO 179-184* (Paul Finkelman & Roberta Alexander, eds., 2012).

25. *Casey*, 505 U.S. at 885.

26. *Id.* at 881.

27. *Id.* at 878. *See also* Jennifer Y. Seo, *Raising the Standard of Abortion Informed Consent: Lessons to Be Learned from the Ethical and Legal Requirements for Consent to Medical Experimentation*, 21 COLUM. J. GENDER & L. 357, 359-60 (2011) (arguing that informed consent provisions constitute informational manipulation).

28. *See Casey*, 505 U.S. at 878.

29. OHIO REV. CODE ANN. § 2317.56(C) (West 2012). The information that the State is required to give “describe[s] the embryo or fetus” and “list[s] agencies that offer alternatives to abortion.” *Id.* Additionally, this information must be provided in-person and must take place before the twenty-four hour waiting period begins. *Id.*

30. *See* Carol Sanger, *Seeing is Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351 (2008) (arguing that the use of ultrasounds has become a mechanism in the law to deter women from having abortions).

and to provide a physical image of it.³¹ Ohio enacted its ultrasound statute in 2008.³² Now H.B. 125 seeks to push the informed consent provisions even further.

Under current Supreme Court precedent, Ohio's H.B. 125 implicates serious Fourteenth Amendment issues. *Roe v. Wade* held that a woman had the right to have an abortion during the first trimester of her pregnancy and that this right derived from her privacy right embedded in the Fourteenth Amendment.³³ The Supreme Court then used *Casey* to transform the *Roe v. Wade* trimester analysis into a fetal viability analysis, implementing an "undue burden" standard. Under *Casey*, an abortion statute is unconstitutional if it seeks to place an undue burden in the path of a woman seeking an abortion.³⁴ An undue burden is "a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."³⁵

Because H.B. 125 seeks to regulate abortion according to cardiac activity, which can occur as early as five to six weeks after conception,³⁶ it would be regulating abortion prior to fetal viability.³⁷ H.B. 125, therefore, is subject to the undue burden analysis under *Casey*.³⁸ According to the undue burden test, since H.B. 125 places a substantial obstacle in the path of a woman seeking an abortion prior to viability, it would be unconstitutional.³⁹ But in addition to its clear Fourteenth Amendment concerns, H.B. 125 also implicates problems under the Establishment Clause of the First Amendment.⁴⁰

III. H.B. 125 VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST

31. *Definition of Pregnancy Ultrasound*, MEDICINENET (Sept. 20, 2012), <http://www.medterms.com/script/main/art.asp?articlekey=9509>.

32. OHIO REV. CODE ANN. § 2317.561 (West 2012).

33. *Roe v. Wade*, 410 U.S. at 153-163. The Court also listed previous cases that guaranteed certain areas or zones of privacy from the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. *Id.* at 152-53.

34. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

35. *Id.* at 877-78.

36. *See Concerns Regarding Early Fetal Development*, AM. PREGNANCY ASSOC. (Sept. 2008), <http://www.americanpregnancy.org/pregnancycomplications/earlyfetaldevelopment.htm>. Five and a half to six and a half weeks after conception is usually a very good time to detect either a fetal pole or even a fetal heartbeat by vaginal ultrasound. *Id.*

37. Am. Sub. H.B. 125, 129th Gen. Assemb., Reg. Sess. (Ohio 2011), *available at* http://www.legislature.state.oh.us/BillText129/129_HB_125_PH_Y.pdf.

38. *See Casey*, 505 U.S. at 878.

39. *See id.*

40. *See Martha A. Field, Abortion and the First Amendment*, 29 U.C. DAVIS L. REV. 545, 551 (1996) (acknowledging that the Establishment Clause of the First Amendment can provide a foundation for access to abortion).

AMENDMENT

The First Amendment to the U.S. Constitution prohibits Congress and the States from, *inter alia*, passing laws that establish a national religion or prefer one religion to another.⁴¹ The focus of the Establishment Clause is neutrality,⁴² and some members of the Supreme Court have asserted that this neutrality should take the form of a “wall of separation between church and State.”⁴³

Opponents to H.B. 125 believe that the bill would impute religious principles on Ohioans by valuing the potential life of a fetus above the life of the mother⁴⁴ and by determining when a fetus becomes a person.⁴⁵ The determination of when a fetus becomes a person implicates religious values both for people that believe life begins after cardiac activity and for people that believe life begins at the moment of conception. While other First Amendment concerns arise in the abortion context,⁴⁶ this Comment focuses on Supreme Court precedent addressing

41. U.S. CONT. amend. I. See Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104, 1104-10, 1119-26 (1979), available at <http://scholarship.law.berkeley.edu/californialawreview/vol67/iss5/2> (arguing that the First Amendment should be construed to prohibit government establishment of particular political ideology).

42. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

43. *March v. Chambers*, 463 U.S. 783, 802 (1983) (Brennan, J., dissenting).

44. See *Testimony to the Health & Aging Committee: Hearing on H.B.125 before the Ohio House of Representatives*, 112th Cong., 1st Sess. (2011) (statement of Rabbi Emily Rosenzweig, Ohio Religious Coalition for Reproductive Choice), available at http://www.ppao.org/Legislation/129th/HB125/HB125_Rosenzweig.pdf; *Opposition Testimony to the Health & Aging Committee: Hearing on H.B.125 before the Ohio House of Representatives*, 112th Cong., 1st Sess. (2011) (statement of Allan Debelak, Pastor of Redeemer Lutheran Church in Columbus), available at http://ppao.org/Legislation/129th/HB125/HB125_Debelak.pdf.

45. See *Testimony—Ohio: to H.B. 125: Senate Health, Human Services, and Aging Committee in Opposition to H.B. 125*, 112th Cong., 1st Sess. (2011) (statement of Pastor David Meredith, Broad St. United Methodist Church), available at http://ppao.org/Legislation/129th/HB125/HB125_Meredith_121311.pdf.

46. See *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 830-31 (1986), overruled by *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (briefly addressing whether compelled speech on behalf of physicians violated the First Amendment); *Rust v. Sullivan*, 500 U.S. 173, 174 (1991) (holding that regulations prohibiting abortion as a method of family planning in counseling do not violate First Amendment free speech rights by impermissibly imposing viewpoint-discriminatory conditions by Government subsidies); 1 AM. JUR. 2D *Abortion and Birth Control* § 79 (2012).

Another unreported effect of anti-abortion legislation is the effect it has on doctors willing to enter into the profession. Lydia Strauss, the Supervisor of Support Services for Capital Care Women's Center in Ohio, in a live interview explained that the lack of physicians willing to perform abortions will be an epidemic soon. Interview with Lydia Strauss, Supervisor of Support Services for Capital Care Women's Center in Ohio (Dec. 6, 2011). Regardless of whether proposed pro-life legislation actually passes, it contributes to the overall body of media hype regarding abortions and deters physicians

the establishment of religion by the state through its abortion laws and how that precedent affects H.B 125.

In a series of cases addressing funding for abortion through state and federal medical plans, the Supreme Court routinely dismissed alleged Establishment Clause violations. In *Maher v. Roe*,⁴⁷ the Supreme Court upheld a Connecticut welfare regulation under which Medicaid recipients received payments for medical services related to childbirth but not for therapeutic abortions.⁴⁸ The Supreme Court reasoned that unequal subsidization was permissible under *Roe v. Wade* because the regulations did not place any obstacles in a pregnant woman's path to an abortion.⁴⁹ While the regulations may have effectuated Connecticut's views on abortion, the regulations themselves did not impose a restriction on access to abortion.⁵⁰

In *Poelker v. Doe*,⁵¹ the Supreme Court found no constitutional violation when the City of St. Louis decided as matter of policy to only provide hospital services for childbirth and not for abortions in the public hospital setting.⁵² More recently in *Harris v. McRae*,⁵³ the Court considered whether an amendment to the Social Security Act violated the First Amendment.⁵⁴ The amendment prohibited the use of federal funds to reimburse people for abortions sought under Medicaid, absent some exceptions.⁵⁵ Plaintiffs challenging the amendment argued that it violated the Establishment Clause of the First Amendment because it incorporated views of the Roman Catholic Church about the sinfulness of abortion and the time at which life begins.⁵⁶ The plaintiffs also argued that the amendment violated the Free Exercise Clause by preventing a woman from having an abortion as an exercise of her religious beliefs under Protestant or Jewish faiths.⁵⁷

from entering the profession because of its controversy. *Id.* Ms. Straus stated that all of the abortion-providing physicians she works with in Ohio are older and seeking to retire soon, but there are no newer physicians that are willing to enter the practice. *Id.* Based upon Ms. Straus's experience in the field, she believes that even if abortion remains legal in Ohio prior to viability, the lack of physicians willing to perform the procedure will be an epidemic soon. *Id.*

47. *Maher v. Roe*, 432 U.S. 464 (1977).

48. *Id.*

49. *Id.* at 474.

50. *Id.*

51. *Poelker v. Doe*, 432 U.S. 519 (1977).

52. *Id.* at 521.

53. *Harris v. McRae*, 448 U.S. 297 (1980).

54. *Id.* at 302-311.

55. *Id.* at 302.

56. *Id.* at 318-319.

57. *Id.* at 311-19.

Without conducting a lengthy analysis, the Supreme Court dismissed the First Amendment claims in *Harris*, reasoning that a statute does not violate the First Amendment simply because “it happens to coincide or harmonize with the tenets of some or all religions.”⁵⁸ To illustrate its point, the Court reasoned “that [although] the Judeo-Christian religions oppose stealing [that] does not mean that a State . . . may not, consistent with the Establishment Clause, enact laws prohibiting larceny.”⁵⁹ The Court then categorized the amendment as a “reflection of traditionalist values towards abortion”⁶⁰ which, without more, did not violate the Establishment Clause.⁶¹

Maher, Poelker, and *Harris* demonstrate how the Supreme Court has rejected Establishment Clause and Free Exercise Clause arguments against antiabortion laws despite the role of religion in the abortion debate.⁶² However, H.B. 125’s religious concerns are distinguishable from the laws at issue in *Maher, Poelker*, and *Harris* because H.B. 125 directly places an obstacle in the path of a woman seeking an abortion. The Court in *Maher*, for example, upheld a restriction on funding for abortion, reasoning that, although funding allocation affected abortion, the funding itself did not place an obstacle in the path of a woman seeking an abortion.⁶³ H.B. 125, however, not only places an obstacle in the path of a woman seeking an abortion, but it also seeks to make the decision for the woman.⁶⁴

Establishment of religion concerns were also briefly touched upon in *Roe v. Wade* and *Casey*. *Roe v. Wade* recognized that abortion must be a constitutional issue:

One’s philosophy, one’s experiences, one’s exposure to the raw edges of human existence, one’s religious training, one’s attitudes toward life and family and their values, and the moral standards one establishes

58. *Id.* at 319 (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)). *See also* *Crossen v. Breckenridge*, 446 F.2d 833, 840 (6th Cir. 1971) (declining to address the argument that an abortion law “violates the establishment clause . . . in that it enacts as law the religious beliefs of certain groups not held by other persons.”).

59. *Harris*, 448 U.S. at 319.

60. *Id.*

61. *Id.* at 319-20.

62. *See* John Morton Cummings Jr., *The State, the Stork, and the Wall: The Establishment Clause and Statutory Abortion Regulation*, 39 CATH. U. L. REV. 1191, 1217-1218 (1990); David R. Dow, *The Establishment Clause Argument for Choice*, 20 GOLDEN GATE U. L. REV. 479, 479 (1990).

63. *Maher v. Roe*, 432 U.S. 464, 464 (1977).

64. *But see* Scott C. Idleman, *Religious Premises, Legislative Judgments, and the Establishment Clause*, 12 CORNELL J.L. & PUB. POL’Y 1, 6 (2002) (arguing that laws informed by religious moral premises generally do not, by that fact alone, violate the First Amendment).

and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection.⁶⁵

Additionally, *Casey* recognized that people will always disagree about the “profound moral and spiritual implications of terminating a pregnancy” and recognized that “[s]ome of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision.”⁶⁶ The Court went on to state again that abortion is a constitutional, not a religious, issue.⁶⁷ The Court also recognized that the only religious aspect that should be involved in the abortion decision is the woman's own spirituality.⁶⁸

Opponents to H.B. 125 believe the bill violates the First Amendment because it effectively values the life of the fetus as coequal with or above the life of the mother, a valuation inconsistent with the religious beliefs of many people.⁶⁹ Jewish Rabbi Emily Rosenzweig, for example, has argued that H.B. 125 directly opposes the Jewish faith by valuing the potentiality of the fetus above the health and welfare of an already-living woman.⁷⁰ In the Jewish faith, Exodus 21:22-23 distinguishes the legal status of the fetus as less than that of the pregnant woman by assigning a financial penalty for the death of the fetus but a capital penalty for the death of the woman.⁷¹ According to Jewish Babylonian Talmud, Chullin 58a, rabbis are taught that the fetus is the thigh of its mother. The pregnant woman is the person, and the fetus is part of her body.⁷² Because H.B. 125 seeks to prevent a woman from having an abortion after the detection of cardiac activity absent only a medical emergency, it therefore equates the value of the woman's life

65. *Roe v. Wade*, 410 U.S. 113, 116 (1973).

66. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992).

67. *Id.* (“Our obligation is to define the liberty of all, not to mandate our own moral code.”).

68. *Id.* at 852 (“The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.”).

69. *See, e.g.*, Brief of Amici Curiae of Religious Coalition for Reprod. Choice et al. in Support of Respondent at 10, 21, *Stenberg v. Carhart*, 530 U.S. 914 (2000) (No. 99-830) (arguing that Nebraska's statute banning partial-birth abortion “has unconstitutionally imbedded into law certain religious beliefs over others” though framing the legal issue as one of “individual conscience”).

70. Rosenzweig, *supra* note 44.

71. *Id.* (citing *Exodus* 21:22-23 (“If people are fighting and hit a pregnant woman and she gives birth prematurely but there is no serious injury, the offender must be fined whatever the woman's husband demands and the court allows. But if there is serious injury, you are to take life for life”)).

72. Rosenzweig, *supra* note 44.

with the fetus, directly contradicting Jewish beliefs.

Some followers of Christian-based faiths also believe H.B. 125 encroaches on their religious beliefs and therefore violates the Establish Clause. For example, Methodist Pastor David Meredith provided opposition testimony on behalf of Methodists and does not support H.B. 125.⁷³ The Book of Discipline of the United Methodist Church requires Methodists to respect the life of the mother who may be severely damaged from an unacceptable pregnancy.⁷⁴ Some members of the United Church of Christ are similarly opposed to H.B. 125 because it contradicts The Sixteenth General Synod of the United Church of Christ, which “uphold[s] the right of men and women to have access to adequately funded family planning services, and to safe, legal abortions as one option among others.”⁷⁵ By prohibiting women from accessing these services, H.B. 125 would establish the parameters by which some Christians practice their faith in the abortion context.

Pastor Allan Debelak of Redeemer Lutheran Church in Columbus, Ohio stated that the “sanctity of life” has so many meanings to the various Christian faiths. To Lutherans the “sanctity of life” means considering more “than the state of the fetus.”⁷⁶ Reverend Robert Molsberry, the Conference Minister for the Ohio Conference of the United Church of Christ, perhaps sums up many of these Christian opponents’ views best by stating, “House Bill 125 reflects an extreme expression of Christianity that even I, a faithful, practicing Christian, would find oppressive if it were to be enacted into law.”⁷⁷

The specific language used in H.B. 125 suggesting that the life of a fetus begins at a certain point in time also raises Establishment Clause concerns. Because America is home to many religions, religious diversity precludes a unanimous sectarian view of when life actually begins.⁷⁸ Reflecting on the Texas abortion laws that established life as

73. Meredith, *supra* note 45.

74. *Id.*

75. *Opposition Testimony to the Health & Aging Committee: Hearing on H.B. 125 before the Ohio Senate*, 112th Cong., 1st Sess. (2011) (statement of Reverend Robert Molsberry, Conference Minister for the Ohio Conference of the United Church of Christ), available at http://ppao.org/Legislation/129th/HB125/HB125_Molsberry121311.pdf.

76. Debelak, *supra* note 44.

77. Molsberry, *supra* note 75.

78. Brief Amicus Curiae for American Jewish Congress at 11-17, *Webster v. Reprod. Health Services*, 109 S. Ct. 3040 (1989) (No.88-605). Views regarding abortion defy unanimity, even within sects. *Id.* While many Roman Catholics reject abortion, some allow it under certain circumstances. *Id.* Baptists generally consider their opposition to abortion as non-binding. *Id.* The Episcopal Church continues to support a woman’s right to have an abortion, as do the Presbyterians, who focus on viability. *Id.* Many Protestant theologians maintain that life does not begin at

beginning at conception, Justice Harry Blackmun famously stated that the Court is not in a position to speculate on “the difficult question of when life begins” because not even those trained in medicine, philosophy, and theology are able to arrive at a consensus.⁷⁹ For this reason, the Court in *Roe v. Wade* and in *Casey* drew the line of constitutionality at fetal viability—because the precise determination as to when life begins is impossible to make in light of Americans’ varying religious views. Furthermore, the fetal viability line is a practical and legal line, not a religious line, and it allows States to prohibit abortions after viability because that is when the State’s interest in preserving life becomes compelling.⁸⁰ The Court in *Roe v. Wade* reasoned that viability is the appropriate demarcation because “the fetus then presumably has the capability of meaningful life outside the mother’s womb.”⁸¹

Although H.B. 125 does not attempt to redefine viability as the moment of detectable cardiac activity,⁸² it seeks to proscribe abortion at a point in time much earlier than viability as defined in *Roe v. Wade*. Some Christians take issue with this determination. For example, Pastor Meredith believes that abortion is consistent with Christian principles in certain situations and that H.B. 125 seeks to unconstitutionally espouse certain Christian religious principles on others by making a blanket determination for all persons as to when life begins.⁸³ This determination also affects persons on the opposite side of the spectrum, including religious pro-life groups, who believe that life begins prior to detectable cardiac activity and prior to viability.

Ohio Right to Life (“ORTL”), Ohio’s largest and long-serving pro-life non-profit, is a religious group that believes a fetus is a person from the moment of conception and not from the point at which cardiac activity is detectable.⁸⁴ ORTL routinely works with elected officials to draft and pass laws advocating for the fetus’s right to life, arguing that “[t]he right to life is the most fundamental of all our liberties as Americans and as God’s creation.”⁸⁵ ORTL does not support H.B. 125

conception, as do many Jewish groups. *Id.*

79. *Roe v. Wade*, 410 U.S. 113, 159 (1973).

80. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 870 (1992); *Cummings Jr.*, *supra* note 62, at 1234-1237.

81. 410 U.S. at 163.

82. Am. Sub. H.B. 125, 129th Gen. Assemb., Reg. Sess. (Ohio 2011) (enacting OHIO REV. CODE § 2919.19(A)(5)).

83. Meredith, *supra* note 45.

84. *Ohio Right to Life Mission*, OHIO RIGHT TO LIFE, <http://www.ohiolife.org/mission-and-beliefs> (last visited Sept. 22, 2012).

85. *Ohio Right to Life Mission: “Who We Are Video,”* OHIO RIGHT TO LIFE, <http://www.ohiolife.org/about-us/> (last visited Oct. 16, 2012) (“The right to life is the most

in its current form because it is not a conception-based bill. If H.B. 125 were a consent-only bill, thus requiring the woman to only be informed about the presence of a fetal heartbeat, then the organization would support the bill because it is requiring the woman to make a decision regarding an abortion based upon all the available information.⁸⁶ However, ORTL's position for nearly forty years has been that life begins at the moment of conception, not weeks later when the heartbeat begins.⁸⁷ H.B. 125 therefore "represents a potential step backwards in the truth of the matter,"⁸⁸ and determining that a fetus is a person at the point of cardiac activity, rather than conception, encroaches upon ORTL's religious beliefs.⁸⁹ Therefore, H.B. 125 implicates religious concerns for people on both sides of the spectrum—those that believe life begins earlier than cardiac activity and those that believe life begins later than cardiac activity—by defining a precise point in time at which a woman cannot have an abortion.

The language in H.B. 125 referring to cardiac activity beginning at a biologically identifiable point in time also poses an Establishment Clause issue. The Supreme Court in *Webster v. Reproductive Health Services*⁹⁰ addressed similar language to that used in H.B. 125. In *Webster*, the Supreme Court considered the constitutionality of a series of Missouri state laws that sought to regulate abortion. The preamble to Missouri's law contained "findings" by the state legislature that "[t]he

fundamental of all our liberties as Americans and as God's creation," quote from Stephanie Krider, Ohio Right to Life Director of Legislative Affairs.).

86. Letter from Marshal M. Pitchford, Chairman, Bd. of Trustees & Political Action Comm. for Ohio Right to Life Society, to The Hon. Lynn Wachtmann, Chairman of the Health & Aging Comm., Ohio House of Representatives, at 3 (May 6, 2011), available at http://ppao.org/Legislation/129th/HB125/HB125_ORTL120711.pdf.

87. Letter from Marshal M. Pitchford, Chairman, Bd. of Trustees & Political Action Comm. for Ohio Right to Life Society, to Ohio Life Chapter Leaders, at 2 (Mar. 22, 2011), available at <http://www.ohiolife.org/storage/Affiliated%20Chapter%20Letter.pdf>.

88. *Id.*

89. ORTL has voiced other concerns regarding H.B. 125. *Id.* at 1-3. ORTL understands the current Supreme Court case law does not support the bill and believes that a specific legal protocol must be followed in order to overturn *Roe v. Wade* and *Casey*. *Id.* The organization believes that if their pro-life legislation is not well timed it will be held unconstitutional because ORTL recognizes that members of the Supreme Court greatly affect the legislation's success. *Id.* ORTL believes Justices Sotomayor and Kagan will not support the constitutionality of H.B. 125. *Id.* ORTL believes that if the Supreme Court is ready to hold constitutional a heartbeat bill, it is ready to hold constitutional a conception-based bill. *Id.* Additionally, ORTL fears more binding precedent reaffirming *Roe v. Wade* that ORTL and other pro-life supporters will have to overcome in the future. *Id.* Lastly, ORTL believes that defending H.B. 125 will exhaust much needed treasury money and will award thousands of Ohio taxpayer dollars to pro-choice organizations' attorneys, thus ultimately supporting abortion. *Id.*

90. *Webster v. Reprod. Health Services*, 492 U.S. 490 (1989).

life of each human being begins at conception” and that “unborn children have protectable interests in life, health, and well-being.”⁹¹ The Court of Appeals for the Eighth Circuit determined that Missouri’s declaration that life begins at conception was “simply an impermissible state adoption of theory of when life begins to justify its abortion regulations” and was therefore unconstitutional.⁹² However, the Supreme Court determined that this was not law because the language was in the statute’s preamble and merely expressed a “value judgment.”⁹³ Because the preamble language was a value judgment and because of federalism concerns, the Court concluded it was not empowered to decide “abstract propositions . . . for the government of future cases.”⁹⁴

In his dissenting opinion, Justice John Paul Stevens argued that absent a secular legislative declaration, the preamble violated the Establishment Clause.⁹⁵ The preamble, Justice Stevens continued, was an “unequivocal endorsement of a religious tenet of some but by no means all Christian faiths,” “serve[d] no identifiable secular purpose,” and espoused Roman Catholic beliefs.⁹⁶

H.B. 125’s first section contains similar language to the preamble language of the Missouri statutes in *Webster*. The first section of H.B. 125 concludes that “[c]ardiac activity begins at a biologically identifiable moment in time, normally when the fetal heart is formed in the gestational sac”⁹⁷ and later prohibits abortions after the detection of this cardiac activity.⁹⁸ Like the Missouri statutes, H.B. 125 makes a precise determination of exactly when life begins for all persons by prohibiting abortion after the determination of cardiac activity. The Supreme Court precedent in *Webster* suggests that this language may be

91. *Id.* at 501.

92. *Id.* at 503.

93. *Id.* at 506.

94. *Id.* at 506-07 (quoting *Tyler v. Judges of Court of Registration*, 179 U.S. 405, 409 (1900)).

95. *Id.* at 566 (Stevens, J., dissenting).

96. *Id.* at 566-569 (“As a secular matter, there is an obvious difference between the state interest in protecting the freshly fertilized egg and the state interest in protecting a 9-month-gestated, fully sentient fetus on the eve of birth. There can be no interest in protecting the newly fertilized egg from physical pain or mental anguish, because the capacity for such suffering does not yet exist; respecting a developed fetus, however, that interest is valid. In fact, if one prescind the theological concept of ensoulment . . . a State has no greater secular interest in protecting the potential life of an embryo that is still “seed” than in protecting the potential life of a sperm or an unfertilized ovum.”).

97. Am. Sub. H.B. 125, 129th Gen. Assemb., Reg. Sess. (Ohio 2011) (enacting OHIO REV. CODE § 2919.19(A)(6)).

98. *Id.* (enacting OHIO REV. CODE § 2919.19(C)(1)).

a value judgment. However, H.B. 125's language is not labeled as a "preamble" but instead is a part of the statute itself. In H.B. 125, the heading declares that the language underneath the section is based on "contemporary medical research," perhaps attempting to provide a "secular purpose" to combat Justice Stevens' dissenting concerns in *Webster*. With the new makeup of the U.S. Supreme Court, the Court may be willing to view H.B. 125's language as more than a mere value judgment and may instead view it as an Establishment Clause violation.

Pre-viability prohibition of abortion is the product of religious belief in life beginning at the point of cardiac activity, comingling religious principles with legal rights in a manner intolerable under the First Amendment. *Casey* specifically demarcated viability as the point of prohibition because it is a fair and independent factor separate from diverging religious principles.⁹⁹ H.B. 125 seeks to depart from this constitutionally-drawn line, therefore constituting an establishment of state-sponsored religion in violation of the First Amendment.¹⁰⁰

IV. CONCLUSION

Although Ohio has consistently been at the forefront in anti-abortion legislation, H.B. 125 goes one step too far. This bill violates Ohioans' First Amendment right to be free from state-sponsored religion by valuing the potential life of the fetus over the mother's life and by making a blanket determination for all Ohioans regarding when life begins and when it is worth protecting. In the midst of Ohio's efforts to further its pro-life agenda, legislators must take a step back and evaluate the constitutionality of the provisions they seek to impose, reflecting not only on Fourteenth Amendment issues but also on how these proposed laws violate the First Amendment right of Ohioans to be free from state-sponsored religion.

99. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 870-71 (1992) ("Consistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw . . . The viability line also has . . . an element of fairness . . .").

100. *See Dow*, *supra* note 62, at 499.