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Reproductive Freedom and Virginia's 2012 General Assembly Session

Katherine Greenier

REPRODUCTIVE FREEDOM AND VIRGINIA'S 2012 GENERAL ASSEMBLY SESSION

Katherine Greenier[*]

In 2012, legislators across the country were laser focused on taking away a woman's right to make private decisions, and Virginia was a key part of that trend.[1] Nationwide, legislative attempts to restrict reproductive freedom have become a strategy aimed at chipping away at federally-protected rights, grounded in longstanding Supreme Court precedent.[2] In the first three months of 2012, state legislators across the U.S. introduced 944 provisions related to reproductive health and rights, half of which would restrict women's access to abortion services.[3] While the number of abortion restrictions approved nationwide has decreased in 2012,[4] compared to 2011, Virginia saw an increase in the number of bills introduced restricting reproductive rights.[5] In the 2011 session of the Virginia General Assembly, legislators considered nine bills that sought to take away reproductive rights; in the 2012 session that number increased to thirteen.[6] Further, a number of new bills introduced in Virginia in 2012 showcase the increasing efforts of conservative legislators to restrict access to reproductive healthcare in a variety of ways.[7] For reasons that have nothing to do with healthcare, politicians seemingly want to step into the examining room, and tell doctors and women how to make their most personal, private, medical decisions. This is

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[*] Director, Patricia M. Arnold Women's Rights Project, American Civil Liberties Union of Virginia.

[1] Press Release, ACLU, State Senate Approves Mandatory Ultrasound Bill, But Many Other Victories For Women's Rights This Session (Feb. 28, 2012) *available at* http://www.aclu.org/reproductive-freedom/state-senate-approves-mandatory-ultrasound-bill-many-other-victories-womens.

[2] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1991).

[3] *State Policy Trends: Abortion and Contraception in the Crosshairs,* GUTTMACHER INST., Apr. 2011, *available at* http://www.guttmacher.org/media/inthenews/2012/04/13/index.html.

[4] *Id.* ("So far, 75 abortion restrictions have been approved by at least one legislative chamber, and nine have been enacted. This is below the record-breaking pace of 2011, when 127 abortion restrictions had been approved by at least one body in the first quarter of the year, but still higher than usual for an election year.").

[5] State Senate Approves Mandatory Ultrasound Bill, *supra* note 1.

[6] *Id.*

[7] Claire Porter, *Bills Undercut Reproductive Rights, Democrats Say*, CAPITAL NEWS SERVICE, Feb. 17 2012, *available at* http://wp.vcu.edu/capitalnews/2012/02/16/bills-undercut-reproductive-rights-democrats-say.

a political move, and an attempt to undermine a fundamental right that has been long protected under the Constitution of the United States.

Anyone who watches TV, reads the newspaper, listens to the radio, or surfs the Internet has probably seen the national attention given to Virginia regarding legislators' attempts to undermine a woman's right to choose her own reproductive healthcare.[8] Most of this attention focused on House Bill 462[9] and Senate Bill 484,[10] measures that mandated that a woman undergo an ultrasound before an abortion,[11] even if she does not consent to the test and even if her doctor does not advise it.[12] These bills curtail a woman's constitutional rights to privacy and liberty by subjecting her to possibly unwanted and unnecessary medical procedures.[13] Mandating ultrasounds is simply a delay tactic that imposes additional costs and restricts a woman's access to abortion. There is also a concern that the bills' requirement of a 24-hour waiting period between initial consultation and the procedure itself places an undue burden on women trying to access their constitutionally protected right to abortion.[14] News coverage of the mandatory ultrasound bill focused on the bills' initial mandate of an invasive ultrasound rather than on these constitutional issues.[15]

Instead, media reports primarily focused on H.B. 462 and S.B. 484's requirement that the doctor perform an invasive trans-vaginal ultrasound.[16]

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[8] *See generally* John W. Whitehead, *There is Nothing Constitutional About State-Mandated Transvaginal Ultrasounds*, HUFFINGTON POST, Feb 24, 2012, *available at* http://www.huffingtonpost.com/john-w-whitehead/transvaginal-ultrasounds_b_1293645.html.

[9] H.B. 462, 2012 Va. Gen. Assemb. Reg. Sess. (Va. 2012) § 18.2-76 (as enacted Apr. 7, 2012).

[10] S.B. 484, 2012 Va. Gen. Assemb. Reg. Sess. (Va. 2012) (as introduced Jan. 11, 2012).

[11] These bills mandated, in part, an ultrasound at least twenty four hours before an abortion procedure, but made an exception "if the pregnant woman lives at least 100 miles from the facility where the abortion is to be performed, the fetal ultrasound imaging shall be performed at least two hours before the abortion." The medical professional providing the ultrasound is required to "offer the woman an opportunity to view the ultrasound image, receive a printed copy of the ultrasound image and hear the fetal heart tones…" H.B. 462, (as enacted Apr. 7, 2012); S.B. 484, (as introduced Jan. 11, 2012).

[12] H.B. 462 (as enacted Apr. 7, 2012); S.B. 484 (as introduced Jan. 11, 2012).

[13] Roe v. Wade, 410 U.S. 113, 152–53(1973) (holding the right to privacy encompasses a woman's decision to terminate pregnancy); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877–78 (1992).

[14] Under the precedent set in *Planned Parenthood v. Casey*, the court applies an "undue burden" test to determine if a statute has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 837. The question of the constitutionality of mandatory ultrasound bills under this test is but one of the many constitutional issues raised by opponents of these measures.

[15] Max Smith & Paul D. Shinkman, Va. Bill Could Require "Transvaginal Ultrasound" Before Abortions, WTOP,, Feb. 17, 2012, available at http://www.wtop.com/index.php?nid=1035&sid=2752666.

[16] See Dahlia Lithwick, Virginia's Proposed Ultrasound Bill is an Abomination, Reader Supported News, Feb. 12, 201, available at http://www.readersupportednews.org/opinion2/273-40/10037-virginias-proposed-ultrasound-law-is-an-abomination? ("Because the great majority of abortions occur during the first 12 weeks, [the required ultrasound] means most women will be forced to have a transvaginal procedure.").

After innumerable press reports, demonstrations by local activists, and ridicule by national comedians, the bills were amended to require only a trans-abdominal ultrasound; the doctor must offer a trans-vaginal ultrasound if he/she is otherwise unable to obtain an image of the fetus.[17] While Senator Jill Holtzman Vogel decided to rescind her sponsorship of, S.B. 484,[18] Delegate Kathy Byron's identical version, H.B. 462, remained for consideration before the General Assembly. This version ultimately passed both chambers, and was approved by the Governor.[19]

During the General Assembly's debates over mandatory ultrasounds, women's health experts testified before legislators to explain that most abortions occur in the very early stages of pregnancy,[20] when an abdominal ultrasound cannot capture an image of the fetus.[21] Mandating an abdominal ultrasound means requiring doctors to perform a medically unnecessary procedure, and demonstrates that the true intent of these bills is to delay access to abortion, and seek to punish women for their private decisions. The amendment changing the requirements for trans-vaginal ultrasounds, seen by many as a retreat by abortion opponents,[22] does not signal the end of the extremism of the legislation. Mandating any type of ultrasound puts the government into the examination room, and forces politics to come between a woman and her physician in an effort to undermine the constitutional protections afforded to her. The amendment removing the trans-vaginal ultrasound requirement was merely an attempt to halt national media attention while allowing for the intended effects of the bill to remain: shaming women seeking abortion care, putting up obstacles to healthcare access, and intruding in the private doctor-patient relationship.

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[17] H.B. 462, 2012 Va. Gen. Assemb. Reg. Sess. (Va. 2012) (as enacted Apr. 7, 2012). S.B. 484, 2012 Gen. Assemb. Reg. Sess. (Va. 2012) (as amended Feb. 22, 2012).

[18] *See H.B. 462 Abortion; Informed Consent, Shall Undergo Ultrasound Imaging, Exception*, LEGISLATIVE INFORMATION SYSTEM (2012), *available at* http://lis.virginia.gov/cgi-bin/legp604.exe?ses=121&typ=bil&val=sb484.

[19] *See id.*

[20] GUTTMACHER INST., FACTS ON INDUCED ABORTION IN THE UNITED STATES, (2011), *available at* http://www.guttmacher.org/pubs/fb_induced_abortion.pdf ("Eighty-eight percent of abortions occur in the first 12 weeks of pregnancy.").

[21] *State-Policy Trends*, *supra* note 3.

[22] See, e.g., Patrik Jonsson, Abortion Wars: Virginia Retreats on Invasive Probe in Ultrasound Bill, Christian Sci. Monitor, Feb. 23, 2012, available at http://www.csmonitor.com/USA/2012/0223/Abortion-wars-Virginia-retreats-on-invasive-probe-in-ultrasound-bill-video.

Another bill hotly contested in Virginia's 2012 General Assembly session was House Bill 1,[23] the so-called "personhood bill" that would have granted fertilized eggs the same rights, privileges, and immunities as people. H.B. 1 would have had wide-ranging consequences for women's health and for families' personal and private decision-making. For example, this bill could endanger women's health and lives by interfering with doctors' ability to treat miscarriages and ectopic pregnancies,[24] and could even deny a pregnant woman life-saving medical treatment for a disease, like cancer, if the treatment might harm a fertilized egg. The bill would have impacted thousands of laws and interjected the government, lawyers, and courts in the middle of women's personal and private decisions. This legislation intended to lay the legal foundation to ban access to abortions and contraception in the Commonwealth in the event of a reversal of current Supreme Court precedent.[25]

Less attention was paid to House Bill 62,[26] which would have repealed abortion funding currently available to low-income women when a physician certifies in writing that the fetus has an incapacitating physical or mental anomaly.[27] This bill would have placed no restrictions on women who could afford to pay for their own abortions, and targeted only those low-income women who could not afford to end their pregnancy after learning of a severe physical or mental abnormality.[28] H.B. 62 would have denied underprivileged women access to safe care, for no other reason than their poverty. If H.B. 62 had been approved, Medicaid-eligible women in Virginia would not have had the option to terminate pregnancy in which the fetus had an incapacitating physical or mental anomaly.

Even less attention was paid to House Bill 1285[29] and Senate Bill 637,[30] both entitled the "Virginia Pain-Capable Unborn Child Protection Act." These bills sought to ban abortions at twenty weeks gestational age,[31] based on the false premise that that a fetus may feel pain beginning at twenty weeks of gestation.[32] These bills are not about fetal pain,[33] but rather the

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[23] H.B. 1, 2012 Va. Gen. Assemb. Reg. Sess. (Va. 2012) (as introduced Jan.11, 2012).

[24] Bill Sizemore, *Some Doctors Say 'Personhood' Bill Unsound*, VIRGINIAN-PILOT, Feb. 16, 2012, *available at* http://hamptonroads.com/2012/02/some-doctors-say-personhood-bill-unsound.

[25] *See generally* Roe v. Wade, 410 U.S. 113 (1973) (extending the Due Process Clause's right to privacy to a woman's right to an abortion in certain circumstances).

[26] H.B. 62, 2012 Va. Gen. Assemb. Reg. Sess. (Va. 2012) (as introduced Jan. 11, 2012).

[27] *See id.*; VA. CODE ANN. § 32.1-92.2 (1982).

[28] *See* H.B. 62, § 32.1-92.2 (as introduced Jan. 11, 2012).

[29] H.B. 1285, 2012 Va. Gen. Assemb. Reg. Sess.(Va. 2012) (as introduced Jan. 20, 2012).

[30] S.B. 637, 2012 Va. Gen. Assemb. Reg. Sess. (Va. 2012) (as introduced Jan. 20, 2012).

[31] *Id.*; H.B. 1285 (as introduced Jan. 20, 2012).

[32] Experts on fetal development have found that there is no scientific support for the "findings" in the

desire to take the decision about abortion away from women and their doctors.[34] Abortion bans at twenty weeks have been a national trend aimed at challenging *Roe v. Wade*.[35] In fact, H.B. 1285 and S.B. 637 would have established an unprecedented "Litigation Fund" for the Attorney General to use to defend the bills, providing evidence of their true intent.[36] These bills were blatantly unconstitutional, would have failed to protect women's health, and would have prohibited abortions where the Supreme Court has held that states may not do so.

While the Governor approved H.B. 462, the mandatory ultrasound bill, H.B. 62, H.B. 1285, and S.B. 637 failed in the General Assembly.[37] As introduced this 2012 session, H.B. 1 contained different bill language than the prior years it has been introduced. H.B. 62, H.B. 1285, and S.B. 637 were new bills, not seen in past years. An analysis and overview of these measures sheds light on the increasing attempts and the tactics used by legislators to undermine reproductive freedom.

A. H.B. 1285 AND S.B. 637: BANS ON ABORTION AT 20 WEEKS GESTATIONAL AGE

H.B. 1285 and S.B. 637 posed a serious threat to women's health, ignoring women's health needs and individual circumstances. They sought to ban

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bill. See Royal Coll. of Obstetricians and Gynecologists, Fetal Awareness – Review of Research and Recommendations for Practice 11 (2010), available at http://www.rcog.org.uk/files/rcog-corp/RCOGFetalAwarenessWPR0610.pdf. The Royal College of Obstetricians and Gynecologists in Great Britain found that nerve connections in the fetal brain are not sufficiently formed to allow pain perception before twenty-four weeks. Id.

[33] *See* Tarina Keene, *2012 General Assembly Session in Review – The Good, the Bad and the Ugly*, NARAL PRO-CHOICE VIRGINIA BLOG, Mar.14, 2012, https://prochoiceva.wordpress.com/2012/03/14/2012-session-in-review-the-good-the-bad-and-the-ugly/ (stating the true motivation for H.B. 1285 and S.B. 637 is to challenge *Roe v. Wade*)

[34] *See id.*

[35] *Roe*, 410 U.S. at 163–165. For more information on the measures in other states banning later abortions *see* GUTTMACHER INST., STATE POLICIES IN BRIEF: STATE POLICIES ON LATER ABORTIONS (2012) *available at* http://www.guttmacher.org/statecenter/spibs/spib_PLTA.pdf.

[36] H.B. 1285,¶ 1, § 18.2-76.12 (as introduced Jan. 20, 2012); S.B. 637, ¶ 1, § 18.2-76.12 (as introduced Jan. 20, 2012).

[37] Laura Bassett, Bob McDonnell, Virginia Governor, Signs Mandatory Ultrasound Bill into Law, Huffington Post, Mar. 7, 2012, available at http://www.huffingtonpost.com/2012/03/07/bob-mcdonnell-virginia-mandatory-ultrasound-bill_n_1327707.html; see H.B. 62, Abortion Funding; Repealed, Legislative Information System (2012), available at http://lis.virginia.gov/cgi-bin/legp604.exe?121+sum+HB62; H.B. 1285, Virginia Pain-Capable Unborn Child Protection Act; Created, Penalty, Legislative Information System (2012), available at http://lis.virginia.gov/cgi-bin/legp604.exe?131+sum+HB1285; S.B. 637, Virginia Pain-Capable Unborn Child Protection Act; Created, Penalty, Legislative Information System (2012), available at http://leg1.state.va.us/cgi-bin/legp504.exe?121+cab+SC10123SB0637+SBREF.

abortions at twenty weeks' gestation, with only the most narrow of exceptions.[38] However, even these very narrow, limited exceptions would not have permitted abortions even in situations where one might be medically necessary.[39] Women seeking abortions may be facing extremely complicated pregnancies and must have every medical option, including terminating the pregnancy, available to them. Every pregnant woman's circumstances are different and these bills would have deprived women of their ability to make extremely personal medical decisions.

H.B. 1285 and S.B. 637 would have been unconstitutional political interference in women's most personal, private medical decisions. The U.S. Supreme Court has recognized and reaffirmed constitutional protection of women's ability to make those decisions.[40] The Court specifically held that: (1) a state may not ban abortion prior to fetal viability; and (2) a state may ban abortion after viability so long as there are exceptions to protect the woman's health and life.[41] These principles have been repeatedly reaffirmed.[42] A woman should not be denied basic healthcare or the ability to make the best decision for her circumstances because some politicians disagree with her decision.

Because of the inherently private nature of a woman's decision to have an abortion, the Supreme Court has recognized that a woman should "be free from unwarranted governmental intrusion" when deciding whether to continue or terminate a pre-viability pregnancy.[43] But in conflict with the law, in disregard of medical science, and for reasons unrelated to viability, these bills would have taken away a woman's decision-making ability after a certain number of weeks. Banning abortions starting at twenty weeks – which is a pre-viability stage of pregnancy[44] – directly contradicts longstanding precedent.

In the context of viability, the Supreme Court has said a legislature can-

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[38] These bills would have banned abortions at twenty weeks' gestation, providing only very narrow exceptions in cases in which the woman's life is at risk or where she could risk substantial and irreversible physical impairment of a major bodily function. The bills would have imposed heavy criminal and civil penalties for violations. The bill would also have given civil standing to a variety of people, including a woman's sibling and former healthcare provider, to bring suit against a physician, regardless of the woman's wishes. H.B. 1285, 2012 Va. Gen. Assemb. Reg. Sess. (Va. 2012) (as introduced Jan 20, 2012); S.B 637, 2012 Va. Gen. Assemb. Reg. Sess. (Va. 2012) (as introduced Jan. 20, 2012).

[39] *See* H.B. 1285 (as introduced Jan. 20, 2012); S.B 637 (as introduced Jan. 20, 2012).

[40] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

[41] Roe v. Wade, 410 U.S. 113, 163–64 (1973).

[42] *Casey*, 505 U.S. at 851.

[43] *Id.* (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

[44] Marilee C. Allen, Pamela K. Donahue & Amy E. Dusman, *The Limit of Viability - Neonatal Outcomes of Infants Born at 22 to 25 Weeks' Gestation* 329 N. ENG. J. MED. 1597, 1597 (1993).

not declare any one element, "be it weeks of gestation or fetal weight or any other single factor… as the determinant of when the State has a compelling interest in the life or health of the fetus."[45] Similarly, outside the context of viability, a state cannot draw a line based on any single factor to prohibit abortions. A twenty-week ban on abortions, no matter the justification, is unconstitutional. In fact, a similar twenty-week provision enacted by the Utah legislature[46] has already been struck down as unconstitutional by the United States Court of Appeals for the 10th Circuit.[47] Moreover, H.B. 1285 and S.B. 637 provided only very narrow exceptions to their abortion ban. Even if the ban applied only to post-viability abortions, a post-viability ban must make an exception where an abortion is, as the Supreme Court wrote, "necessary, in appropriate medical judgment, for the preservation of the life *or health*" of the woman.[48] The Supreme Court has rejected the notion that a health exception can be limited to only major physical issues; factors also include "emotional, psychological, familial, and the woman's age-relevant to the well-being of the patient."[49]

Many things can go wrong during a pregnancy.[50] A woman's health could be at risk in ways that are unimaginable. When complications develop, a woman should be able to get the care she needs. In addition to being unconstitutional, it is callous to impose one rule on every woman, regardless of the circumstances of her pregnancy. A woman facing pregnancy-related difficulties needs the best care she can get, not the legislature's interference in the doctor-patient relationship.

B. H.B. 62: REPEALING ABORTION FUNDING FOR LOW-INCOME WOMEN

H.B. 62 sought to repeal § 32.1-92.2 of the Code of Virginia,[51] which relates to funding for abortions where a physician certifies in writing that he or she believes the fetus has an incapacitating physical or mental anomaly.[52] The bill would have also restricted access for very poor women,[53] resulting in a system where only wealthy women could afford the full range of healthcare services in the face of a devastating prenatal diagnosis. Leav-

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[45] *See* Colautti v. Franklin, 439 U.S. 379, 388–89 (1978).
[46] Jane L. v. Bangerter, 102 F.3d 1112, 1114 (10th Cir. 1996).
[47] *Id.* at 1118.
[48] *Casey*, 505 U.S. at 879 (emphasis added); *see also Roe*, 410 U.S. at 165.
[49] *See, e.g.,* Doe v. Bolton, 410 U.S. 179, 192 (1973).
[50] *See, e.g.*, *Pregnancy Complications*, AMERICAN PREGNANCY ASSOCIATION, (last visited May 8, 2012), http://www.americanpregnancy.org/pregnancycomplications. .
[51] H.B. 62, 2012 Va. Gen. Assemb. Reg. Sess. (Va. 2012) (as introduced Jan. 11, 2012).
[52] VA. CODE ANN. § 32.1-92.2 (1982).
[53] *Id.*

ing poor women without financial assistance for safe and sometimes critical care threatens their well-being. These Medicaid-eligible women are, by definition, very poor,[54] and H.B. 62's denial of care would have exacerbated the crisis for those who decided they wanted to terminate their pregnancies.

D.J. Feldman, a woman from the Washington, D.C. area presents an instructive example.[55] Ms. Feldman learned eleven weeks into her pregnancy that her fetus had anencephaly,[56] meaning that if she carried to term, she would deliver a baby with almost no brain, and with no chance of survival; anencephaly is always fatal.[57] Ms. Feldman and her husband had been trying for two years to have a baby, but she had no choice in this instance; her doctor told her that, given her circumstances, an abortion was necessary to safeguard her health.[58] Ms. Feldman's federally-provided insurance did not cover the cost of the procedure,[59] but she was not low-income, so she received the care she needed.[60]

In 2011, only ten Medicaid-eligible Virginians received funding for an abortion procedure based on these circumstances,[61] indicating that H.B. 62's limited exceptions would only be invoked in truly dire circumstances. When a woman receives a catastrophic prenatal diagnosis, she should have the option to end the pregnancy safely and with dignity, no matter her socio-economic status. HB 62 would have forced low-income women to spend money they do not have, and therefore force them, quite possibly, to carry their pregnancies to term. This is no way to treat a woman in a medical crisis.

C. HB 1: PERSONHOOD

Del. Bob Marshall (R., 13th District) and Sen. Colgan (D., 29th District)

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[54] *See* U.S. Dep't of Commerce, *How the Census Bureau Measures Poverty*, U.S. CENSUS BUREAU, (Sep. 12, 2012), *available at* http://www.census.gov/hhes/www/poverty/about/overview/measure.html; Medicaid and CHIP payment and access Commission, 42 U.S.C. § 1396 (2006).

[55] Joe Davidson, Federal Diary: A Case Study in Abortion Funding, Wash. Post, Dec. 1, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/11/30/AR2009113004065.htm.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] Davidson, *supra* note 55. .

[61] Maddie Oatman, *Virginia Legislature Votes to Slash Abortion Funding for Low -Income Women*, MOTHER JONES, Feb. 16, 2012, *available at* http://motherjones.com/mojo/2012/02/low-income-women-virginia-complications-abortions ("in 2011, funding was approved for 10 abortions, costing the state a grand total of $2,784.").

pre-filed House Bill 1[62] on November 21, 2011. The first section of H.B. 1 state, "The life of each human being begins at conception."[63] While personhood bills have been introduced in prior sessions of the General Assembly, this iteration contained new language not seen in prior years. The new language includes a so-called "trigger ban," stating that H.B. 1 is "subject to the Constitution of the United States and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this Commonwealth."[64] A "trigger ban" effectively outlaws abortions in the event of a reversal of current Supreme Court precedent, namely *Roe v. Wade*.[65] This bill could also have been used to ban commonly prescribed FDA-approved methods of birth control, including the pill and emergency contraception, if the Supreme Court ever reversed past precedent. Thus, the intent of this legislation was to lay the legal foundation to ban access to abortions and contraception in the Commonwealth.

In fact, Delegate Marshall told CBN News on November 23, 2011 that H.B. 1, "By itself . . . doesn't outlaw abortion but it sets the platform for doing it."[66] Other proponents of this bill cited Missouri law,[67] nearly identical to H.B. 1, and the Supreme Court's decision in *Webster v. Reproductive Health Services*[68] regarding that law to assert that H.B. 1 was constitutional. However, H.B. 1 differed from the upheld Missouri in significant ways. In the Missouri law, the bill language mirrored in H.B. 1 appeared only in a preamble, in addition to other operative provisions restricting reproductive rights.

In 1986, Missouri enacted a law regulating abortions. Specifically, the law (1) required physicians to conduct certain viability tests if they had reason to believe the woman was carrying a child of twenty weeks or older, (2) prohibited the use of state employees or facilities to perform abortions not necessary to save the life of the mother, (3) prohibited the use of state funds

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[62] H.B. 1, 2012 Va. Gen. Assemb. Reg. Sess. (Va. 2012) (as introduced Jan.11, 2012).
[63] *Id.*
[64] H.B. 1 (as introduced Jan.11, 2012).
[65] Roe v. Wade, 410 U.S. 113 (1973). Only four states have laws that automatically ban abortion if *Roe* were to be overturned. Seven states have laws that express their intent to restrict the right to legal abortion to the maximum extent permitted by the U.S. Supreme Court in the absence of *Roe*. *See* GUTTMACHER INST., STATE POLICIES IN BRIEF: ABORTION POLICY IN THE ABSENCE OF ROE (2012), *available at* http://www.guttmacher.org/statecenter/spibs/spib_APAR.pdf.
[66] John Waage, *Republican Majority Could Pass VA 'Personhood' Bill*, CBN NEWS, Nov. 23, 2011, *available at* http://www.cbn.com/cbnnews/politics/2011/November/Va-Delegate-Introduces-Personhood-Bill.
[67] MO. REV. STAT. §§ 1.205.1(1), (2) (1986).
[68] Webster v. Reproductive Health Servs., 492 U.S. 490, 501 (1989).

for "counseling or encouraging" a woman to have an abortion not necessary to save her life, and (4) set forth in its preamble findings of the state legislature.[69] Specifically, the preamble provided:

> 1. The general assembly of this state finds that: (1) The life of each human being begins at conception; (2) Unborn children have protectable interests in life, health, and well-being; (3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.
> 2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.
> 3. As used in this section, the term 'unborn children' or 'unborn child' shall include all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development.
> 4. Nothing in this section shall be interpreted as creating a cause of action against a woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.[70]

In H.B. 1, the language Missouri used in a preamble *is* the operative language. The *Webster* Court did not uphold the constitutionality of the preamble in the Missouri law.[71] Justice Rehnquist, writing for the plurality, wrote that the Court "need not pass on the constitutionality of the Act's preamble."[72] He further stated, "Certainly the preamble does not by its terms regulate abortion or any other aspect of appellees' medical practice. The Court has emphasized that *Roe* v. *Wade* implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion. . . The preamble can be read simply to express that sort of value judgment."[73] The Court in *Webster* further declined to consider the question of the constitutionality of the preamble until it saw how Missouri interpreted the preamble and whether it would do so in a way that would affect medical practice.[74] The Supreme Court *never* declared or implied that the law would be

[69] *Id.*.
[70] MO. REV. STAT. § 1.205 (1986).
[71] *Webster*, 492 U.S. at 506–507.
[72] *Id.* at 507.
[73] Id. at 506 (citing Maher v. Roe, 432 U.S. 467, 474 (1977)).
[74] *Webster*, 492 U.S. at 506–507 (citing Tyler v. Judges of Court of Registration, 179 U.S. 405, 409 (1900) ("It will be time enough for federal courts to address the meaning of the preamble should it be applies to restrict the activities of appellees in some concrete way. Until then, this Court is not empowered to decide...abstract propositions, or to declare, for the government of future cases, principles or

constitutional if that if its language was interpreted as affecting practice.

Proponents of H.B. 1 argued that the primary effect of the bill would be to create "a civil cause of action for the wrongful death of an unborn child."75 Delegate Marshall maintained that this "cause of action already exists in the majority of states and is a natural complement to Virginia's fetal homicide law."76 However, HB 1's broad re-definition of "person" was not necessary to provide a wrongful death cause of action for a fetus. Instead, the General Assembly could have simply passed a bill to directly amend the language of Virginia's current wrongful death law.[77] In fact, that is exactly what the General Assembly did, in passing Senate Bill 674.[78] The true purpose of H.B. 1 was to lay the legal foundation to ban access to abortions and contraception in the Commonwealth.[79]

During consideration of the bill, the Senate Education and Health Committee voted to amend H.B. 1 to state that nothing in the bill would be interpreted to affect contraception.[80] This amendment was only an attempt to quiet national outrage over extremist politicians' intent to lay the legal foundation to ban access to birth control. If courts interpreted H.B. 1 to outlaw certain forms of contraception, those forms would not be "lawful." Thus, the amendment would do nothing to protect women's access to the forms of birth control affected by H.B. 1.

Now, as of October 2012, new bills have been introduced before the General Assembly in preparation for the 2013 session, and others have carried over from the 2012, indicating that the trend of increasing attempts to attack reproductive health care does not appear to show signs of abating in Virginia. This trend both leads and is instructed by national efforts to curtail reproductive freedom, despite a nation-wide outcry against such measures and the defeat of nearly every anti-choice bill in Virginia in 2012. Anti-choice legislators seek to undermine fundamental, long-standing Court precedent by chipping away at women's rights piece by piece, bill by bill.

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rules of law which cannot affect the result as to the thing in issue in the case before it.")).

[75] Press Release, Marshall Says Tim Kaine Misrepresents His Personhood Bill (Dec. 7, 2011), *available at* http://delegatebob.com/news/press-releases/del-marshall-says-tim-kaine-misrepresents-his-personhood-bill.

[76] *Id.*

[77] VA. CODE ANN. § 8.01-50(A).

[78] S.B. 674, 2012 Gen. Assemb. Reg. Sess. (Va. 2012) (as enacted Apr. 9, 2012).

[79] *"Personhood" and Mandatory Ultrasound,* NARAL PRO-CHOICE VIRGINIA BLOG (Feb. 16, 2012), http://prochoiceva.wordpress.com/2012/02/16/personhood-and-mandatory-ultrasound-what-would-they-mean-for-virginia-womens-rights-and-freedom.

[80] *See* VA. CODE ANN. § 8.01-50; S.B. 674 (as enacted Apr. 9, 2012). S.B. 674 amended Va. Code § 8.01-50. *Id.*

All eyes are on the Commonwealth as Virginia moves in to the 2013 General Assembly session, given legislators' focus in 2012 on restricting women's reproductive rights.