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# REPRODUCTIVE RIGHTS UNDER ATTACK: CAN THE FUNDAMENTALS OF *ROE* SURVIVE?

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## INTRODUCTION

More than forty years since the United States Supreme Court recognized a woman's constitutional right to choose whether or not to terminate a pregnancy in the polestar case of *Roe v. Wade*,<sup>1</sup> women's reproductive rights are under attack in ways that are unprecedented. We see efforts to limit access continue at a frightening pace. From specific restrictions under state and federal statutes to ongoing legal challenges, abortion and reproductive rights jurisprudence is being shaped by changes in which the ultimate goal is to ensure that abortion is not an option. In this article I examine the evolution of these restrictions and trends, and consider related Supreme Court decisions through the 2013 - 2014 session that have added fuel to the fire engulfing reproductive rights.<sup>2</sup>

Part I of this article provides an overview of cases in abortion jurisprudence from *Roe* through *Gonzales*.<sup>3</sup> Part II examines the continued attacks on reproductive choice ranging in form from personhood amendments to additional anti-abortion policies. It further considers mandates including invasive ultrasounds, increased waiting periods, more extensive counseling requirements, restrictions associated with the inception of fetal heartbeat

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1. *Roe v. Wade*, 410 U.S. 113 (1973) (The Court in *Roe* set forth a trimester framework to determine when and how the State might regulate the abortion procedure. The Court held that prior to the first trimester the abortion decision should be left to the pregnant woman in consultation with her attending physician. *Id.* at 163).

2. *See, e.g., McCullen v. Coakley*, 134 S. Ct. 2518 (2014); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

3. *Gonzales v. Carhart*, 550 U.S. 124 (2007).

and fetal pain, Targeted Regulation of Abortion Providers (TRAP) laws, parental consent/notice requirements, crisis pregnancy centers and defunding of reproductive care providers. Part III provides additional updates on legislation and litigation through July 2015. My conclusion in Part IV flows from my belief that the “undue burden” standard set forth in *Casey*,<sup>4</sup> despite what promise it may have had, is unworkable. As will be discussed, it has mired the courts in the intimate decision making of women and challenging issues of judicial manageability. It has allowed states to impose regulations that completely undermine *Roe*. Securing the rights by fighting state by state and legislature by legislature is not only cost prohibitive for women; the defense of the necessary lawsuits also costs the states. The regime thus ties the quality and security of a woman’s right to meaningful unobstructed reproductive choice to the state where a woman happens to live, or one where she can afford to traverse or visit, harkening to the Pre-*Roe* era when safe reproductive choice depended on money and mobility.

We are on the verge of returning to the Pre-*Roe* days when women had little to no right to choose, and navigated in danger, darkness and fear when forced to consider abortion as an option. Hard fought gains are slipping away. Full female equality and dignity require that a woman control her body and make her own non-coerced choices about whether or when she will bear children. We stand at a critical place in time. Will our Constitutional order insure the equal dignity of women; will it provide meaningful protection for what have become fragile female rights? I offer what I hope are illuminating thoughts for our navigation of a murky post-*Roe*, post-*Casey*, post-*Carhart* universe.

## I. FROM ROE FORWARD

In *Roe* and the companion case of *Doe v. Bolton*<sup>5</sup> the Supreme Court was presented with constitutional challenges to state criminal abortion laws (from Texas and Georgia respectively). As the court noted, although such laws were in effect in a majority of states, they “are of relatively recent vintage,” and the court ultimately found those state statutes to be unconstitu-

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4. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

5. *Doe v. Bolton*, 410 U.S. 179 (1973). In this essay, I have not focused at length on the historical significance of *Roe*; however, should a reader wish to learn more concerning pre- and post-*Roe* jurisprudence I would suggest reviewing the works of Professor Reva B. Siegel whose scholarship has been consistent and informative for more than several decades. (See, e.g., Reva Siegel *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Question of Equal Protection*, 44 STAN. L. REV. 261 (1992); Reva B. Siegel, *Abortion and the “Women Question”*: Forty Years of Debate, 89 IND. L.J. 1365 (2012); and LINDA GREENHOUSE & REVA SIEGEL, *BEFORE ROE V. WADE: VOICES THAT SHAPE THE ABORTION DEBATE BEFORE THE SUPREME COURT’S RULING* (2d. ed. 2012).

tional.<sup>6</sup> After considering the works of philosophers, theologians, and common law scholars, among others,<sup>7</sup> the court concluded that the decision to have an abortion was protected in the right of personal privacy.<sup>8</sup> This right, though unenumerated, is encompassed in the penumbra of rights first recognized in *Griswold v. Connecticut*.<sup>9</sup> The trimester framework set forth in *Roe* prohibited state interference with a woman's right to terminate her pregnancy during the first trimester.<sup>10</sup> State regulations "reasonably related to maternal health" were permissible after the first trimester<sup>11</sup> and the State's interest in potential life is so compelling at viability that the State may go so far as to proscribe abortion.<sup>12</sup>

The Court's decision in *Roe* was met with a variety of hostile reactions. For example, the Hyde Amendment was passed and sustained, resulting in a prohibition on use of federal funds to pay for abortions other than to preserve a woman's life or in cases of incest or rape.<sup>13</sup> Versions of this amendment governing state funds were enacted in a majority of states.<sup>14</sup> Parental consent statutes were first upheld in *Bellotti v. Baird*,<sup>15</sup> and likewise were enacted in a majority of states.<sup>16</sup>

It was clear from the decision in *Roe* that the right to an abortion was neither absolute nor without limitation. The parameters of permissible limitations were tested in a number of cases that followed. For example, three years later, in *Planned Parenthood v. Danforth*, the Supreme Court unanimously upheld an informed consent provision applicable to all abortions

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6. *Roe*, 410 U.S. at 129.

7. *See, Id.* at 131—37.

8. *Id.* at 154.

9. *See, Griswold*, 381 U.S. 479 (1965) (Appellant Griswold, executive director of Planned Parenthood League of Connecticut, and appellant Buxton, medical director, challenged a Connecticut statute prohibiting dissemination of information about and use of birth control by married couples. The appellants were arrested for providing instruction and medical advice in violation of §§ 53-32 & 54-196 of the statute. This criminal statute was determined to be unconstitutional and the recognition of the Bill of Rights having a "penumbra" of guarantees emanating was recognized for the first time. These guarantees encompass the right to marital privacy.).

10. *Roe*, 410 U.S. at 163.

11. *Id.*

12. *Id.*

13. Social Security Act §§ 1901 et seq., 1902(a)(1, 17) as amended 42 U.S.C.A. §§ 1396 et seq., 1396b(a)(1, 17)(2014); *see* Beale v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519 (1977) (all supporting states' decisions not to provide Medicaid funds for nontherapeutic abortions); and Harris v. McRae, 448 U.S. 297 (1980) (sustaining the Hyde amendment).

14. *See e.g.* Humphreys v. Clinic for Women, Inc., 796 N.E.2d 247 (Ind. 2003) (holding that states do not have to fund all medically necessary abortions so long as Medicaid funds abortions in cases of rape, incest, serious risk of impairment of bodily functions or risk to life).

15. *Bellotti v. Baird*, 443 U.S. 622 (1979). (Just about every state has adopted such a requirement which is consistently upheld provided that there is a judicial bypass option for the minor.) (*See infra* discussion in section II E).

16. *Id.*

including those in the first trimester.<sup>17</sup> Throughout the 1980s, challenges were brought and restrictions sought with varying degrees of success.<sup>18</sup> The court in *Akron I*, determined that section 1870.06(B) of the Akron municipal ordinance was unconstitutional.<sup>19</sup> It is interesting that some of the concerns expressed in Akron about coercive information being provided and justified as being necessary to ensure informed consent remain relevant and controversial today.<sup>20</sup>

On at least two occasions anti-*Roe* constituencies anticipated that the Court would overturn *Roe*. In *Webster v. Reprod. Health Servs.*,<sup>21</sup> the court failed to overturn *Roe*, but did allow Missouri in its preamble, to define life as beginning at conception.<sup>22</sup> Moreover, it upheld a statute prohibiting the use of public hospitals and medical staff in the performance of abortions.<sup>23</sup> Even more importantly, it clearly articulated a State's *compelling interest* in

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17. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (The court was concerned that a woman's decision to terminate a pregnancy be made knowingly and is uncoerced; thus written consent was considered useful provided that it did not interfere with the choice. The court explained "the decision to abort...is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent." *Id.* at 67.

18. *See, e.g.* *Planned Parenthood of Kan. City v. Ashcroft*, 462 U.S. 476 (1983) (upholding, *inter alia*, the requirement for a second physician at post-viability abortions. *Id.*); *City of Akron v. Akron Ctr. For Reprod. Health, Inc.*, 462 U.S. 476 (1983) (in which three informed consent requirements were found unconstitutional at 443—49, as was a requirement for hospitalization for second and third trimester abortions at 438—39; ). In *Akron* the court recognized the invasive regulations for what they were. i.e. attempts to prevent a woman from exercising the right to decide whether or not to terminate her pregnancy. In *Ohio v. Akron Ctr. For Reprod. Health (Akron II)* 497 U.S. 502 (1990) seeds for informed consent laws were sown and have borne fruit in the form of unprecedented informed consent requirements enacted in a number of states from 2010 forward. (see parts II & III of this article). For an informative discussion, including the historical context, of *Akron I* & II see Tracy A. Thomas, *Back to the Future of Regulating Abortion in the First Term*, 29 WIS. J.L. GENDER & SOC'Y 47 (2014); compare also *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (striking requirements that doctors report medical information, identifying information and reasons for performance of post-viability abortions. *Id.* at 765—68).

19. *City of Akron*, 462 U.S. at 444. (The court concluded that the regulations, under the guise of informed consent, were extending the State's interest beyond permissible limits. "...the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether...Moreover, much of the detailed description of 'the anatomical and physiological characteristics of the particular unborn child' ...would involve at best speculation by the physician...and physical and psychological complications of abortions is a 'parade of horrors' intended to suggest that abortion is a particularly dangerous procedure.")

20. *See, e.g.* N.C. Gen. Stat. § 90-21.82(1)-(2) (2014) (adopted as the Woman's Right to Know Act) (requiring physicians to among other things display a sonogram and describe the fetus even if the woman refuses to see or hear (enforcement enjoined 12/22/2014)); and *Tex. Med. Providers Performing Abortion Serv. v. Lakey*, 806 F. Supp. 2d 942 (W.D. Tex. 2011) (finding mandatory ultrasound and display law violates free speech rights of doctors and patients).

21. *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

22. *Id.* at 501.

23. *Id.* at 511.

potential life for the duration of one's pregnancy, not just at viability.<sup>24</sup> This decision certainly laid the foundation for the concept of "personhood" that came to fruition in the plethora of amendments, statutes and ballot initiatives put forth from 2008 to the present.<sup>25</sup>

By 1992, when the Supreme Court decided *Planned Parenthood of Southeastern Pa. v. Casey*<sup>26</sup>, there was a concern that the court would take this opportunity to finally repeal *Roe*.<sup>27</sup> The Court did not do so; however, it did, in reaffirming *Roe*, reject the *Roe* trimester framework<sup>28</sup>. *Casey* significantly changed the protections set forth in *Roe* in at least two ways. The Court replaced the trimester framework with an "undue burden" standard.<sup>29</sup> That standard, to this day, remains unclear and ambiguous. The Court states "[a] finding of an undue burden is shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."<sup>30</sup> The Court placed additional emphasis on a State's "important and legitimate interest in protecting the potentiality of human life."<sup>31</sup> As it had in *Webster*, the Court finds this interest compelling throughout one's pregnancy. The State is in a position to implement restrictions that may be hostile to abortion rights throughout all stages of one's pregnancy. The language used in *Casey* opened the door for legislatures to restrict access by regulating clinics, as well as qualifications for persons performing abortions and to require procedures such as ultrasounds and provision of biased information under the guise of informed consent, with the clear goal of discouraging abortion.<sup>32</sup>

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24. *Id.* at 494.

25. *See infra* discussion at II A.

26. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

27. The concern was foreshadowed by Justice Blackmun's dissenting opinion in *Webster*. Stating that the plurality had essentially "invite[d] every state to enact more and more restrictive regulations... [that] will return the law of procreative freedom to the severe limitations that generally prevailed in this country before January 22, 1973." *Webster*. 492 U.S. at 538, he continued with "...[f]or today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows." *Id.* at 560. (From *Webster* on state legislatures accepted that invitation.)

28. *Casey*, 505 U.S. at 876—77.

29. *Id.* At 837.

30. *Id.* at 877 (The court then went on to conclude that provisions such as the statute's definition of medical emergency, informed consent requirements and a 24-hour waiting period do not constitute an undue burden. Ultimately the only provision found to constitute an undue burden was the spousal notification requirement. *Id.* at 877—91).

31. *Id.* at 871 (citing *Roe*, 410 U.S. at 162).

32. For example, the Task Force on Abortion in South Dakota, was instrumental in South Dakota's enactment of H.B. 1166, 2005 Leg., 80<sup>th</sup> Sess. (S.D. 2005) and provided substantial support for the language used in crafting that bill as well as H.B. 1233 its companion bill. Under the legislation, doctors are required to provide information indicating that there is a causal link between abortion and suicide. There is no such causal link. *See Spurious Science Trumps as U.S. Court Upholds South Dakota "Suicide Advisory" Law*, GUTTMACHER INST., (July 27, 2012), <http://www.guttmacher.org/media/inthenews/2012/07/27/index.html>. *See also* section II C of this article.

Even so the Court was clear that in determining the constitutionality of restrictions, the proper measure should be the restrictions “impact on those whose conduct it affects.”<sup>33</sup> Abortion is incorporated in one’s fundamental reproductive rights; therefore, abortion restrictions should be examined using a strict scrutiny analysis. It is unclear how using an “undue burden” analysis comports with strict scrutiny.

After the *Casey* decision, abortion opponents seemed to modify strategies from focusing on repealing *Roe*, to enacting regulations using the language set forth in *Casey* to make access to abortion near impossible. The opinion in *Gonzales v. Carhart*<sup>34</sup> set the stage for the tactics of eliminating/reducing access via regulation of the process. This case challenged the constitutionality of the Partial—Birth Abortion Ban Act of 2003.<sup>35</sup> The court found that the act was constitutional in a 5—4 decision, holding that the act did not constitute an “undue burden” on the right to terminate a pregnancy.<sup>36</sup> Moreover, a majority of the court found that a health exception to the prohibition of dilation and evacuation (D&E) abortions was not needed since “whether the act creates significant health risks for women has been a contested factual question.”<sup>37</sup> The court devoted some time detailing “documented medical disagreement” about whether the prohibition would ever “impose significant health risks on women.”<sup>38</sup> *Gonzales* served as a vehicle for abortion opponents to expand regulations that had been facilitated by *Casey* to new levels. The language used in *Gonzales* has been used subsequently to support all manner of TRAP laws.<sup>39</sup> It also provides support for states promulgating laws based on notions that abortions have a negative impact on women’s health both physically and mentally and thus are necessary to protect a woman’s health. Women—protective antiabortion arguments had been percolating from the early 1990s on.<sup>40</sup> Justice Kennedy’s words can be interpreted as suggesting some support for such arguments. He posits “Respect for human life finds an ultimate expression in the bond

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33. *Casey*, 505 U.S. at 894 (the Court makes clear that “the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s choice not hinder it.” *Id.* at 877.

34. *Gonzales v. Carhart*, 550 U.S. 124 (2007).

35. The Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 1, 117 Stat. 1201, 1201 (2003)(codified at 18 U.S.C. § 1531 (2003)).

36. *Gonzales*, 550 U.S. at 160—61.

37. *Id.* at 161.

38. See opinion *id.* at 161—67.

39. See discussion at section II D *infra*.

40. See, e.g. David C. Reardon, Politically Correct vs. Politically Smart: Why Politicians Should Be Both Pro-Woman and Pro-Life, AFTERABORTION.ORG (Nov. 10, 1994), <http://www.afterabortion.info/PAR/V2/n3/PROWOMAN.htm> and Pro-Woman/Pro-Life Campaign, AFTERABORTION.ORG (Mar. 23, 1993), <http://www.afterabortion.info/PAR/V1/n1/prowoman.htm>. (For background on David Reardon see Reva B. Siegel, *The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Anti-Abortion Arguments*, 57 DUKE L.J. 1641, 1672—76 (2008).

of love the mother has for her child. The Act recognizes this reality as well... While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained”.<sup>41</sup> The Justice’s concerns seem unfounded. Leaders in the field of medicine have concluded that there is no such thing as “post-abortion syndrome.”<sup>42</sup> Still some states require that unproven, inaccurate information is provided to women considering abortion.<sup>43</sup> In upholding the Partial Birth Abortion Act, *Gonzales* also opened the door to arguments for fetal personhood and fetal pain by concluding that the Partial Birth Abortion Act “appl[ie]d [to] both pre-viability and post-viability because, by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside [of] the womb.”<sup>44</sup> The resulting restrictions and attempted restrictions could be anticipated by such language. Thus from 2010 to the present (2015), state legislatures sought and implemented major restrictions on both procedures and access to abortion and reproductive health care.<sup>45</sup>

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41. *Gonzales*, 550 U.S. at 159 (the justice seems to have been swayed by an amicus brief, referencing Brief for Sandra Cano et al. as *Amici Curiae* in no. 05-380, pp.22-24 indicating “severe depression and loss of esteem can follow. See *ibid*”).

42. See Abortion Myths: Post-Abortion Syndrome, NAT’L ABORTION FED’N, <http://prochoice.org/education-and-advocacy/about-abortion/abortion-myths/> (last visited Mar. 17, 2015) (a 1989 report of the American Psychological Association from a panel of psychologist who reviewed the top studies on post-abortion syndrome and found no evidence of such a syndrome).

43. For example, according to Guttmacher Institute updates, in nine of twenty-two states requiring providers to talk about the psychological response to abortion and how a woman is likely to feel afterwards, only negative responses are stressed despite evidence that some women feel relief (Kansas, Louisiana, Michigan, Nebraska, North Carolina, South Dakota, Texas, Utah and West Virginia); in five states women must be given inaccurate information about the impact of abortion on future fertility (Arizona, Kansas, South Dakota, Texas and West Virginia); in five states women are told having an abortion increases their risk of breast cancer, a fact that has been definitively refuted by the National Cancer Institute of the National Institutes of Health (Alaska, Kansas, Mississippi, Oklahoma and Texas). See *State Policies in Brief: Counseling and Waiting Periods For Abortion*, Guttmacher Inst. (Mar. 1, 2015) [http://www.guttmacher.org/statecenter/spibs/spib\\_MWPA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf).

44. *Gonzales*, 550 U.S. at 147; see also discussion II C *infra*.

45. The latitude expanded using *Casey* and *Gonzales* was further supported by the political shift exhibited by the 2010 midterm elections. The Republican platform has opposed abortion over multiple election cycles. The 2012 platform explicitly states “Numerous studies have shown that abortion endangers the health and well-being of women and we stand firmly against it.” See 2012 Republican Party Platform, THE AMERICAN PRESIDENCY PROJECT (Aug. 27, 2012) <http://www.presidency.ucsb.edu/ws/index.php?pid=101961>. The most recent 2014 midterm elections offer little hope that the onslaught of restrictions will abate.



## II. REGULATIONS CONSIDERED AND ENACTED

More abortion legislation was enacted between 2011 and 2013 than during the entire previous decade.<sup>46</sup> In 2011, ninety-two abortion restrictions were enacted.<sup>47</sup> Forty-three provisions seeking to restrict access to abortion services were enacted in 2012, and forty-three additional restrictions were enacted by the middle of 2013.<sup>48</sup> During 2014 abortion bans to replace *Roe* were enacted in seventeen states.<sup>49</sup> A patchwork of laws regulate and limit whether, when and under what circumstances a woman may obtain an abortion. Restrictions are seen in a variety of forms including “Personhood Amendments,” Early Abortion Bans, Limits under the Affordable Care Act (ACA), Limitation to Access using Targeted Restrictions on Abortion Providers (TRAP) laws, Mandatory Counseling and Ultrasound Requirements.<sup>50</sup> These strategies will be discussed in this section.

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46. See More State Abortion Restrictions Were Enacted in 2011—2013 Than in the Entire Previous Decade, GUTTMACHER INST. (Jan. 2, 2014) <http://guttmacher.org/media/inthe-news/2014/01/02/index.html>.

47. Laws Affecting Reproductive Health and Rights: 2012 State Policy Review, GUTTMACHER INST., <http://guttmacher.org/statecenter/updates/2012/statetrends42012.html> (last visited Mar. 18, 2015).

48. State Level Assault on Abortion Rights Continues in First Half of 2013, GUTTMACHER INST. (July 8, 2013), <http://www.guttmacher.org/media/inthenews/2013/07/08/>.

49. Bills were introduced in Alabama, Colorado, Florida, Indiana, Kansas, Kentucky, Louisiana, Missouri, Mississippi, New Hampshire, New York, Ohio, Oklahoma, South Carolina, Washington and West Virginia. The house in Alabama passed a bill that would ban abortion after a heartbeat is detected (no further action is expected since the legislature adjourned its regular session.); an Arkansas ban on abortion after 12 weeks of pregnancy was struck down in March (see note 69 *infra*). Such a pre viability restriction clearly conflicts with U.S. Supreme Court rulings; in Louisiana a measure has been enacted requiring the continuation of life support for a pregnant woman at 20 weeks post fertilization or later to allow the fetus to develop until live birth; the U.S. District Court in North Dakota blocked enforcement of a law passed in 2013 banning abortion after a fetal heartbeat is detected (see note 68 *infra*), the law was found to be unconstitutional and in violation of the precedent set forth in *Roe* which provides a woman with the right to choose to terminate her pregnancy prior to viability. See Monthly State Update: MAJOR DEVELOPMENTS IN 2015, GUTTMACHER INST. (Mar. 1, 2015), <http://www.guttmacher.org/statecenter/updates/index.html>

50. The Americans United for Life (AUL) has been instrumental in providing support for pro life legislatures. They describe their strategies and the success they have been seeing in their document “Defending Life”. (“[M]ore pro-life laws are in effect than ever before, life affirming legislation continues to be introduced in record numbers in a majority of states...AUL actively pursues a strategy of accumulated victories, advocating the systemic and persistent adoption and implementation of life affirming laws...We provide...lawmakers...proven legal strategies and tools that will...state by state, lead to a more pro-life America and help set the stage for the state-by-state battle that will follow *Roe*'s ultimate reversal.” Americans United for Life, DEFENDING LIFE 2013 55-56 (Denise M. Burke ed., 2013).

### A. Personhood Amendments

Although the Supreme Court in *Roe* refused to define the point at which one becomes a person<sup>51</sup>, personhood amendments are seen in a number of variations, from amendments to state constitutions to state statutes. The most extreme ballot initiatives<sup>52</sup> would define life as beginning at conception and thus would prohibit not only abortions, but also some forms of birth control.<sup>53</sup> The intent of these amendments is to challenge the core premise set forth in *Roe* that the fetus is not a person.<sup>54</sup> Thus far, the voters in their respective states have defeated the initiatives, or initiative supporters have not successfully gathered sufficient support to get them on the ballot.<sup>55</sup> As mentioned in discussing *Webster*<sup>56</sup> Missouri defines life as beginning at conception in the preamble to its constitution. It is among eight states that express their intent to restrict the right to legal abortion to the maximum extent permitted in the absence of *Roe*.<sup>57</sup> Statutes which define life/personhood as beginning at conception have been proposed in other states.<sup>58</sup> North Dakota sought to become the first state to pass a “fetal personhood amendment” that would provide protection to a fertilized egg.<sup>59</sup>

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51. Justice Blackmun asserted “We need not resolve the difficult question of when life begins...the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer. *Roe v. Wade*, 410 U.S. 113, 159 (1973).

52. See e.g. Act offered Jan. 11, 2012, H.B. No. 1 (Va. 2012) (bill to construe the word “person” to include unborn children); H.B. 531, Gen. Assem., Reg. Sess. (Va.) 2014.

53. See e.g., Act effective July 1, 2015, H.B. 1309, 113th Leg. Sess. (Miss. 2015), (voted on in the fall of 2011); Florida, H.B. 395, 115th Reg. Sess. (Fla. 2013); Katie Sanders, Personhood Florida Aims to Mimic Mississippi’s Amendment Push, *Politics*, MCCLATCHY DC. Nov. 8, 2011, <http://www.mcclatchydc.com/2011/11/08/129628/florida-group-aims-to-mimic-mississippis.html> (although the anti-abortion group Personhood USA failed to gather enough signatures for the 2012 and 2014 ballots they have not given up); Bruce Finley, Abortion Foes to Try Again to Pass Personhood Amendment in Colorado, THE DENVER POST (Nov. 21, 2011) [http://www.denverpost.com/news/ci\\_19380916?source=rss#sthash.76sY1rCO.dpuf](http://www.denverpost.com/news/ci_19380916?source=rss#sthash.76sY1rCO.dpuf); 2012 Ballot Issues, MONTANA SECRETARY OF STATE, <http://sos.mt.gov/Elections/2012/BallotIssues/#BallotIssue6> (last visited Mar. 17, 2015).

54. *Roe*, 410 U.S. at 158 (“...the word ‘person’ as used in the 14<sup>th</sup> amendment, does not include the unborn.”)

55. See Florida, H.B. 395, 115th Reg. Sess. (Fla. 2013); Aaron Blake, Anti-Abortion ‘Personhood’ Amendment Fails in Mississippi, THE WASHINGTON POST (Nov. 8 2011), [http://www.washingtonpost.com/blogs/the-fix/post/anti-abortion-personhood-amendment-fails-in-mississippi/2011/11/08/gIQASRPd3M\\_blog.html](http://www.washingtonpost.com/blogs/the-fix/post/anti-abortion-personhood-amendment-fails-in-mississippi/2011/11/08/gIQASRPd3M_blog.html) (in Colorado voters rejected a personhood amendment on the 2008, and 2010 ballots by a 3-1 margin and it was defeated again in 2014; in Montana the secretary of state approved the petition for signature gathering but no amendment has been enacted).

56. *Webster*, 492 U.S. at 501; see also *supra* text accompanying notes 21-25.

57. *State Policies in Brief: Abortion Policy in the Absence of Roe*, GUTTMACHER INST., (Jan. 1, 2015), <http://www.guttmacher.org/statecenter/spibs/spib.pdf>.

58. H.B. 490, 62<sup>nd</sup> Leg., 2011 Sess. (Mont. 2011) (defining a person as of the moment of conception); H.B. 1450, 62 Leg., 2011 Sess. (N.D. 2011) (defining person as “individual member[s] of the species homo sapiens at every stage of development.”); H.B. 1571, 53<sup>rd</sup> Leg., 1<sup>st</sup> Sess. (Okla. 2011)(defining as a person “a human being at all stages of human development of life, including the state of fertilization or conception, regardless of age, health, level of functioning, or condition of de-

Personhood is also implicated in both criminal and tort law. In criminal law, the doctrine evolved from finding criminal homicide only if the fetus died after birth (the “born alive” view).<sup>60</sup> Under the modern trend, states have moved away from strict application of the born alive rule and will allow findings of homicide even without a live birth. As the doctrine evolved, there was initially a requirement for viability. Yet some jurisdictions have allowed a cause of action even pre-viability. At the federal level, Congress amended federal criminal law with what has commonly been referred to as “Laci and Connor’s Law” or the Unborn Victims of Violence Act (UVVA).<sup>61</sup> This law makes it a crime to kill or injure a fetus during the commission of a crime against a pregnant woman. In essence, the law classifies the fetus or embryo as a legal person deserving of its own protection under criminal law. The statute defines an unborn child as “a member of the species homo sapiens, at any stage of development, who is carried in the womb.”<sup>62</sup> This recognition and protection is on its face in conflict with *Roe* which specifically states “...that the word ‘person’ as used in the Fourteenth Amendment, does not include the unborn.”<sup>63</sup> The majority of States had already enacted homicide laws that recognized unborn victims, most providing protection regardless of the stage of prenatal development.<sup>64</sup>

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pendency.”); H.B. 1440, 2011 Sess. (Va. 2011) defining life as beginning at conception and an unborn child as “children or the offspring of children of human beings from the moment of conception until birth at every stage of biological development.”); Note that a Virginia legislator introduced a personhood bill at the federal level. See Anita Kumar, Lawmaker files “personhood bill” in the House, *The Washington Post*, Nov. 9 2011.

59. See Mira Oberman, *North Dakota Now Has the Toughest Restrictions in the Country*, BUSINESS INSIDER (Mar. 27, 2013, 10:48 AM), <http://www.businessinsider.com/north-dakota-introduces-toughest-abortion-laws-in-the-country-2013-3>.

60. If a woman be quick with childe, and by a potion or otherwise killeth in her wombe; or if a man beat her, whereby the childe deth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder; but if the childe be born alive and deth of a potion, battery or other cause, this is murder... See William E. Buelow III, *To Be and Not to Be: Inconsistencies in the Law Regarding the Legal Status of the Unborn Fetus*, 71 TEMP. L. REV. 963, 972 (1998) (quoting 3 Coke, Institutes 50 (1648)).

61. See 18 U.S.C. § 1841 (2004). This law was so named for Laci Peterson who was pregnant with Connor at the time she disappeared. Her husband, Scott Peterson, was later convicted of her murder. For more details regarding the Peterson case see <http://www.scottpetersonappeal.org/>. (Note that the South Dakota legislature enacted House Bill 1166 requiring patients to sign a statement indicating “[t]hat abortion will terminate the life of a whole, separate, unique, living human being.” S.D.C.L. §34-23A-10.1(b)-(d) (2011). South Dakota also enacted “The Women’s Health and Human Life Protection Act 2006” H.B. 1215 SD (2006), which attempted to ban all abortions with the limited exception “to prevent the death of a pregnant mother.” This statute was defeated by referendum Nov. 7, 2006 (56 to 44%). To this extent, South Dakota was at the forefront of personhood amendments.

62. 18 U.S.C. § 1841(d) (2014).

63. *Roe*, 410 U.S. at 158 (but again cf. *Webster*, 492 U.S. at 506).

64. See e.g., ARIZ. REV. STAT. ANN. § 13-1102 (2014); GA CODE ANN. § 16-5-80 (2006); IDAHO CODE ANN. § 18-4003 (2014); Illinois, 720 ILL. COMP. STAT. 5/9-1.2 (2014); KY REV. STAT. ANN. § 507A.0303 (2014); LA. REV. STAT. ANN. § 32:8 (2014); MICH. COMP. LAWS ANN. § 750.322 (2014); MINN. STAT. § 609.2661 (2014); MISS. CODE ANN. § 97-3-3 (2014); MONT. CODE ANN. § 45-5-103 (2014); and NEB. REV. STAT. ANN. § 28-391 (2014).

In the context of tort law, the idea that prenatal injuries could not support a cause of action persisted until at least 1946.<sup>65</sup> States today have moved well beyond a born alive analysis and will allow recovery for wrongful death regardless of whether a fetus is viable or not.<sup>66</sup>

Consistent with the notion that prohibition of abortion is warranted, if not at conception, then at least as early in fetal development as possible, a number of states have sought to enact “fetal heartbeat” bills. The first state to consider such a bill was Ohio.<sup>67</sup> These bills, while not technically a total ban on abortion, could outlaw abortion in most circumstances since a fetal heartbeat can be detected as early as five weeks of gestation. Using the notion of fetal heart beat, North Dakota attempted to prohibit abortions as early as five weeks.<sup>68</sup> Other states have followed or attempted to follow suit.<sup>69</sup>

Closely related to the fetal heartbeat bills are attempts to move the point of viability back as far as possible and the attempt to ban abortions on the basis of fetal pain. States have attempted to prohibit abortions well before any point of viability. A number of states have enacted laws that are clearly unconstitutional under existing laws. Although there is no argument that a fetus is not viable at twelve weeks, over eighteen states have enacted statutes that would ban abortions before viability.<sup>70</sup>

Fetal pain laws are based on the premise that a fetus feels pain upon administration of stimuli by at least twenty weeks of gestation if not sooner.

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65. Buelow, *supra* note 60, at 979.

66. Consistent with its view in *Webster*, Missouri was among the first states to adopt this position. See *Connor v. Monkem Co.*, 898 S.W.2d 89, 93 (Mo. 1995), others adopting this view include Alabama, Illinois, Louisiana, Oklahoma, South Dakota and West Virginia. For more on states that allow wrongful death suits that may or may not be tied to viability see Sheryl A. Symonds, *Wrongful Death of the Fetus: Viability is Not a Viable Distinction*, 8 U. PUGET SOUND L. REV. 103 (1984).

67. H.B. 125, 129<sup>th</sup> Gen. Assemb., Reg. Sess. (Ohio 2011) (as passed by Ohio house, June 28, 2011) Although the bill passed the house, it was not pursued in the Senate; Ann Sanner, *Ohio Senate Puts End to “Heartbeat” Abortion Bill*, *Salon* (Nov. 27, 2012), available at <http://www.ohio.com/news/break-news/ohio-senate-puts-end-to-heartbeat-abortion-bill-1.353376>. see also Jessica L. Knopp, *The Unconstitutionality of Ohio House Bill 124: The Heartbeat Bill*, 46 AKRON L. REV. 253 (2013).

68. N.D. CENT. CODE § 14-02.1-1-05.2 (2013) (banning abortion after detection of a heartbeat; see also *MKB Mgmt. Corp. v. Burdick*, 855 N.W.2d 31 (N.D. 2014).

69. Ark. Code. Ann § 20-16-13 (2013) (amending to add the Arkansas Human Heartbeat Protection Act, which prohibits abortion at twelve weeks if heartbeat detected in abdominal ultrasound); *Edwards v. Beck*, 946 F. Supp. 2d 843 (E.D. Ark. 2013); see also S.B. 96, 121<sup>st</sup> Gen. Assemb. Reg. Sess. (S.C. 2015); A.B. 8947, 237<sup>th</sup> Gen. Assemb. Leg. Sess. (N.Y. 2013); H.B. 5644, 97<sup>th</sup> Gen. Assemb. Reg. Sess. (MI. 2013); H.B. 490, 2014 Leg. Reg. Sess. (AL. 2014); S.B. 2807, 129<sup>th</sup> Leg. Sess., Reg. Sess. (MS. 2014); H.R. 7330, 2014 Leg. Sess. (2013); H.B. 5463, 98<sup>th</sup> Gen. Assemb. Sec. Reg. Sess. (I.L. 2013) (all addressing fetal heartbeat legislation in 2014).

70. See *Guttmacher supra* note 49 (Alabama, Arkansas, Delaware, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Missouri, New Mexico, North Dakota, Ohio, Oklahoma, West Virginia and Wisconsin all banning abortions prior to viability.)

There is substantial disagreement on this point.<sup>71</sup> The idea that a fetus can feel pain has been promulgated by a number of scholars, yet there is little support for this position.<sup>72</sup> A 2005 review of the medical literature by the Journal of the American Medical Association (JAMA) seems to refute claims that a fetus feels pain at twenty weeks. The article states:

Pain is an emotional and psychological experience that requires conscious recognition of a noxious stimulus. Consequently, the capacity for conscious perception of pain can rise only after thalamocortical pathways begin to function, which may occur in the third trimester around 29 to 30 weeks' gestational age, based on the limited data available. Small scale histological studies of human fetuses have found that thalamocortical fibers begin to form between 23 and 30 weeks' gestational age, but these studies did not specifically examine thalamocortical pathways active in pain perception.<sup>73</sup>

Nevertheless, as discussed above,<sup>74</sup> *Gonzales* provided the impetus for states to pass more restrictive laws based on all aspects of personhood, including fetal pain. In addition to exemplifying fetal heartbeat laws, North Dakota laws are also illustrative of fetal pain laws.<sup>75</sup> States including North Carolina prohibit abortions at twenty weeks gestation on the theory that fetuses experience pain.<sup>76</sup> Nebraska enacted a bill prohibiting pre-viability abortion using fetal pain as a justification.<sup>77</sup> Pre-viable fetal pain laws, if enforced, severely burden a pregnant woman's choice on whether to continue or terminate her pregnancy.

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71. Denise Grady, *Study Finds 29-Week Fetuses Probably Feel No Pain and Need No Anesthesia*, N.Y. TIMES, (Aug. 24, 2005) <http://www.nytimes.com/2005/08/24/health/24fetus.html>; *Texas: Pro-Life Side Wins Debate Over Fetal-Pain Abortion Ban*, (Mar. 18, 2013) <http://www.lifetimes.com/2013/04/18/texas-pro-life-side-wins-debate-over-fetal-pain-abortion-ban/>.

72. John A. Robertson, *Abortion and Technology Sonograms, Fetal Pain, Viability and Early Prenatal Diagnosis*, 14 U. PA. J. CONST. L. 327,368 (2011).

73. Susan J. Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 J. AM. MED. ASS'N 947 (2005) available at <http://jama.jamanetwork.com/article.aspx?articleid=201429>; see also *Fetus Can't Feel Pain Before 24 Weeks, Study Says*, ASSOCIATED PRESS (June 25, 2010), <http://www.nbcnews.com/id/37920310/>.

74. *Gonzales* and discussion *supra* notes 34-44.

75. James MacPherson, *North Dakota Fetal Pain Bill Passes House, Sent to Governor Jack Dalrymple*, HUFFINGTON POST (Apr. 12, 2013, 4:51 PM), available at [http://www.huffingtonpost.com/2013/04/12/north-dakota-fetal-pain\\_n\\_3071760.html](http://www.huffingtonpost.com/2013/04/12/north-dakota-fetal-pain_n_3071760.html).

76. N.C. Gen. Stat. § 14-45.1 (2013); other states include Alabama, Arizona, Idaho, Indiana, Kansas, and Louisiana; ALA. CODE 1975 § 26-23B-5 (2014); ARIZ. REV. STAT. ANN. § 36-2301 (2014); IDAHO CODE ANN. § 18-608 (2014) (unconstitutionally preempted by *McCormack v. Hiedeman*, 900 F. Supp. 2d 1128 (D. Idaho 2013)); KAN. STAT. ANN. § 65-6709(B)(6)(WEST 2014); LA. REV. STAT. ANN. § 40:1299.35.2 (2014).

77. NEB. REV. STAT. §§ 28-3-102-111 (2010) (the sponsors of the bill admitted that it was intended as a challenge to *Roe v. Wade*).

### B. *Mandatory Ultrasounds and Informed Consent*

Closely related to the “fetal heartbeat” and “fetal pain” bills are the mandatory ultrasound bills.<sup>78</sup> States have attempted to make ultrasounds a part of abortion services since the early 1990s. Even though routine ultrasounds are not considered medically necessary as a component of first trimester abortion, the requirement is becoming more and more common.<sup>79</sup> Ultrasounds are regulated in twenty-three states.<sup>80</sup> Transvaginal ultrasounds have been especially controversial. They have been particularly popular as states enact fetal heart beat legislation since they are the means needed to detect a fetal heart beat during the first trimester of one’s pregnancy. Ultrasounds are commonly used by an obstetrician to determine the date of pregnancy.<sup>81</sup>

Proponents of mandatory ultrasounds argue that the information provided to the pregnant woman will insure that she is making an informed choice on whether to terminate her pregnancy. Instead of being used in a manner that facilitates informed choice, however, they are more likely to be used in an attempt to discourage or reduce abortions. The ultrasound procedure is mandated whether a doctor believes it is medically necessary or not<sup>82</sup> and without consideration of the increased cost for the procedure or the undue burden on one’s ability to terminate a pregnancy. Because a number of the ultrasound laws also require the physician to describe with specificity and

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78. Ultrasound requirements are in place in the following states: Florida, FLA. STAT. ANN. § 390.0111 (WEST 2014); Indiana, IND. CODE § 16-34-2-1.1 (WEST 2014); Kansas, KAN. STAT. ANN. § 65-6709 (WEST 2014) North Carolina, N.C. GEN. STAT. § 90-21 et seq. (2014); Texas, Informed Consent to Abortion Act, §§ 33.001-011, 101.003 et seq. (Vernon, Westlaw through the end of 2013 3<sup>rd</sup> called Sess. of 83<sup>rd</sup> Legislature); Oklahoma, OKLA. STAT. ANN. TIT. 63 § 1-746.1 et seq. (2014); Utah, UTAH CODE ANN. § 76-7-305 (2014) (allows provider to waive under certain circumstances). Although the states have been inconsistent concerning the validity of mandatory ultrasounds, the trend seems to be decidedly towards enforcement and disclosure of findings. *Tex. Med. Providers performing Abortion Servs. v. Lakey*, 806 F. Supp. 2d 942 (W.D. Tex. 2011) (declaring mandatory ultrasound law unconstitutional), *vacated in part*, 667 F.3d 570 (5<sup>th</sup> Cir. 2012) (upholding the mandatory ultrasound law) even on remand the court asserted that the intent of the legislature in enacting the requirement was to discourage women from exercising their constitutional right by making it more difficult for caring and competent physicians to perform abortions, finding that mandatory ultrasound and display law violates free speech rights of doctors and patients); *Lakey* No. A-11-A-CA-486-SS, 2012 WL 373132 at\*5 (W.D. Tex. Feb. 6, 2012) (reluctantly enforcing); *see also* Jim Vertuno, *Federal Judge Rejects Major Parts of New Texas Law on Sonograms and Abortions*, AP (Aug. 30, 2011), available at [http://www.nbcnews.com/id/44334105/ns/us\\_news-life/#.Um\\_E4\\_msiyM](http://www.nbcnews.com/id/44334105/ns/us_news-life/#.Um_E4_msiyM).

79. *See* Guttmacher Inst., *State Policies in Brief: Requirements for Ultrasound* (2015), available at <http://www.guttmacher.org/statecenter/spibs/spibRFU.pdf>

80. *Id.*

81. *See* Robertson *supra* note 72 at 347.

82. *See* Guttmacher *supra* note 79. The report indicates 12 states require verbal counseling or written materials: Georgia, Indiana and Utah require verbal; Kansas, Michigan (included in materials, although not mandated), Missouri, North Carolina, South Carolina and Virginia require written; Nebraska, Oklahoma and Wisconsin require verbal and written materials.

use visual imagery, the laws have been challenged as violative of the first amendment on the grounds that they compel speech.<sup>83</sup>

Professor Carol Sanger argues that requiring ultrasounds as a precondition of abortion is intended to make the abortion decision more difficult for women. “[Mandatory ultrasound is] a fortuitous combination of imagery, imagination and ideology...harassment masquerading as information.”<sup>84</sup> At least three states (Texas, Oklahoma and North Carolina) have had mandatory ultrasound laws challenged. The law challenged in Texas, S.B. 16/H.B. 15, requires the physician “who is to perform an abortion” to display a sonogram of the fetus to the woman, while describing the images to her and making the heartbeat audible to her.<sup>85</sup> The law was challenged in federal court, where the court upheld the law, rejecting concerns about medical necessity or deference to the doctor’s medical judgment.<sup>86</sup> The Supreme Court of Oklahoma permanently enjoined its proposed mandatory ultrasound law.<sup>87</sup>

In North Carolina, the U.S. District Court for the Middle District of North Carolina enjoined two provisions of the North Carolina law, one requiring the provider to describe the image and the other requiring the provider to offer a woman an opportunity to hear the fetal heartbeat.<sup>88</sup> Noting that the act went “well beyond requiring disclosure of those items traditionally a part of the informed consent process, which include in this context the nature and risks of the procedure and the gestational age of the fetus”<sup>89</sup>, the court concluded that the State failed to show that such requirements furthered a compelling state interest in protecting the patients from psycho-

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83. Three states (Louisiana, Texas and Wisconsin) require that the provider perform an ultrasound and show and describe the image. A woman is allowed to look away; 10 states (Alabama, Arizona, Florida, Indiana, Kansas, Mississippi, North Carolina, Ohio, Oklahoma, and Virginia) require the provider to offer the woman the opportunity to view the image. 9 states (Arkansas, Georgia, Idaho, Michigan, Nebraska, Ohio, South Carolina, Utah and West Virginia) require the provider who performs an ultrasound in preparation for an abortion to offer the woman an opportunity to view the image and 5 states (Idaho, Missouri, North Dakota, South Dakota and Utah) require that a woman be given an opportunity to view an ultrasound image. The requirement has been enjoined in North Carolina and Oklahoma.

84. Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351,358 (2008).

85. See H.B. 15, 2011 Leg., 82nd Sess. (Tex.2011) (this bill states in part that the physician performing the abortion provide “in a manner understandable to a layperson, a verbal explanation of the results of the sonogram images, including a medical description of the dimensions of the embryo or fetus, the presence of cardiac activity, and the presence of external members and internal organs”).

86. See *Tex. Med. Providers performing Abortion Servs. v. Lakey*, 667 F.3d 570, 579-80 (5th Cir. 2012). (Louisiana, also in the Fifth Circuit, quickly passed its own mandatory ultrasound law LA. REV. STAT. ANN. § 40:1299.35.2 (2014).

87. *Okla. Coal. For Reprod. Justice v. Cline*, 292 P.3d 27 (Okla. 2012), cert. granted, 133 S. Ct. 2887 (2013) (no. 12-1094) cert. dismissed, 292 P.3d 27 (2013).

88. *Stuart v. Huff*, 834 F Supp 2d 424 (M.D.N.C. 2011) enjoining enforcement of N.C. Gen. Stat. § 90-21.85.

89. *Id.* at 431.

logical/emotional distress or in preventing women from being coerced into having an abortion.<sup>90</sup>

More recently, the Court of Appeals for the Fourth Circuit, in considering challenges to this same act, affirmed the district court's holding that N. C. Gen. Stat. § 90-21.85(b) violated the First Amendment. The court held that the "Women's Right to Know Act", which was passed in 2011 over a gubernatorial veto, resulted in compelled speech and as such was not constitutional.<sup>91</sup> The court opined, in sum, "though the State would have us view this provision as simply a reasonable regulation of the medical profession, these requirements look nothing like traditional informed consent, or even the versions provided in *Casey* and in N.C. Gen. Stat. § 90-21.82. As such, they impose an extraordinary burden on expressive rights."<sup>92</sup> Given the inconsistency of outcomes among the circuits, it appears that the Supreme Court will ultimately determine the validity of mandatory ultrasounds. Unfortunately, as discussed above, the Court's language in *Gonzales* would seem to support an extreme interpretation of informed consent rather than a reasonable one.

### C. *Mandatory Counseling and Informed Consent*

The principle of informed consent has its roots in the English common law.<sup>93</sup> Under the doctrine, administering medical treatment without first obtaining the patient's consent was considered a form of battery.<sup>94</sup> The fundamentals of the concept as exemplified in American jurisprudence include the notion "that '[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body....' True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and

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90. *Id.* at 432.

91. *Stuart v. Camnitz*, 774 F.3d 238, 242 (4th Cir. 2014), *cert. denied*, *Walker-McGill v. Stuart*, 83 U.S.L.W. 3901 (July 2015)

92. *Id.* at 254. (In a well reasoned decision the court further concluded that the challenged elements (requiring a physician to speak to a patient who is not listening, rendering the physician a mouth piece of the state's message, and omitting a therapeutic privilege to protect the health of the patient) markedly depart from standard medical practice. *Id.*)

93. *See Arato v. Avedon*, 858 P.2d 598, 605 (Cal. 1993) (imposing a duty for physicians to disclose "material risks" regarding medical procedures).

94. *See e.g. Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."



the risks attendant upon each.”<sup>95</sup> Challenges based on Informed consent date back to the early 1900s.<sup>96</sup>

One of the provisions of the Pennsylvania Abortion Control Act of 1982 at issue in *Casey* involved informed consent.<sup>97</sup> The informed consent provision required that at least twenty-four hours prior to performance of the abortion a physician inform the woman about, inter alia, risks of the procedure and of childbirth, availability of printed materials published by the State describing the fetus, and a list of agencies which provide adoption and other services as alternatives to abortion.<sup>98</sup> The woman must certify in writing that she has been informed of the availability of the printed materials and been provided them if she chooses to view them.<sup>99</sup> In holding that the informed consent requirements did not constitute an undue burden or substantial obstacle to a woman’s decision whether or not to terminate a pregnancy, the Court concluded that “the State had a ‘legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.’”<sup>100</sup> It was clear from the Court’s opinion, however, that information provided under the premise of informed consent should be “truthful” and “not misleading.”<sup>101</sup>

Despite the fact that informed consent is an accepted doctrine and recognized in every state, thirty-five states have fashioned additional mandatory counseling requirements, mandatory delays or both under the guise of ensuring that one’s decision to seek an abortion is informed.<sup>102</sup> As with Personhood Amendments,<sup>103</sup> South Dakota was among the first to enact such informed consent provisions. Its “ACT” contained four major provisions: the Pregnancy Help Center Requirement; the Seventy-two—hour Waiting Period Requirement; the Risk Factors Requirement and the Coercion Provision.<sup>104</sup> Some of the counseling required under the Act can easily be de-

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95. *Canterbury v. Spence*, 464 F.2d 772, 780, *cert. denied*, 409 U.S. 1064 (1972).

96. *Id.* at 779; *See, e.g.*, *Theodore v. Ellis*, 75 So. 655, 660 (La. 1917); *Hunter v. Burroughs*, 96 S.E. 360, 366-68 (Va. 1918).

97. *Casey*, 505 U.S. at 844.

98. *Id.*

99. *Id.* at 881.

100. *Id.* at 882.

101. *Id.* “If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.” *Id.*

102. *State Policies Brief: Counseling and Waiting Periods for Abortion*, GUTTMACHER INST. (Mar. 1, 2015), [http://www.guttmacher.org/statecenter/spibs/spib\\_MWPA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf).]

103. *Roe*, 410 U.S. at 156-57.

104. S.D. CODIFIED LAWS § 34-23A-10.1 (2011). The Pregnancy Help Center Requirement provides that a pregnant woman must consult with a pregnancy health center prior to undergoing an abortion. The 72-hour requirement mandates that there be three full days between the woman’s consultation with a physician and the procedure. The Risk Factor requirement establishes information that a physi-

scribed as misleading, which would seem to conflict with *Casey*'s requirement that information provided be "truthful and nonmisleading."<sup>105</sup> The ACT was challenged and upheld despite its flaws.<sup>106</sup> The court in *Rounds* relied on *Gonzales* to reach the *Casey* standard for "truthful and nonmisleading" information. As mentioned earlier, *Gonzales* seems to have moved to a standard that recognizes scientific disagreement where there is none, to establish what is truthful and nonmisleading.

#### D. Targeted Restrictions on Abortion Providers (TRAP) Laws

TRAP requirements are now in place in twenty-seven states.<sup>107</sup> The changed standard of review in *Casey*, from the trimester framework to an undue burden standard and the already articulated interest from *Roe* in a woman's health combined to open the door to what, arguably, have been the most devastating abortion restrictions to date. These laws place substantial requirements on abortion facilities, some of which are structural and others of which go to qualifications of those performing the procedure. Few are medically necessary. Rather, they are intended to make it too expensive for the clinics to operate, to prevent access to care and to drive abortion providers out of business.<sup>108</sup> To date these measures have been most damaging. As a result some states have lost a significant number of their clinics.

TRAP regulations typically regulate the licensing of a clinic and/or charge an excessive licensure fee; single out abortion providers for medically unnecessary standards; or regulate the place in which abortions may be performed such as designating clinics as ambulatory surgical centers, which require standards not necessary to provide safe abortions.<sup>109</sup> A usual sus-

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cian must tell a pregnant woman about the complications associated with abortion and the Coercion Provision requires the doctor to certify that the woman has not been coerced.

105. *Casey*, 505 U.S. at 844; the Act requires that information be distributed to women indicating that risk of abortion include an increased risk of suicide ideation and suicide and there is a risk of depression and related psychological distress. This information is provided as factual despite medical uncertainty as to its validity. (See Julia R. Steinberg & Lawrence B. Finer, *Coleman, Coyle, Shuping and Rue Make False Statements and Draw Erroneous Conclusions in Analysis of Abortion and Mental Health Using the National Comorbidity Survey*, 46 J. OF PSYCHIATRIC RESEARCH 407 (2012), available at <http://www.guttmacher.org/pubs/journals/j.jpsychires.2012.01.019.pdf>).

106. *Planned Parenthood Minn. v. Rounds*, 653 F.3d 662, 668 (8<sup>th</sup> Cir. 2011).

107. See 16 GUTTMACHER POL'Y REV. 7 (2013); 60 percent of reproductive age women live in those twenty-seven states (*Id.* at 8).

108. Lisa M. Brown, *The TRAP: Targeted Regulations of Abortion Providers*, NAT'L ABORTION FED'N, [http://www.prochoice.org/about\\_abortion/facts/trap\\_laws.html](http://www.prochoice.org/about_abortion/facts/trap_laws.html).

109. *Id.*; see also *State Policies in Brief: Targeted Regulations of Abortion Providers*, GUTTMACHER INST., March 1, 2015, [http://www.guttmacher.org/statecenter/spibs/spib\\_TRAP.pdf](http://www.guttmacher.org/statecenter/spibs/spib_TRAP.pdf) (data provided indicate regulations governing such things as size of procedure rooms, width of corridors, placement within a set distance from a hospital. Abortion providers may be required to have an affiliation with a local hospital and/or admitting privileges or an agreement with another physician who has admitting privileges).

pect, Mississippi, proposed legislation that required all physicians associated with abortion clinics in the state to have admitting and staff privileges at local hospitals.<sup>110</sup> Enforcement of the new law was enjoined by a federal judge in July 2012.<sup>111</sup> The Fifth Circuit Court of Appeals affirmed the stay on enforcement where the court held “that H.B. 1390 admission—privileges requirement imposes an undue burden on a woman’s right to choose an abortion in Mississippi, and is therefore unconstitutional as applied to the plaintiffs in this case.”<sup>112</sup> If the legislation had been enforced, the clinic (which was the last remaining clinic in the State) would have been forced to close.<sup>113</sup> Compliance with the legislation would have increased the operating cost of the clinic by \$1,000 per practitioner, per day.<sup>114</sup> Even with such ramifications the legislation was thought not to violate *Casey’s* undue burden test.<sup>115</sup> Other Mississippi clinics had been regulated out of existence by such provisions.<sup>116</sup>

As indicated above, twenty-seven states have TRAP Laws and, in some states, these laws have resulted in available clinics being reduced to few or one.<sup>117</sup> Other states where clinics are in danger of being regulated out of existence include Alabama, Louisiana and Texas.<sup>118</sup> In Alabama, Reproductive Health Services and Planned Parenthood Southeast brought suit challenging the constitutionality of an Alabama statute that required all doctors providing abortions to have staff privileges.<sup>119</sup> In providing background, the Court commented on the history of violence surrounding this issue<sup>120</sup> and noted, “...the State has enacted separate ‘abortion-related’ legislation...in each of the last four years.”<sup>121</sup> The Women’s Health and Safety Act, which

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110. 2012 Miss. H.B. 1390 127th Leg. Sess. (codified as amended at MISS. CODE ANN. § 41-75-1 (2013)).

111. Jackson Women’s Health Org. v. Currier (*JWHO I*), 878 F. Supp. 2d 714, 720 (S.D. Miss. 2012). In April 2013, the clinic moved for a preliminary injunction to challenge revocation of its license. Jackson’s Women’s Health Org. v. Currier (*JWHO II*), 940 F. Supp. 2d 416, 417 (S.D. Miss. 2012).

112. See Jackson Women’s Health Org. v. Currier, 760 F.3d 448 (5th Cir. 2014).

113. *JWHO I*, 878 F. Supp. 2d at 715-18.

114. *Id.* at 718.

115. *Id.* at 720.

116. *Abortion Laws: And Then There Was One*, ECONOMIST (Sept. 8, 2012), <http://www.economist.com/node/21562215> (for a fuller discussion of the Mississippi TRAP laws see Laura Young, Note and Comment, *Falling Into the TRAP: The Ineffectiveness of ‘Undue Burden’ Analysis in Protecting Women’s Right to Choose*, 34 PACE L. REV. 947 (2014)).

117. Rachel B. Gold & Elizabeth Nash, *TRAP Laws Gain Political Traction While Abortion Clinics—And the Women They Serve—Pay the Price*, GUTTMACHER POL’Y REV., Spring 2013, at 10

118. See *Midtown Medical LLC v. Dept. of Health and Hosp.* 135 So. 3d 594 (La. 2014) (affirming Louisiana’s Department of Health and Hospital’s ability to impose fines on outpatient abortions clinics for failure to comply with state and federal rules).

119. *Planned Parenthood Southeast, Inc. v. Strange*, 33 F. Supp. 3d 1330 (Ala. M.D. 2014).

120. *Id.* at 1333.

121. *Id.* at 1334; see also 2014 Ala. Acts 441 (extending informed consent waiting period to 38 hours); 2013 Ala. Acts 79 (Women’s Health and Safety Act); 2012 Ala. Acts 405 (Federal Abortion Opt Out Act); 2011 Ala. Acts 672 (Alabama Pain—Capable Unborn Child Protection Act).

had been enacted the year before, imposed several new architectural, personnel and procedural requirements on abortion clinics.<sup>122</sup> The Court applied *Casey's* undue burden test in evaluating whether a staff privileges requirement posed a substantial obstacle.<sup>123</sup> The Court found that none of the current providers at the clinics would be able to obtain staff privileges.<sup>124</sup> Moreover, it was unlikely that the Plaintiffs would be able to find replacements for them.<sup>125</sup> The Court ultimately declared the Act unconstitutional and entered an “initial declaratory judgment” to seek input as to whether ‘facial’ relief (including an injunction), is warranted.<sup>126</sup>

Mississippi, likewise required that all physicians associated with an abortion facility have admitting privileges at a local hospital.<sup>127</sup> Jackson Women’s Health Organization (JWHO) sought and obtained a temporary restraining order and a preliminary injunction.<sup>128</sup> The state appealed the district court’s decision.<sup>129</sup> The Court of Appeals for the Fifth Circuit recognized that application of the statute at issue would result in the closing of the only remaining abortion clinic in the state.<sup>130</sup> The Court, applying the undue burden test, held that JWHO had demonstrated a substantial likelihood that it would succeed on the merits and affirmed the granting of the preliminary injunction by the district court.<sup>131</sup>

Texas also addressed its TRAP law in 2014.<sup>132</sup> In *Whole Woman’s Health v. Lakey*, the provisions at issue included admitting privileges as well as a requirement that abortion facilities meet state standards for ambulatory surgical centers.<sup>133</sup> Prior to this case, the Fifth Circuit found that the admitting privileges requirement was constitutional, so in this case the challenge to admitting privileges was challenged as applied to the El Paso and McAllen clinics.<sup>134</sup> After careful review, the district court concluded that the ambulatory surgical center requirements and the admitting privileges requirement as applied to the El Paso and McAllen clinics were unconstitutional.<sup>135</sup> The

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122. Effect. 2013 Ala. Acts 79 codified at 1975 ALA. CODE § 26-23E-1 et. Seq.

123. *Strange*, 33 F. Supp. at 1336.

124. *Id.* at 1343.

125. *Id.* at 1348.

126. *Id.* at 1380.

127. Act of July 1, 2012, 2012 Miss. Laws 331 (requiring physicians who perform abortions have admitting privileges at a local hospital).

128. *Jackson Women’s Health Org.*, 760 F.3d at 450 (5th Cir. 2014).

129. *Id.*

130. *Id.* at 449.

131. *Id.* at 459.

132. *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673 (W.D. Tex. Aug. 29, 2014) (Note that as of this writing, the court’s order was stayed, see *Whole Woman’s Health v. Cole*, No 14 A1288, 2015 WL 3947579, at \*1 (U.S. June 29, 2015) and a petition for a writ of certiorari is pending).

133. *Id.* at \*2.

134. *Id.* at \*3.

135. *Id.* at \*12.

court also concluded that the ambulatory surgical center provisions, as applied to medication abortions, were unconstitutional.<sup>136</sup>

The District Court's decision was immediately appealed by the state and the Fifth Circuit heard the case in September of 2014.<sup>137</sup> The Fifth Circuit disagreed with the District Court.<sup>138</sup> From the perspective of the Fifth Circuit, the state would have a substantial likelihood of success on all of its claims.<sup>139</sup> It further found that the Plaintiff had not preserved its as applied challenge to the admitting privileges and thus, was barred by res judicata.<sup>140</sup> All was not lost, however; on appeal to the Supreme Court the state was prohibited from enforcing the admitting privileges requirement against the El Paso and McAllen clinics.<sup>141</sup> The Court also stayed enforcement of the other provisions pending trial.<sup>142</sup> TRAP regulations continue to be passed and introduced without regard for increased cost or impact on access. Admitting privileges requirements for providers have been introduced in seven states.<sup>143</sup>

#### E. *Parental Involvement Laws:*

Parental involvement laws typically require that a pregnant minor's parents be notified of or consent to an abortion. Some form of these laws has been at issue since shortly after the passage of *Roe*. In 1976, the Supreme Court considered a parental consent requirement in *Planned Parenthood v. Danforth*.<sup>144</sup> The Court held that a blanket parental consent requirement was unconstitutional.<sup>145</sup> Likewise, in *Bellotti v. Baird (Bellotti II)* a parental notification requirement was found to be problematic but not totally prohib-

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136. *Id.* at \*12-13.

137. *Whole Woman's Health v. Lakey*, 769 F. 3d 285 (5th Cir. 2014), *vacated in part*, 135 S. Ct. 399 (2014).

138. *Id.*

139. *Id.*

140. *Id.* at 301.

141. *Whole Woman's Health v. Lakey*, 135 S. Ct. 399 (2014).

142. *Id.*

143. Illinois, Indiana, Oklahoma, Pennsylvania, South Carolina and West Virginia. Guttmacher Institute update, *Monthly State Update: MAJOR DEVELOPMENTS IN 2015*, <http://www.Guttmacher.org/statecenter/updates/index.html> (last updated 3/1/15). Arizona already had such a requirement, but have enhanced the regulation by requiring that the hospital granting privileges be within 30 miles of the clinic; Louisiana has enacted a law requiring admitting privileges at a hospital w/n 30 miles; the Oklahoma Supreme Court blocked enforcement of its law. Indiana's law has been enacted, although clinics providing medication abortions are exempted from structural and staffing requirements. *Id.*; Specific TRAP requirements have been introduced in 10 states, (Arizona, Florida, Hawaii, Illinois, Indiana, Minnesota, Missouri, New Hampshire, New York and West Virginia). At least an annual inspection is required in Missouri and Arizona permits unannounced inspections. *Id.*

144. *Danforth*, 428 U.S. 52 (1976).

145. *Id.* at 75 (The Court struck down the part of the statute that prohibited unmarried minors from obtaining an abortion during the first trimester without a parent's consent. Five members of the Court concluded a state could not subject the minor to a parent's absolute veto without justification.)

ited.<sup>146</sup> States may institute parental consent statutes provided they contain an alternative procedure by which the minor may seek an abortion without notifying or consulting her parents.<sup>147</sup> The statute in *Bellotti* included a judicial bypass authorizing the superior court to grant consent after determining the minor was sufficiently mature and informed to choose an abortion without parental consent or even if she could not establish capacity to make the decisions independently, the abortion was in her best interest.<sup>148</sup>

The Pennsylvania Abortion Control Act of 1982 ( Pennsylvania Act amended in 1988 and 1989), likewise required informed consent of one parent for a minor seeking an abortion.<sup>149</sup> Consistent with prior precedent, the Pennsylvania Act included a judicial bypass option for a minor who did not wish to or could not obtain parental consent.<sup>150</sup> The parental consent provision was found to not constitute an undue burden under the court's newly articulated standard.<sup>151</sup> Application of the parental consent provision of the Pennsylvania Act was at issue in *In re Doe*.<sup>152</sup> In this case, the Court determined that the appropriate standard for appellate review of the trial court's decision was abuse of discretion, not de novo review.<sup>153</sup> The Supreme Court of Pennsylvania concluded that the trial court had abused its discretion by basing its determination that appellant lacked maturity/capacity on her failure to seek the consent of her parent.<sup>154</sup> It is unclear why the trial court would rely on such a factor when the General Assembly in enacting the Act, included the judicial bypass so that a minor would not be required to consult with a parent when determining whether or not to terminate her pregnancy. As the Pennsylvania Supreme Court indicates, "The Act states with unmistakable clarity that in order for a physician to legally perform an abortion on a minor, the minor must obtain the consent of one parent or, alternatively, obtain judicial authorization. *Id.* § 3296(a), (c)(emphasis added). Neither parental consultation nor consent is required if the minor is seeking judicial authorization for an abortion, as the Act expressly permits the minor to elect not to seek the consent of her parents."<sup>155</sup>

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146. *Bellotti II*, 443 U.S. 622 (1979) (The Court retreated somewhat from its position in *Danforth*. Even though the court held that a state may not impose a blanket provision requiring the consent of a parent or person in loco parentis as a condition for abortion of an unmarried minor," a majority of the court did recognize that a State's interest in protecting immature minors was sufficient to support a requirement for a consent substitute, either parental or judicial. *Id.* at 643-44).

147. *Id.* at 643.

148. *Id.* at 643-44.

149. *See Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992).

150. *Id.*

151. *Id.* at 887.

152. *Doe*, 33 A.3d 615 (Pa. 2011).

153. *Id.* at 625.

154. *Id.* at 628.

155. *Id.* at 627.

Additional examples of the challenges facing a minor seeking a judicial bypass are seen in other of the trial court's actions in this case. The court relied on the abortion facility's initial failure to provide Appellant with printed materials erroneously deemed required by Section 3205.<sup>156</sup> Appellant's counsel requested a brief recess to allow appellant to retrieve and review the materials, which she did.<sup>157</sup> The trial court was not satisfied with her examination. Among other factors that the trial court cited as being relevant to her intelligence and experience included her average high school grades and her improper use of English during the hearing.<sup>158</sup>

A parental notification statute was at issue in *H.L. v. Matheson*.<sup>159</sup> The statute applied to unemancipated minors who did not claim to be mature enough to choose an abortion independently.<sup>160</sup> Under the circumstances, the State could reasonably and constitutionally mandate parental involvement.<sup>161</sup> Though the statute in *Matheson* did not contain a judicial bypass provision, subsequent statutes have provided such provisions.<sup>162</sup> The judicial bypass provision balances the state's interest in the minor's right to exercise her constitutional right and the interest in protecting the minor by parental or judicial involvement.<sup>163</sup> At the state level litigation is illustrated further in Illinois where enjoinder of the Parental Notice of Abortion Act<sup>164</sup> was sought by the Hope Clinic for Women in 2010.<sup>165</sup> In 2013, the

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156. *Doe*, 33 A.3d at 619 n.4 (Pa. 2001)(Section 3205(a)(2) does not require that these materials be given to a woman seeking an abortion. "Rather it requires that 24 hours prior to the abortion procedure, the physician or designated individual inform the woman that the state health department publishes certain printed materials, 'and that a copy [of such printed materials] will be provided to her free of charge if she chooses to review it'." *Id.* § 3205(a)(2)(i).")

157. *Id.* at 619.

158. *Id.* at 620 (footnote 6 indicates specifically the court noted "That on two separate occasions during the hearing Appellant used improper grammar by stating, 'I can't run no more,' N.T. 3/19/2010 at 8, and 'but that's not there no more.' *Id.* at 17.")

159. *Matheson*, 450 U.S. 398, 413 (1980).

160. *Id.* at 407.

161. *Id.* at 409.

162. *See e.g.* *Lambert v. Wicklund*, 520 U.S. 292 (1997).

163. *See e.g.* *Ohio v. Akron Ctr. For Reprod. Health (Akron II)*, 497 U.S. 502, 514 (1990) (holding parental notice requirement was constitutional because judicial bypass clause provided due process); *Lambert v. Wicklund*, 520 U.S. 292, 298 (1997) (upholding judicial bypass provision for waiver of parental notice if notice is not in the best interest of the minor); *but cf.* *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 332 (2006) (holding that enforcement of parental notification law without exception for health of the minor should be enjoined if no narrower remedy could be reached on remand).

164. 750 Ill. Comp. Stat. Ann. 70/1-70/99 (West 1996). This law had an extensive history of litigation. The original version of the act became law in 1983, over the veto of then Governor Thompson. It prohibited "unemancipated minors and incompetents" from obtaining an abortion without both parents, or the legal guardian" being given notice. Ill. Rev. Stat. 1985, ch. 38, ¶ 81-61 *et seq.*; Pub. Act 83-890 eff. Jan. 31, 1984). It was held unconstitutional for a number of reasons including judicial bypass procedures that failed to provide for expeditious appellate review of notification decisions or assure the minor's anonymity. *See Zbaraz v. Hartigan*, 584 F. Supp. 1452, 1459 (N.D. Ill. 1984).

Supreme Court of Illinois held (*inter alia*) that the statute did not violate due process, equal protection, or gender-equality clauses.<sup>166</sup>

In 2014, parental consent legislation was introduced in 8 states<sup>167</sup> and parental notification requirements were introduced in seven.<sup>168</sup> In Missouri, the house passed a bill that would amend the parental consent requirement for minors obtaining an abortion to require a two-step process for a minor who has two custodial parents.<sup>169</sup> In Montana, a state district court blocked enforcement of a state law that would have required a minor to obtain consent before an abortion.<sup>170</sup> Both Arizona and Alabama revised their laws concerning parental consent.<sup>171</sup> Currently twenty-six states (and counting) have some form of parental consent statute in place.<sup>172</sup>

165. *The Hope Clinic For Women Ltd. v. Adams*, No. 209-CH-38661.010, WL 1198356 at \*1 (Ill. Cir. Ct. Mar. 29, 2010). The 1995 Act had been enjoined for 10 years awaiting promulgation of judicial bypass procedures by the Illinois Supreme Court. The rule entitled “Expedited and Confidential Proceedings under the Parental Notification and Abortion Act” was finally adopted in 2006. Ill. S. Ct. R. 303(A) (2006).

166. *Hope Clinic for Women, Ltd. v. Flores*, 991 N.E.2d 745,772 (Ill. 2013). As mentioned above, The Act in this case had a detailed history of litigation associated with it and this particular case. The Act was first enacted in 1995, after Illinois repealed the Parental Notice of Abortion Act of 1983. *See Id.* 991 N.E.2d at 749-753 and notes 164 & 165 *supra*.

167. Alabama, H.B. 494, Reg. Sess. (Ala. 2014); Arizona, H.B. 2649, 51th Leg., Reg. Sess. (Ariz. 2014); Florida, S.B. 260, 116th Sess., Reg. Sess. (Fla. 2014); Kentucky, H.B. 180, Reg. Sess. (Ky. 2014); Mississippi, S.B. 2138, 133th Leg., Reg. Sess. (Miss. 2014); Missouri, H.B. 1192, 97th Gen. Assemb., Sec. Reg. Sess. (Mo. 2014); New York, S.B. 7550, 237th Leg., Reg. Sess. (N.Y. 2014) and West Virginia, H.B. 2172, 87th Leg., Reg. Sess. (W. Va. 2014).

168. California, 5 A.C.A., Reg. Sess. (Cal. 2014); Georgia, H.B. 242, 152th Gen. Assemb., Reg. Sess. (Ga. 2014); Hawaii, S.B. 254, 27th Leg., Reg. Sess. (Haw. 2014); New Jersey, 25 S.C.R., 216th Leg., First Annual Sess. (N.J. 2014); New York, S.B. 1684, 236th Leg., Reg. Sess. (N.Y. 2014); Washington, S.B. 5156, 63rd Leg., Reg. Sess. (Wash. 2014); and West Virginia, S.B. 279, 81st Leg., Reg. Sess. (W. Va. 2014).

169. H.B. 1192, 97th Gen. Assemb., Sec. Reg. Sess. (Mo. 2014) (One parent would need to consent to the procedure and then notify the other parent in writing at least five days prior to performance. The bill also contains a provision regarding crisis pregnancy centers. The legislature has adjourned for the regular session so no further action is anticipated.)

170. Mont. Code Ann. §§ 50-20-501 to – 11 (2014) (Parental Consent for Abortion Act of 2013) The court reasoned that the law was violative of the equal protection rights guaranteed under the Montana Constitution. Using the same reasoning the court had earlier blocked a law that would have required parental notification. *Lambert v. Wicklund*, 520 U.S. 292 (1997) addressing 1995 Parental Notification Act. *See also Wicklund v. State* 1999 Mont. Dist. Lexis 1116 (1<sup>st</sup> Jud. Dist. Feb. 11, 1999). A referendum passed in Montana in 2012 requiring parental consent for a minor’s abortion. The first judicial court enjoined enforcement of the referendum and the 2013 Act. The Montana Supreme Court reversed and remanded the decision on Feb. 3, 2015 *See Planned Parenthood of Mont. v. State*, No. DA-14-0110, 2015 WL 446411 at \*1 (Mont. 2015).

171. The Arizona law makes it a crime to intentionally assist a minor in obtaining an abortion without notarized parental consent. *See ARIZ. REV. STAT. ANN. § 36-2152A* (2014); The Alabama law amends the existing parental consent requirement for minors to now require a parent to not only consent to the abortion but also to have the consent form notarized and provide a certified birth certificate. Additionally the law adds requirements to the judicial bypass procedure for minors. *ALA. CODE § 26-21-3* (2014).

172. *ALA. CODE §§ 26-21-1 -8* (2015); *ALASKA STAT. §§ 18.16.010-.090* (2014) (ruled unconstitutional in *State v. Planned Parenthood of Ala.*, 171 P.3d 577 (Alaska 2007); *ARIZ. REV. STAT. ANN. §§ 36-2152* (2014) (statutes amended by 2009 Ariz. Legis. Serv. Ch. 172 (H.B. 2564)); *ARK. CODE ANN. §*



In transitioning into my next section on abstinence only education, I do want to note that some school districts attempt to implement comprehensive family education programs that include teaching about sexuality, birth control and abstinence. Most programs allow for parents to opt out if they do not want their child to participate. Nevertheless, programs are challenged and Boards of Education are sued to prevent their implementation. Such a challenge was at issue in *Smith v. Ricci*.<sup>173</sup> The regulation would require each local district to develop its own “Family Life Education Program”, with input from parents, high school age students, clergypersons, physicians and other community members.<sup>174</sup> The program had an “excusal clause” for parents or guardians who did not want their children to participate.<sup>175</sup> Ultimately, the court concluded that the Board had established a sufficient factual basis for the program and allowed it to go forward.<sup>176</sup> The community opposition, however, illustrates the struggle that society has had coming to terms with the sexual and reproductive lives of its teenagers. Even though *Ricci* was decided in 1981, opposition to comprehensive sex education is still strong.<sup>177</sup> On a more positive note, in 2014 nine states proposed and/or

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20-16-801 (2014) (the Arkansas legislature replaced the state’s notification law with this consent requirement in 2005); Cal. Health & Safety Code § 123400 (repealed 2002), CAL. FAM. CODE § 6925 (2014); DEL. CODE ANN. TIT. 24, § 1780-89B (2015); IDAHO CODE ANN. § 18-603-609A, 614 (2014) (ruled unconstitutional in *Planned Parenthood of Idaho v. Wasden*, 376 F.3d 908, 926 (9th Cir. 2004) *cert. denied*, 125 S. Ct. 1694 (2005)) (statute amended by H.B. 351, 58th Leg., Reg. Sess. (Idaho 2005)) (the amended law was enjoined by *Planned Parenthood of Idaho v. Wasden*, 376 F. Supp. 2d 1012 (D. Idaho 2005)); IND. CODE ANN. § 16-34-2-4 (West, Westlaw through 2<sup>nd</sup> Reg. Sess. & 2<sup>nd</sup> Reg. Tech. Sess. 118<sup>th</sup> Gen. Assemb. 2014); KY. REV. STAT. ANN. § 311.732 (2014); LA. REV. STAT. ANN. § 40:1299.35.5 (2014) (held unconstitutional by *Causeway Med. Suite v. Leyoub*, 109 F.3d 1096 (5th Cir. 1997)); ME. REV. STAT. ANN. TIT.22, § 1597-A (2013); MASS. GEN. LAWS ANN. ch. 112, § 12S (2014); MICH. COMP. LAWS ANN. §§ 722.901-08 (2014); MISS. CODE ANN. §§ 41-41-51,-53, -55 (2014) (*See Barnes v. Mississippi*, 992 F.2d 1335 (5th Cir. 1993), *cert. denied*, 510 U.S. 976 (1993); *see also Pro-choice Miss. v. Fordice*, 716 So. 2d 645 (Miss. 1998) (upholding as a constitutional statutory requirement for consent of both parents)); MO REV. STAT. § 188.028 (West, Westlaw through 2014 Reg. Sess.); MONT. CODE ANN. § 50-20-502 (West, Westlaw current through Aug. 1, 2014 Amend.) NEB. REV. STAT. § 71-6902 (West, Westlaw through 2014 Reg. Sess.); N.C. GEN. STAT. ANN. § 90-21.7 (2014); N.D. CENT. CODE ANN. § 14-02.1-03.1 (2013); OHIO REV. CODE ANN. § 2919.121 (2014) (ruled unconstitutional in *Cincinnati Women’s Services, Inc. v. Taft*, 468 F.3d 361 (6th Cir. 2006)); OKLA. STAT. ANN. TIT. § 1-740 (2014) (held unconstitutional in *Nov. Health Sys. v. Gandy*, 416 F.3d 1149 (10th Cir. 2005)); S.C. CODE ANN § 44-41-31 (2014); S.D. CODIFIED LAWS § 34-23A-7 (2014); Tenn. Code Ann. § 37-10-303 (2014); TEX. OCC. CODE ANN § 164-052 (a)(19) (2013); UTAH CODE ANN § 76-7-304 (2014); VA CODE ANN. § 16.1-241 (2014); W. VA. CODE ANN. § 16-2F-3 (2014); WIS. STAT. ANN. § 48.375 (2013).

173. *Ricci*, 446 A.2d 501 (N.J. 1982). This case involved a program developed by the New Jersey State Board of Education in response to statistics showing that under a, recommended but not required, policy for sex education, only 40% of the public school children received such education.

174. *See id.* at 504 (referencing N.J.A.C. 6:2907.1(b)).

175. *Id.* at 504-05.

176. *Id.* at 508.

177. *See* discussion in subsection F *infra*.

enacted legislation addressing sex education, but most were limited to instruction on sexual abuse, awareness, and prevention.<sup>178</sup>

#### F. *Abstinence-Only Education*

Despite an adolescent pregnancy rate in the United States that far exceeds the rates of most if not all developed nations, adolescents here are faced with increasingly limited access to information on their sexual health, reproduction, contraception, and abortion.<sup>179</sup> Countries in Europe traditionally focus on sexuality as part of health education with positive information provided about sexual development, relationships, contraception, and abortion.<sup>180</sup> A comprehensive sex education program, as mentioned in subsection E, would include reproduction, contraception, disease prevention, and healthy sexual development.<sup>181</sup> Rather than focusing on a comprehensive approach as was considered in the 1980s, we see a shift to abstinence only

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178. A number of additional states considered such measures but did not propose or enact specific legislation. (In April of 2014 Alaska's Senate passed a measure which would require that each school district implement an age appropriate sexual abuse awareness and education program for grades K through 12. No further action is expected as this regular session has adjourned; In California bills were enacted authorizing school districts to educate middle and high school students on dating violence, sexual abuse and sex trafficking prevention and requiring the state board to consider including age appropriate content on sexual abuse, sexual assault awareness and sexual assault prevention. The instruction will be available to students from grade K through 12 and there will be procedures for students to opt out; Connecticut enacted legislation that will require age appropriate instruction on sexual abuse, awareness and prevention beginning October 2015 and a second act will define teen dating violence, require schools to address it and develop prevention and intervention strategies. It will also become effective in October 2015; Louisiana's measure will become effective in August 2015 and will address "child assault" awareness and prevention. Earlier versions of the bill would have addressed "sexual" assault awareness in age appropriate instruction; Massachusetts enacted a measure requiring materials on domestic violence, teen dating violence and healthy relationships to be distributed to students in grades 9 through 12. This law became effective in November, 2015. A bill that would have required mandatory instruction on these issues for students in those grades passed in the house. No further action is expected as the regular session has ended; New Mexico includes age appropriate instruction on sexual abuse and assault awareness and prevention training as part of its health education instruction (instruction began for the 2014—2015 school year); Rhode Island currently has age appropriate instruction for grades k through 8 on prevention of abduction, exploitation and sexual abuse. The bill was signed in July; South Carolina will require instruction in sexual abuse and assault awareness and prevention after September 1, 2015; Utah will require instruction on child sex abuse prevention and awareness for elementary school children in public and charter schools, beginning in July 2015. See Guttmacher Inst., *Monthly State Update: Major Developments in 2015*, <http://www.guttmacher.org/statecenter/updates/index.html> (last updated Mar. 1, 2015).

179. See generally Ammie N. Feijoo, *Adolescent Sexual Health in Europe and the U.S.-Why the Difference*, 2, (2001), available at [http://www.advocatesforyouth.org/storage/advfy/documents/adolescent\\_sexual\\_health\\_in\\_europe\\_and\\_the\\_united\\_states.pdf](http://www.advocatesforyouth.org/storage/advfy/documents/adolescent_sexual_health_in_europe_and_the_united_states.pdf); See generally *id.* at 1 (U.S. teen pregnancy rate is almost three times that of Germany and France, and over four times that of the Netherlands).

180. *Id.* at 34.

181. See e.g., Rebekah Saul, *Sexuality Education Advocates Lament Loss of Virginia's Mandate...or Do They?*, 1 GUTTMACHER REPORTER ON PUB. POLICY 3,3 (June 1998), available at <https://www.guttmacher.org/pubs/tgr/01/3/gr010303.html>.

education with substantial government funding in support of it.<sup>182</sup> The funding for abstinence only education (also referenced as abstinence only until marriage or AOUM) began in the late 1980s. Funding averaged \$4 million annually until 1996.<sup>183</sup> From 1996 on funding increased substantially.<sup>184</sup> In the 2007 budget, President Bush was granted \$204 million for AOUM education.<sup>185</sup> Federally funded programs were required to adhere to eight principles called “A to H.”<sup>186</sup> The primary source of funding since 2001 has been the Community Based Abstinence Education Program (CBAE).<sup>187</sup> The communities with high levels of teen pregnancy and sexual activity are more likely to be funded with CBAE funds and use curricula supporting AOUM which seems particularly harmful and unwarranted. This population is especially in need of comprehensive information on contraception and prevention of sexually transmitted diseases.<sup>188</sup> Moreover, studies show that AOUM programs are not successful.<sup>189</sup>

Lack of contraceptive information may result in unplanned pregnancies in an environment where minors have limited access to emergency contraception. States have sought bills requiring minors to have a prescription for emergency contraceptives which should be available over the counter.<sup>190</sup>

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182. In addition to the shift in focus, parental consent and notice provisions for minors' abortion (as discussed in section E *supra*) impose further on a minor's access to reproductive choice.

183. Risha K. Foulkes, *Abstinence-Only Education and Minority Teenagers: The Importance of Race in a Question of Constitutionality*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 1, 2 n.5 (2013), available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1084&context=bjalp>. See e.g., 42 U.S.C.A. § 300z (b)(2) (Prior to this period the Adolescent Family Life Act had been passed. It was the first step in federal funding for sex education and was promulgated “to promote self discipline and other prudent approaches.”)

184. Foulkes, *id.* at 2 n.6. This infusion of funds was augmented by President Bush and his administration beginning in 2002. See Cynthia Dailard, *Sex Education: Politicians, Parents, Teachers and Teens*, GUTTMACHER REPORT ON PUB. POLICY, at 9, 10 (Feb. 2001) available at <http://www.guttmacher.org/pubs/tgr/04/1/gr040109.pdf>. (It was at this point that abstinence only education began to be taught as its own doctrine and as the only option as comprehensive sexual education became a thing of the past.)

185. Michelle Fine & Sara I. McClelland, *The Politics of Teen Women's Sexuality: Public Policy and the Adolescent Female Body*, 56 EMORY L. J. 993, 1002, 1038 n.26 (2007).

186. *Id.* at 1002, 1038 n.27.

187. *Id.* at 1003. These funds come from the Department of Health and Human Services which circulates funding opportunity announcements to community organizations. It should be noted that initially “sex education programs that promote the use of contraceptives are not eligible for funding.” See e.g., *id.* at 1038 n. 38.

188. See *id.* at 1038 n. 34 (indicating for example that 60% of black males and males living in nonmetropolitan areas had received no formal instruction about birth control methods).

189. *Id.* at 1008 (Students who took virginity pledges were less likely to use condoms at first intercourse, engaged in nonintercourse behaviors such as oral sex and had comparable rates of sexually transmitted diseases with nonpledgers. On the positive side pledgers did defer their first sexual intercourse and had fewer partners than nonpledgers.) See also Hannah Bruckner & Peter Bearman, *After the Promise: The STD Consequences of Adolescent Virginity Pledges*, 36 J. ADOLESCENT HEALTH 271 (2005).

190. *Id.* at 1012 (The FDC rejected Barr Pharmaceuticals' application to distribute Plan B over the counter without any age limitations.) See also *id.* at 1038 n. 78.

Almost a decade since emergency contraception has been approved for over the counter sales, States are still seeking to restrict access.<sup>191</sup>

### G. *Public Funding Cuts, and Support for Crisis Pregnancy Centers*

Since the Hyde Amendment was passed in 1977<sup>192</sup> the use of federal Medicaid funds for abortions has been prohibited. Despite challenges, the restriction continues in force.<sup>193</sup> It should be noted that since the enactment of the “Welfare Reform Act” of 1996<sup>194</sup> and the State Children’s Health Insurance Program (S-CHIP), poor immigrants and non-citizens have limited Medicaid eligibility.<sup>195</sup> Such restrictions beg the question of how true a right to reproductive choice is there if it can only be exercised by those who can afford it? Most state policies follow federal guidelines, barring public funding at the state level as well.<sup>196</sup> Planned Parenthood continues to be under attack, with calls for a total elimination of federal funding, despite the fact that no federal funds allocated are used to support abortions.<sup>197</sup> Federal funds to Planned Parenthood are available through Title X.<sup>198</sup> Title X of the Public Health Service Act, enacted in 1970, is devoted exclusively to family planning.<sup>199</sup> It provides funds to family planning services such as Planned Parenthood.

191. In 2014 two states introduced bills that would restrict a minor’s access to emergency contraception. In March the Oklahoma Senate passed a bill that would require a minor younger than 17 to obtain a prescription order. This was in direct contravention of federal law and was identical to a law that had been enjoined two months prior. . See *Monthly State Update: Major Developments in 2015*, *supra* note 178, <http://www.guttmacher.org/statecenter/updates/index.html>.

192. See *supra* note 13. The amendment has been renewed each year since 1977. This prohibition has significantly impacted abortion access for poor women.

193. See *e.g.*, *Maier v. Roe*, 432 U.S. 464 (1977) (holding that the equal protection clause does not require Medicaid programs to pay for non-therapeutic abortions); *Harris v. McCrae*, 448 U.S. 297 (1980) (upholding funding restrictions of Hyde Amendment).

194. Welfare Reform Act of 1996, 8 U.S.C. § 1601 (2014).

195. Although Medicaid will cover non-citizen women’s labor and delivery, it will not cover prenatal or post-natal care. See *Lewis v. Thompson*, 252 F.3d 567 (2d Cir. 2001) (upholding denial of Medicaid funding for prenatal care to undocumented immigrants). The Patient Protection and Affordable Care Act (ACA), 26 U.S.C. § 5000A et seq., has made some progress expanding health care eligibility for citizens who were not Medicaid eligible, but who were unable to afford health insurance. There are states that refuse to participate in the program and as a result there are people who are in need but who cannot get coverage. The ACA includes contraceptive coverage but there is an exemption from the mandate for religiously affiliated employers. See discussion on *Burwell v. Hobby Lobby*, section III. *Infra* pp. 34-36.

196. See *e.g.* Ind. Code § 16-34-1-2 (2015).

197. See generally S.B. 1510, 116th Reg. Sess. (Fl. 2014); H.B. 1310, 97th Gen. Assemb., 2nd Reg. Sess. (Mo. 2014); H.B. 147, Gen. Assemb., Reg. Sess. (Va. 2014); S.B. 763, 97th Leg., Reg. Sess. (Mich. 2014); H.B. 278, 98th Gen. Assemb., Reg. Sess. (Pa. 2013); H.B. 1336, 69th Gen. Assemb., 2nd Reg. Sess. (Co. 2014).

198. See 42 U.S.C. 300a-6 (2014) (prohibiting use of family planning funds where abortion is used as method of family planning).

199. See 42 C.F.R. 59.5 (2000).

Currently Department of Health and Human Services regulations stipulate that programs which treat abortion as a family planning method are not eligible for Title X funding.<sup>200</sup> In 2015, the Senate introduced a bill entitled “Title X Abortion Provider Prohibition Act”, that would deny Title X funds to any entity that performs abortion.<sup>201</sup> Seven states introduced legislation that would ban abortion coverage by health plans offered through Health Exchanges under the Affordable Care Act.<sup>202</sup> Georgia enacted a bill that bans coverage in plans offered by the health exchange except in cases of life endangerment or possible “substantial or irreversible impairment of a major bodily function.”<sup>203</sup> The enacted law also codifies restrictions on abortion in the state employees’ health plan.<sup>204</sup> Eight states have introduced limits in abortion coverage under private insurance coverage.<sup>205</sup>

At the same time that Planned Parenthood is under attack, a number of states are funding Crisis Pregnancy Centers (CPCs). South Dakota was one of the first states to embrace the concept of such centers. As part of its counseling requirements, a pregnant woman was required to consult with a registered “pregnancy help center” prior to undergoing an abortion.<sup>206</sup> Such Centers have become common in a number of states and far outnumber clinics providing reproductive services. The Centers purport to provide free maternity services and are often funded by religious organizations. Although the Supreme Court has not determined whether a state may regulate crisis center speech, a Maryland federal district court has considered a Baltimore ordinance regulating such speech. In *O’Brien v. Mayor and City Council of Baltimore*<sup>207</sup> the Greater Baltimore Center for Pregnancy Concerns, Inc. (The Center) challenged a Baltimore ordinance directed towards

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200. See 42 C.F.R. 59.5(a)(5)(i)(c) (2000) (Title X programs are required to provide pregnant women with nondirective counseling about all options including termination of a pregnancy.)

201. S.51, 114th Cong. (as passed by Senate, January 7, 2015) See *infra* pp. 26-27.

202. Florida, Georgia, Iowa, Michigan, Ohio, Rhode Island and West Virginia. See *Monthly Status Update, Major Developments in 2014*, GUTTMACHER INST., (Dec. 31, 2014), available at <http://www.guttmacher.org/statecenter/updates/december.html>.

203. GA. CODE ANN. § 45-18-4 (2014).

204. GA. CODE ANN. § 45-18-4 (2014).

205. See *An Overview of Abortion Laws*, GUTTMACHER INST., (Jan. 1, 2015), available at [http://www.guttmacher.org/statecenter/spibs/spib\\_OAL.pdf](http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf) (listing Idaho, Indiana, Kansas, Kentucky, Michigan, Montana, Missouri, Nebraska, North Dakota, Oklahoma, and Utah as states with insurance coverage). To be fair, two states have introduced bills that would require abortion coverage under insurance plans. In 2014, Washington passed a measure that would require all health plans offered through the health exchange providing coverage for maternity care or services to include substantially equivalent coverage for abortion services. There are exceptions for entities that purchase insurance and have religious based reasons for not offering such coverage. The legislature adjourned its regular session without approving the measure.

206. S.D. Codified Laws § 34-23A-10.1 (2011) see discussion in section II C and note 104 *supra*. This requirement was stayed by a preliminary injunction in *Planned Parenthood of Minn. v. Daugaard*, 799 F. Supp. 2d 1048, 1060 (D.S.D. 2011).

207. *O’Brien*, 768 F. Supp. 2d 804 (D. Md. 2011).

organizations that provide information about pregnancy-related services but which do not provide or refer clients for abortions or certain types of birth-control services.<sup>208</sup>

Under this Ordinance, The Center would have been required to post a sign in English and Spanish notifying clients that The Center did not provide or make referrals for abortion or birth control services.<sup>209</sup> The Center in this case typifies Crisis Pregnancy Centers. It is supported by a religious organization.<sup>210</sup> It will never provide or refer for abortion or birth control services.<sup>211</sup> It offers pregnancy testing and sonograms.<sup>212</sup> Centers covered under the ordinance engaged in deceptive advertising to attract women seeking abortions to their services.<sup>213</sup> The city was also concerned that limited service pregnancy centers used delay tactics in an effort to dissuade woman from accessing abortion services.<sup>214</sup> Although it is unclear if and to what extent such crisis pregnancy centers can be regulated, it does appear that Baltimore is not the only city expressing these concerns.<sup>215</sup> San Francisco has fared better with its Pregnancy Information and Protection ordinance.<sup>216</sup> The ordinance regulates CPCs to prevent false advertising. The ordinance has been challenged as a violation of free speech, but its validity was upheld by a federal district court for the ninth circuit.<sup>217</sup> Furthermore, it

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208. *Id.* at 810—811 (Ordinance 09-252 was enacted in December of 2009. The Ordinance referred to a center covered under its provisions as a “limited service pregnancy center.”).

209. *Id.* at 810.

210. *Id.* In this instance, the Catholic archbishop and Saint Brigid’s church.

211. *O’Brien*, 768 F. Supp. 2d at 815. (although it would, however, provide information on “Catholic compliant” birth control techniques) *Id.* at 810.

212. *Id.*

213. *Id.* at 815 relying on a 2006 report compiled by U.S. Representative Henry Waxman. (See Minority Staff, Special Investigation Division, Committee on Government Reform, U.S. House of Representatives, *False and Misleading Health Information Provided by Federally Funded Pregnancy Resource Centers* at 1-2 (2006). (Note that Representative Waxman, the then ranking member on the Government Reform Committee, also undertook a review of the abstinence only curricula that found inter alia that two thirds of the programs contained basic scientific errors, blurred religion and science and reinforced stereotypes about boys and girls as scientific fact. See U.S. House of Representatives, Comm. On Gov’t Reform, *The Content of Federally Funded Abstinence-Only Education Programs* 5 (2004), available at <http://belowthewaist.org/podcast/2008/12/20041201102153-50247.pdf>).

214. *O’Brien*, 768 F. Supp. 2d at 815.

215. The District Court enjoined enforcement of the Baltimore ordinance. *Id.* at 817. The City appealed (see *Baltimore Ctr. For Pregnancy Concerns v. Mayor*, 721 F.3d 264 (4th Cir. 2013)). Although the judgment was vacated and the case was remanded because the district court’s decision was “laden with error,” it remains to be seen whether the ordinance will ultimately be enforced. In 2014, an appeals court overturned provisions of New York city’s regulation that required CPCs to tell clients that New York city health officials recommend that pregnant women consult with a licensed health care provider, but the provision requiring a Center to notify a client if the Center lacked medical staff was upheld. (see *Evergreen Ass’n v. City of N.Y.*, 740 F.3d 233 (2d Cir. 2014); *New York City, N.Y. Code* §§ 20-815—818.

216. See *Pregnancy Information Disclosure and Protection Ordinance*, S.F. Code Admin. Code, ch. 93, §§ 93.1; 93.5 (2011).

217. *First Resort, Inc. v. Dennis Herrera et al.*, (9<sup>th</sup> Cir. Docket # 4:11-CV-05534-SBA).

appears that the State of California is poised to enact a “Reproductive Freedom Accountability, Comprehensive and Transparency Act.”<sup>218</sup> Rather than focusing on CPCs and risking a first amendment challenge, the Act will uniformly regulate all pregnancy centers.<sup>219</sup> According to the analysis accompanying the legislative history, “at least 228 CPCs exist in California and approximately 2,500 exist nationwide.”<sup>220</sup>

### III. MORE RECENT CASE LAW AND LEGISLATION

As a result of the November 2014 elections, both the House of Representatives and the United States Senate now have a majority of Republican legislators.<sup>221</sup> This has provided these legislators with the opportunity to further limit abortion access. The newly configured Congress came into session January 6, 2015 and immediately turned to this task.<sup>222</sup> Within twenty-four hours four pieces of legislation addressing abortion were introduced.<sup>223</sup> The “Pain-Capable Unborn Child Protection Act” was introduced in the house on January 6<sup>th</sup>.<sup>224</sup> This bill fully supports the notion of fetal pain that has resulted in restrictions at the state level.<sup>225</sup> The Act establishes that a fetus is capable of feeling pain at twenty weeks of gestation and for that reason would prohibit abortions or attempts at abortions at that point.<sup>226</sup> The Act states that the compelling interest supporting this prohibition is “separate and independent” from the compelling interest providing protection based on viability.<sup>227</sup> The Act would also change the title of the chapter heading for chapter 74 of title 18 from “partial birth abortions” to abortions.<sup>228</sup>

The Senate introduced the “Title X Abortion Provider Prohibition Act.”<sup>229</sup> This Act mandates that “[t]he Secretary shall not provide any assis-

218. Ca. A.B. 775 (2015)

219. The Act has been approved by the Assembly as well as by the Senate Health Committee. 2015 Legis. Bill Hist. Ca. A.B. 775.

220. *Id.* July 1, 2015.

221. *Perilous Year For Abortion Rights*, N.Y. TIMES, (Jan. 20, 2015) [http://www.nytimes.com/2015/01/20/opinion/a-perilous-year-for-abortion-rights.html?\\_r=0](http://www.nytimes.com/2015/01/20/opinion/a-perilous-year-for-abortion-rights.html?_r=0); See also Ed O’Keefe, *Abortion Bill Dropped Amid Concerns of Female GOP Lawmakers*, WASH. POST, (Jan. 21, 2015) <http://www.washingtonpost.com/blogs/post-politics/wp/2015/01/21/abortion-bill-in-flux-as-female-gop-lawmakers-raise-concerns/>.

222. See also, *House Republicans to Investigate Planned Parenthood Over Fetal Tissue*, N.Y. Times, (July 16, 2015)

223. H.R. 36, 114<sup>th</sup> Cong. (2015); S. 48, 114<sup>th</sup> Cong. (2015); S. 50, 114<sup>th</sup> Cong. (2015); S. 51, 114<sup>th</sup> Cong. (2015).

224. H.R. 36, 114<sup>th</sup> Cong. (2015).

225. See discussion in Part II A and notes 71-77 *supra*.

226. H.R. 36, 114<sup>th</sup> Cong. (2015).

227. *Id.*

228. *Id.*

229. S. 51, 114<sup>th</sup> Cong. (2015).

tance under this title to any entity unless the entity certifies that, during the period of such assistance, the entity will not perform, and will not provide any funds to any other entity that performs an abortion.”<sup>230</sup> The Act provides for exceptions for pregnancy resulting from rape or incest or where there is danger of physical injury, illness or death.<sup>231</sup> Once enacted an annual report is required that shows each entity receiving grants and specific statistics for entities performing abortions under the exceptions.<sup>232</sup> Using a strict scrutiny standard, the district court held that the Ordinance violated the Freedom of Speech Clause of Article I of the Constitution.

Clinic Access continues to be of concern. In 2014, legislation addressing clinic access was introduced in four states and enacted in two.<sup>233</sup> In Massachusetts, a law was enacted that would allow police to order individuals who “substantially impede” anyone’s passage to or from a clinic entrance to disperse.<sup>234</sup> New Hampshire enacted a measure that would establish a buffer zone of up to twenty-five feet around reproductive health care facilities.<sup>235</sup> The Freedom of Access to Clinic Entrances Act (FACE)<sup>236</sup> was passed to ensure that protestors, who have a history of using blocking tactics to deny access, do not hinder women’s clinic access.<sup>237</sup> The tactic of “sidewalk counseling” had evolved during the 1980s & 1990s. Initially, abortion providers had found some relief by the imposition of buffer zones separating these “counselors” from the clinic patients and staff. The issue of “floating buffer zones was at issue in *Schenk v. Pro-Choice Network of Western New York*.<sup>238</sup> In an 8-1 decision the Court invalidated provisions of the injunction that had been upheld by the District Court creating “floating buffer zones” to prevent protestors from approaching those entering or leaving the clinic.<sup>239</sup> The Court stated “[w]e need not decide whether the

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230. *Id.*

231. *Id.*

232. *Id.*

233. Massachusetts, New Hampshire, New York and Pennsylvania.

234. Mass. Gen. L., Ch. 266, § 120E (2015) (This law also would allow police (after giving a dispersal order) to require those blocking access to stay at least 25 feet away and would prohibit obstruction of vehicles. The law was tailored to replace the Massachusetts law invalidated in *McCullen v. Coakley* discussed in Part III).

235. N.H. REV. STAT. ANN. § 132:38 (2014).

236. 18 U.S.C. § 248 (2012).

237. See also, *NAF Violence and Disruption Statistics: Incidents of Violence and Disruption Against Abortion Providers in the U.S. and Canada, Nat'l Abortion Fed'n*, available at [http://prochoice.org/wp-content/uploads/violence\\_stats.pdf](http://prochoice.org/wp-content/uploads/violence_stats.pdf).

238. *Schenk*, 519 U.S. 357, 351 (1997). The respondents included three doctors and four medical clinics in upstate New York. The clinics had been subjected to large scale blockades in which the protestors marched, sat, lay in the driveways and in other ways blocked or hindered cars from entering. *Id.* at 362. The District found that local police had been “unable to respond effectively” for reasons including constant protests that overwhelmed police officers and where it was difficult to arrest as protestors would simply disperse and return later. *Id.* at 363.

239. *Id.* at 377.



governmental interests involved would ever justify some sort of zone of separation between individuals entering the clinic and protestors, measured by the distance between the two.”<sup>240</sup> The Court did uphold fixed buffer zones around the doorways, driveways, and driveway entrances.<sup>241</sup>

The issue of buffer zones was addressed most recently in *McCullen v. Coakley*.<sup>242</sup> Petitioner, Eleanor McCullen<sup>243</sup>, and others sought to enjoin enforcement of Massachusetts’ Reproductive Health Care Facilities Act.<sup>244</sup> The Supreme Court recognized that “public way[s]” and “sidewalk[s]” “occupy ‘a special position in terms of First Amendment protection’, because of their historic role as sites for discussion and debate.”<sup>245</sup> The Court had to determine whether the Act was content neutral and therefore not subject to strict scrutiny or content based which would require such an analysis.<sup>246</sup> The Court concluded that the act was neither content neutral, nor content based and therefore did not need to be evaluated using strict scrutiny.<sup>247</sup> Even without strict scrutiny, however, a state would need to ensure that the regulation does not “burden substantially more speech than is necessary to further the government’s legitimate interest.”<sup>248</sup>

The Court determined that because the buffer zone made it more difficult for petitioners “to initiate the close, personal conversations that they view as essential to ‘sidewalk counseling’” the buffer zones were unenforceable.<sup>249</sup> From the Court’s perspective, the respondents had not done enough to address the issue of the protestors in less intrusive ways. They had not prosecuted a protestor in seventeen years.<sup>250</sup> The last time they sought an

240. *Id.*

241. *Id.* at 380; see also Serena Mayeri, *Civil Rights on Both Sides: Reproductive Rights and Free Speech in Schenk v. Pro-choice Network of Western New York*, in *Civil Rights Stories* 293, 318 (Myriam E. Gilles & Risa L. Goluboff eds. 2008.)

242. *McCullen*, 134 S. Ct. 2518 (2014).

243. Mrs. McCullen at the time was a 77 year old life—long Catholic who had devoted countless hours to “sidewalk counseling” before a Boston abortion clinic. See Karls Dial, *More Than Words*, CITIZEN LINK: A PUB. POLICY PARTNER OF FOCUS ON THE FAMILY, (Oct. 27, 2011) available at <http://www.citizenlink.com/2011/10/27/more-than-words/>.

244. Mass. Gen. Laws, ch. 266 (2007) The Act originally enacted in 2000 and amended in 2007, made it a crime to knowingly stand on a “public way or sidewalk” within 35 feet of an entrance or driveway to any “reproductive health care facility...” *id.* § 120E ½(a), (b).

245. *McCullen*, 134 S. Ct. at 2529.

246. *Id.*

247. *Id.* at 2530.

248. *Id.* at 2535 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

249. *McCullen*, 134 S. Ct. at 2537. The Court was also concerned with the protestors being unable to distribute their literature. *Id.* at 2536 Although the majority of the Court seemed to imagine Ms. McCullen and the other protestors as having “personal, consensual conversations” *Id.* with the women entering the clinic, Massachusetts argued that such conversations were hardly consensual and had a sense of violence and intimidation. See Transcript of Oral Argument at 29, 44, *McCullen v. Coakley*, 133 S. Ct. 2857 (2014) (No. 12-1168).

250. *McCullen*, 134 S. Ct. at 2539.

injunction had been in the 1990s,<sup>251</sup> and they had not made sufficient use of the FACE ACT (Freedom of Access to Clinic Entrances of 1994<sup>252</sup> or anti-harassment ordinances.<sup>253</sup>

*Burwell v. Hobby Lobby*<sup>254</sup> was also decided during the 2013—2014 Supreme Court session. In reaching its decision, the Court relied heavily on the Religious Freedom Restoration Act of 1993. (RFRA)<sup>255</sup> The dispute arose because the companies involved, Conestoga, Hobby Lobby, and Mardel, believed they were not required to provide contraceptive coverage for their employees, since doing so would violate their sincerely held religious beliefs that life begins at conception.<sup>256</sup> The companies at the time were all closely held and for profit.<sup>257</sup> The mandate at issue in this case was part of the Patient Protection and Affordable Care Act (ACA).<sup>258</sup> In enacting the ACA, Congress did not specify what preventive care for women was required. Health Resources and Services Administration (HRSA) a component of Health and Human Services (HHS) relied on recommendations from the Institute of Medicine to promulgate Women’s Preventive Services Guidelines that include within required coverage, approved contraceptive methods, sterilization procedures, and patient education and counseling.<sup>259</sup> Certain religious nonprofit organizations, described as “eligible organizations” are exempted from the mandate.<sup>260</sup> None of the companies in the *Hobby Lobby* case fit within the category of “eligible organization” nor did they choose to seek exemption by requesting to be grandfa-

251. *Id.*

252. 18 U.S.C. § 248(a)(1) (2011). This ACT allows for criminal and civil penalties to be brought against anyone who “by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been...obtaining or providing reproductive health services...”*id.*

253. *McCullen*, 134 S.Ct. at 2524. The court cited other jurisdictions that had addressed the problem by having the police order the crowd to disperse and not reassemble within a certain distance for a certain period of time. It also suggested enacting legislation similar to the FACE ACT. The Massachusetts law mentioned in note 233 *supra* did in fact incorporate some of the court’s suggestion by for instance requiring an order to disperse.

254. *Burwell*, 134 S. Ct. 2751 (2014).

255. 42 U.S.C. §§ 2000bb-(1)(a)(b) (2013).

256. *See Burwell*, 134 S. Ct. at 2766 (The companies did not object to all FDA approved methods of birth control; rather, they are objecting to four of twenty at issue.).

257. *Id.* at 2759.

258. § 1001(a)(5), 42 U.S.C.A. § 300gg-13(a)(4); The ACA requires employers with 50 or more full time employees to offer a group health plan or group health insurance. 26 U.S.C. § 5000A(f)(2) (2013).

259. *See* <http://hrsa.gov/womensguidelines>. The contraceptive methods at issue here work by preventing an already fertilized egg from attaching to the uterus. This takes us back to the personhood disputes discussed in section II *supra*.

260. *See* 45 CFR § 147.131(b) (2014) (an eligible organization means a nonprofit organization that holds itself out as a religious organization and opposes providing coverage for some or all of any contraceptive services required to be covered...on account of religious objections).

thered in.<sup>261</sup> Nevertheless, these for profit companies were considered “persons” for purposes of the RFRA.<sup>262</sup> Once the Court held that the companies were protected under RFRA, it was not a huge leap to conclude that application of the contraceptive mandate substantially burdened their sincere religious belief.<sup>263</sup> The Court determined that the companies were not in a position to avoid the burden because of the significant economic consequences.<sup>264</sup>

On its face, Justice Alito’s opinion (other than treating for profit companies as protected under RFRA) might seem plausible. He says the employees are not harmed because the employer can self certify and the employer’s insurance would pick up the contraceptive coverage.<sup>265</sup> However, Justice Ginsburg’s dissent is so much more reasonable and consistent with existing law. She points out that RFRA was enacted in response to *Employment Div. Dep’t of Human Res. of Ore. v. Smith*.<sup>266</sup> The Act was intended to protect individuals. It was extended to protect religious organizations serving larger religious communities out of a special solicitude for organizations serving a shared community of believers. For profit organizations, even if closely held were not contemplated nor in need of such protection. Justice Ginsburg quotes Chief Justice Marshall in describing a corporation as “an artificial being, invisible, intangible and existing only in contemplation of law.”<sup>267</sup> It is difficult to determine how these for profit corporations hold sincerely held religious beliefs. Nor does the fact that the companies are closely held limit the number of employees impacted.<sup>268</sup> Moreover, the Court provides no guidance as to how it would determine which sincerely held beliefs would be worthy of RFRA exemptions.

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261. Companies existing prior to March 23, 2010 had the opportunity to seek exemption from some of the Acts provisions including the contraceptive mandate. 42 U.S.C. §§ 18011(a), (e) (2013).

262. *Burwell*, 134 S. Ct. at 2766.

263. *Id.* at 2779.

264. If they offered insurance without exemption from the mandate they faced taxes of \$100 per day for each affected individual. This could be as high as \$1.3 million per day for Hobby Lobby or \$475 million a year; similarly for Conestoga the cost could be \$90,000 per day or \$33 million a year. For Mardel the cost would be roughly \$15 million per year. 26 U.S.C. § 4980D (2013). Even if they choose not to carry insurance, if an employed obtained insurance under the ACA and qualified for any subsidy, the company would still face fines. 26 U.S.C. § 4980H (2013).

265. 45 CFR §§ 147.131(c)-(d) (2014).

266. *Smith*, 494 U.S. 872 (1990) (Smith involved two members of a Native American Church who lost their jobs and were denied unemployment benefits because they had consumed peyote as part of their religious ceremony. RFRA’s intent was to protect individuals in the free exercise of their sincere religious beliefs.)

267. *Burwell*, 134 S. Ct. at 2794 quoting *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 636, 4 L.Ed. 629 (1819); More recently Justice Stevens reminded us that corporations “have no consciences, no beliefs, no feelings, no thoughts, no desires.” *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 466 (2010) (opinion concurring in part and dissenting in part).

268. As the Dissent points out, “‘closely held’ is not synonymous with small.”

Even if by some interpretation *Hobby Lobby et al.* were considered as worthy of protection under RFRA, that still does not mean that they should have prevailed. It is unclear how their religious beliefs trumps those of the women who do not share their belief and whose health and reproductive rights are equally worthy of protection. *United States v. Lee*<sup>269</sup> can provide some guidance for the Court. The Lee Court concluded that when followers of a particular sect enter into commercial activity as a matter of choice, their faith may not be superimposed on statutory schemes binding on others in that activity.<sup>270</sup> The statutory scheme requiring mandatory comprehensive health coverage should be equally applicable to the companies in this instance. There is no indication that the employees seeking health coverage here share the belief of Hobby Lobby, Conestoga, or Mardel and if they should they are under no obligation to accept coverage. “The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”<sup>271</sup> The Women’s Health Amendment of the ACA is essential to that control. The cost to women being denied this coverage is substantial and expands well beyond pregnancy.<sup>272</sup> The contraceptive coverage provided by the ACA “furthers compelling state interests in public health and women’s well being.”<sup>273</sup> Providing coverage does not command these companies to purchase or provide contraceptives that they object to. Rather, the money for health plans go into undifferentiated funds that finance a wide variety of benefits. The decision to claim benefits is made by the employee and/or dependents not by the company providing insurance under the ACA.<sup>274</sup>

#### IV. CONCLUSION

Anti-Roe strategy has evolved from seeking outright repudiation of *Roe* to chipping *Roe* away, state by state with statutes that push the envelope by making the exercise of the right more time consuming, more costly and more difficult. The TRAP laws discussed earlier are an example of limiting access, law by law, little by little, until one day all the clinics that used to provide reproductive services in a state are gone and women who wish ac-

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269. *Lee*, 455 U.S. 252 (1982) This pre-Smith decision is still relied on post RFRA. See *Burwell*, 134 S. Ct. at 2804 discussing *Lee*; *Lee* involved an Amish employer who believed withholding or paying social security taxes for employees violated his religious beliefs.

270. See *Burwell*, 134 S. Ct. at 2804 quoting *Lee*, 455 U.S. at 261.

271. *Planned Parenthood v. Casey*, 505 U.S. 856 (1992).

272. As the Court notes, contraceptives may be used to control medical conditions such as endometriosis and to reduce the risk of endometrial cancer. Pregnancy may be contraindicated for women with medical conditions such as congenital heart disease, pulmonary hypertension and Marfan syndrome. *Burwell*, 134 S. Ct. at 2789.

273. *Id.* at 2799.

274. *Id.*

cess must seek out distant authorized providers or proximate unauthorized ones.

In 1985, Justice Samuel Alito, then an assistant to the Solicitor General, outlined this strategy in a prescient memo to the Solicitor recommending an approach in the “abortion cases.”<sup>275</sup> At the time the Supreme Court was preparing to hear *Thornburgh v. American Coll. of Obstetricians & Gynecologists*.<sup>276</sup> Alito wrote “no one seriously believes that the Court is about to overrule *Roe v. Wade*...by taking these cases, the Court may be signaling an inclination to cut back. What can be made of this opportunity to advance the goals of bringing about the eventual overruling of *Roe v. Wade* and, in the meantime, of mitigating its effects?”<sup>277</sup> Later in the memo he finds language by a judge in *Planned Parenthood League v. Bellotti*<sup>278</sup> useful. He believes discussing the stage of development of the unborn child while not “medically relevant” very relevant to the extra-medical dimension of the abortion choice.<sup>279</sup> Foreshadowing what we see today in terms of informed consent counseling, he feels a state should have the right to require that a woman contemplating abortion be given information regarding the procedure, the fetus, and the effect of the procedure on her and the fetus.<sup>280</sup> He further makes the point that “abortion is not unregulable...there may be an opportunity to nudge the court to provide greater recognition of the state’s interest in protecting the unborn throughout pregnancy.”<sup>281</sup> He wraps up his recommendations recognizing that a frontal assault on *Roe* is not the best approach. A better approach would be to focus on secondary argument that “does not even tacitly concede *Roe*’s legitimacy, and signals that we regard the question as alive and open.”<sup>282</sup>

Those strategies continue, with momentum, thirty years since Justice Alito wrote those words. The Supreme Court has recognized the interest in potential life throughout one’s pregnancy. The “nudge” has become a straight out assault. Much of *Roe*’s protection has been lost. Yet there is still significant work that can be done. For all of its flaws, *Casey* strengthens a woman’s reproductive right by grounding it as a liberty interest. This interest, while strengthening the right to reproductive choice, has nevertheless been weakened by the undue burden standard. Application of this

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275. See <http://www.archives.gov/news/samuel-alito/accession-060-89-1/Acc060-89-1-box18-SG-AbortionsAlt-1985.pdf>

276. *Thornburgh*, 476 U.S. 747 (1986).

277. Alioto Memo, *supra* note 274 at 8.

278. *Bellotti*, 641 F.2d 1006, 1021-1022 (1<sup>st</sup> Cir, 1981).

279. Alioto Memo, *supra* note 274 at 8.

280. *Id.* at 13.

281. *Id.* at 16. He also expressed his displeasure with the “mystical faith” in the attending physician that supports *Roe*.

282. *Id.* at 17.

standard by the courts has diminished the access provided for in *Roe*, almost beyond recognition. The problem with the standard is two-fold. First, applying it has thrust the courts into the midst of intimate choices for women, presenting judicial manageability issues that were possibly unforeseen and unanticipated. The standard is so open-ended that applying it will almost always require experts as part of the litigation. Who will pay this cost? This open-endedness has allowed for the sorts of assaults on *Roe* that are exemplified in *Gonzales*. Moreover, in addition to increased cost, bringing a challenge under the standard requires increased time, when time is of the essence. One example of the increased cost and time is exemplified by the attempted and enacted mandatory ultrasounds and challenges that are discussed in Part II B above. Consider also the women working at a company such as Hobby Lobby who are unable to afford the more expensive IUD, that their employer objects to and therefore need not pay for.

Who will have the burden of establishing that a particular restriction presents an undue burden? It is immensely unfair and impractical to place such a burden on the women affected. Such a requirement could eviscerate any protection that *Roe* has provided. It would seem to make more sense to have a bright line test to guide the courts in evaluating when the fundamental liberty interest has been violated. I suggest that legislative and judicial evaluation of medical procedures that are solely focused on women and their procreative choices should require a semi-strict scrutiny analysis, consistent with the Court's gender equality decisions that place the burden of persuasion on the State to establish its important interest free of stereotypical assumptions about the roles of women, and as well to prove that the restrictions substantially further the states' interests more effectively than other less burdensome alternative policies.<sup>283</sup>

Courts must also take explicit account of the politicization of women's reproductive choice as they evaluate the rationales for restrictive legislation. Laws are proposed and/or enacted to score political victories that denigrate equal dignity for women and micro-manage women's bodies. *Roe* and *Casey* recognized the importance of the decision a woman makes concerning

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283. The principles governing the validity of gender based classifications are firmly established. In *Mississippi Univ. for Women v. Hogan*, the Court clearly states that "the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification". 458 U.S. 718 at 724 (1982) quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981); *Personnel Administrator of Mass. V. Feeney*, 422 U.S. 256, 273 (1979). The court describes the test for determining the validity of gender-based classification as "straightforward", yet cautions that the test "must be applied free of fixed notions concerning the roles and abilities of males and females." *Hogan*, 458 U.S. at 724-25. The test was reaffirmed by the Court in *United States v. Virginia*, 518 U.S. 515 (1996). Relying on *Mississippi Univ.*(above) the Court was pointed in its assertion that the justification must be "exceedingly persuasive," and "the burden of justification is demanding and it rests entirely on the State." 518 U.S. at 533.

whether to terminate a pregnancy. Even in the absence of a trimester framework, it is a decision best made by a woman in consultation with her physician, not one that is dictated by state legislators. *Roe* also contemplated that regulation of facilities and their provision of care should focus on the health of the woman, not limiting access. *Roe* understood that the legislature should not be allowed in doctors' offices, nor should it mandate what a doctor should tell her patient during the consultation. It is not surprising that Courts have characterized the most recent legislative attempts to script the doctor patient relationship as compelled speech with no relation to informed consent.<sup>284</sup>

We are at a juncture requiring renewed effort and resources, as well as the establishment of a clearer standard than undue burden. More importantly, for those of us who have lived before *Roe* and understand what it meant to be without these rights, we must ensure from one generation to the next, that we never forget and that the ability to exercise these rights is not limited or abolished. The sadness about the direction in which we are heading is that those who will be impacted if we continue to lose ground are the least likely to have resources or alternatives and the most likely to be harmed. And so the struggle must continue!

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284. See, discussion in section II. B.