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ROE AT THIRTY-SIX AND BEYOND: ENHANCING PROTECTION FOR ABORTION RIGHTS THROUGH STATE CONSTITUTIONS

LINDA J. WHARTON*

ABSTRACT

In a series of decisions over the past three decades, the Supreme Court has seriously undermined *Roe v. Wade*'s promise of full and meaningful federal constitutional protection for women's access to abortion. While the new Obama administration will enhance protection for reproductive rights at the federal level, the reality remains that reconstituting the Supreme Court with a majority of Justices amenable to fully restoring *Roe*'s strict protections will likely take many years. This Article considers whether state constitutions are a promising avenue for enhancing protection for abortion rights.

This Article looks back on thirty years of reproductive rights litigation under state constitutions to evaluate the strategy of using state constitutions to advance protection for abortion rights. Part I of the Article provides an overview of the major jurisprudential developments on abortion at the federal level, highlighting the steady erosion of protection under the Due Process Clause of the Fourteenth Amendment and the multiple obstacles to successful legal challenges under current law. Part II reviews the sources of protection for abortion rights available under state constitutions and describes the history of reproductive rights litigation in the state courts, highlighting both selected state court decisions that have provided expansive protection for abortion rights and those that have not. Part III evaluates the advantages and drawbacks of a state constitutional law litigation strategy and offers suggestions for future reproductive rights litigation in the state courts. The Article concludes that state

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constitutions are playing an important role in safeguarding abortion rights in individual states in an era of diminished federal constitutional protection and hold promise for influencing a return to expanded protection at the federal level. Although independent state constitutional adjudication is not without limitations and pitfalls, it offers a fruitful alternative venue for continued litigation as one component of a broad-based strategy that includes litigation in federal courts, legislative advocacy, public education, political action, and grass roots organizing.

INTRODUCTION

Thirty-six years after the United States Supreme Court's historic decision in *Roe v. Wade*,[1] the decision survives, but only as a shadow of its former self. While never directly overruling *Roe*, in a series of decisions over the past three decades, the Supreme Court has seriously undermined *Roe*'s promise of full and meaningful federal constitutional protection for women's access to abortion. Several years after *Roe*, the Court approved laws that denied poor women[2] and young women[3] full access to abortion. Then in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[4] decided in 1992, the Supreme Court discarded the highly protective strict scrutiny standard of *Roe* and instituted a new undue burden standard for measuring the constitutionality of restrictions on abortion. The *Casey* plurality insisted that it intended to provide a level of protection for the abortion right that was fully consistent with *Roe*'s core objective of "ensur[ing] that the woman's right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact."[5] As interpreted by the lower courts and later applied by the Supreme Court itself, however, the undue burden standard has proven to be far less protective of abortion rights than the *Roe* standard.[6] Most significantly, in its 2007 decision, *Gonzales v. Carhart*,[7] a newly constituted Supreme Court dramatically reversed course when it upheld the Federal Partial-Birth Abortion Ban Act.[8] The Court had struck down a similar Nebraska ban in 2000 because it did not allow the procedure when necessary to protect a woman's

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

2. *See* Harris v. McRae, 448 U.S. 297, 325-26 (1980) (holding that Federal Medicaid program is not required to fund all medically necessary abortions even where it funds childbirth); Williams v. Zbaraz, 448 U.S. 358, 369 (1980) (holding that state law restrictions on medically necessary abortions, comparable to those in Federal Hyde Amendment, are constitutional); Maher v. Roe, 432 U.S. 464, 474 (1977) (holding that a state participating in Federal Medicaid program is not required to pay for nontherapeutic abortions even where state funds childbirth); *see infra* notes 51-54 and accompanying text.

3. *See, e.g.*, Bellotti v. Baird (*Bellotti II*), 443 U.S. 622, 643 (1979) (approving mandatory parental consent for minors seeking abortion so long as the state also provides an alternative judicial bypass procedure); *see infra* notes 55-56 and accompanying text.

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

5. *Id.* at 872.

6. *See generally infra* Part I (discussing judicial application of the *Casey* undue burden standard).

7. Gonzales v. Carhart, 550 U.S. 124 (2007). Justice Samuel Alito cast the critical fifth vote necessary to sustain the federal ban. *Id.* at 130. In 2006, Justice Alito replaced Justice Sandra Day O'Connor, a key member of the *Casey* plurality. *See infra* notes 155-57 and accompanying text.

8. Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (Supp. IV 2004); *Carhart*, 550 U.S. at 133.

health,[9] but in an opinion filled with anti-abortion terminology and rhetoric, Justice Kennedy, writing for the *Carhart* majority, found that the intentional omission of a health exception posed no undue burden on women.[10] Moreover, in a striking shift in the Court's discourse on abortion, Justice Kennedy put great emphasis on the "ethical and moral concerns" implicated by the procedure[11] and paternalistically justified the ban as necessary to protect women who may later "come to regret their choice."[12]

Not surprisingly, the erosion of federal constitutional protection for abortion has led to an avalanche of legal restrictions on abortion[13] that, coupled with the harassment and stigmatization of abortion providers, have made it difficult for many American women to access abortion services and for physicians to perform them. As governmental restrictions have mounted, the number of abortion providers in the United States has declined dramatically;[14] four states — North Dakota, South Dakota, Mississippi, and Wyoming — have only one or two providers in the entire state.[15] In these and other states, women must make long, costly trips to reach a provider.[16] The impact can be especially burdensome on young women, poor women, rural women, and those who are victims of physical abuse and sexual assault.[17]

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9. Stenberg v. Carhart, 530 U.S. 914, 929-30 (2000); *see infra* notes 132-47 and accompanying text.

10. *Carhart*, 550 U.S. at 164-65.

11. *Id.* at 158.

12. *Id.* at 159.

13. These restrictions include mandatory waiting periods, informed consent scripts that force doctors to give their patients information biased against abortion, licensing and regulatory laws burdening abortion providers with restrictions not applied to other comparable medical providers, detailed reporting requirements, consent and notification requirements for minors, abortion procedure bans, prohibitions on public funding for abortion, and prohibitions on coverage of abortion in private insurance. *See* GUTTMACHER INST., STATE POLICIES IN BRIEF: AN OVERVIEW OF ABORTION LAWS (2009), http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf; GUTTMACHER INST., STATE POLICIES IN BRIEF: ABORTION REPORTING REQUIREMENTS (2009), http://www.guttmacher.org/statecenter/spibs/spib_ARR.pdf; NARAL Pro-Choice America, Who Decides? The Status of Women's Reproductive Rights in The United States: Targeted Regulation of Abortion Providers (TRAP) (2009), http://www.naral.org/choice-action-center/in_your_state/who-decides/fast-facts/issues-trap.html.

14. *See* Rachel K. Jones et al., *Abortion in the United States: Incidence and Access to Services, 2005*, 40 PERSP. ON SEXUAL & REPROD. HEALTH 6 (2008). The number of abortion providers in the United States has been on the decline since 1982. *Id.* at 6 ("Between 1982 and 2000, the number of abortion providers declined by about 38% . . . ."). Between 2000 and 2005, the number of providers decreased by an additional 2%. *Id.* at 10. An estimated 87% of U.S. counties had no abortion provider in 2005. *Id.*

15. *Id.* at 11.

16. *Id.* at 14 (concluding "that some women travel long distances to obtain an abortion" and noting that nine to ten percent of women in southern and midwestern states must "travel more than 100 miles to access [abortion] services").

17. *See id.* at 14 (documenting barriers women encounter in accessing abortion services based on where they reside and their ability to pay). For an excellent examination of the

For these women, the cumulative burden of forced parental consent, waiting periods that may require multiple long distance trips to a provider, and onerous licensing laws that increase the cost of abortion may cause them to delay or entirely forego their abortions.[18]

State-based campaigns to ban abortion are also on the rise.[19] In 2006, the South Dakota legislature passed, but voters rejected, the nation's first post-*Casey* criminal ban on abortion.[20] In November 2008, South Dakotans again defeated a ballot initiative to ban abortion in that state;[21] Coloradans considered and rejected an effort to amend their state constitution to define personhood as beginning at the moment of fertilization.[22] At the same time, under the Bush administration, programs aimed at reducing the need for abortion by preventing unintended pregnancies have lost federal funding as support for "abstinence-only" programs replaced federal support for comprehensive sexuality education.[23]

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realities of abortion access in rural women's lives, see Lisa R. Pruitt, *Toward a Feminist Theory of the Rural*, 2007 UTAH L. REV. 421. Professor Pruitt points out, for example, that "[a] woman without a car, living in Boulder would . . . have to borrow a car or hitchhike to Parowan [143 miles from Boulder], and then make a four-hour bus journey to Salt Lake City, the site of the nearest abortion clinic." *Id.* at 473; *see also* Evelyn Nieves, *S.D. Makes Abortion Rare Through Laws and Stigma*, WASH. POST, Dec. 27, 2005, at A1, A10 ("For some [South Dakota] women, the only way to do it — and not pay for a hotel room — is to make the 700-mile trip in one day.").

18. *See, e.g.*, Jones et al., *supra* note 14, at 14 ("[S]ome women may be unable to obtain an abortion because of circumstances such as distance, gestational limits and cost."); Theodore Joyce et al., *The Impact of Mississippi's Mandatory Delay Law on Abortions and Births*, 278 J. AM. MED. ASS'N 653, 655 (1997) (studying the impact of Mississippi's 1992 mandatory twenty-four hour waiting period and finding that the total rate of abortions for Mississippi residents decreased by approximately 16%, the proportion of Mississippi residents traveling to other states to obtain abortions increased by 37%, and the proportion of second-trimester abortions among all Mississippi women obtaining abortions increased by almost 40%).

19. *See* NARAL Pro-Choice America, Abortion (2009), http://www.prochoiceamerica.org/issues/abortion/.

20. Women's Health and Human Life Protection Act, 2006 S.D. Sess. Laws ch. 119 (imposing a criminal ban on abortions in all cases except when necessary to preserve a woman's life). A successful petition drive in South Dakota halted implementation of the law and secured a statewide vote on its validity. Monica Davey, *South Dakotans Reject Sweeping Abortion Ban*, N.Y. TIMES, Nov. 8, 2006, at P8. On November 7, 2006, a majority of voters in South Dakota rejected the ban. *Id.*

21. Monica Davey, *S. Dakota to Revisit Restrictions on Abortion*, N.Y. TIMES, Apr. 26, 2008, at A14; Tiffany Sharples, *Ballot Initiatives: No to Gay Marriage, Anti-Abortion Measures*, TIME, Nov. 5, 2008, *available at* http://www.time.com/time/politics/article/0,8599,1856820,00.html.

22. *See* Sharples, *supra* note 21. In California, a measure to mandate parental notification for young women under eighteen was defeated for the third time. *Id.* Abortion ban ballot initiatives in Missouri and Montana failed to garner sufficient support to qualify for the November 2008 ballot. NARAL Pro-Choice America, *supra* note 19.

23. Cynthia Dailard, *The Other Shoe Drops: Federal Abstinence Education Program Becomes More Restrictive*, 9 GUTTMACHER POL'Y REV. 6, 6 (2006), http://www.guttmacher

While the new Obama administration is poised to enhance protection for reproductive rights at the federal level, the reality remains that reconstituting the Supreme Court with a majority of Justices amenable to fully restoring *Roe*'s strict protections will likely take many years.[24] As a result, commentators have wisely urged the development of a long-term, comprehensive, strategic plan to restore abortion rights that includes a broad range of strategies — political action, grass roots organizing, public education, and litigation — and emphasizes meaningful access not only to abortion, but to the full range of policies essential to women's reproductive autonomy.[25] Increasingly, legal commentators are calling for a rethinking of litigation strategy.[26] Some have emphasized that post-*Casey* litigation and advocacy must vigorously challenge the cumulative burden of the multiple, incremental obstacles to abortion that effectively foreclose access to abortion for many women.[27] Others have argued that litigators must counteract diminished protection under *Roe*'s due process/privacy analysis by recasting abortion rights in sex equality theory[28] or other federal

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.org/pubs/gpr/09/1/gpr090119.html. The number of abortions performed in the United States has declined in recent years. *See* Jones et al., *supra* note 14, at 6. "Almost two-thirds of the decline . . . can be traced to eight jurisdictions with few or no abortion restrictions" and a commitment to comprehensive sexuality education. Editorial, *Behind the Abortion Decline*, N.Y. TIMES, Jan. 26, 2008, at A16.

24. The Justices most likely to be replaced in the near future are Justices Stevens, Ginsburg, and perhaps Souter — all members of the Court's liberal bloc. Accordingly, in the short term, Obama's presidency will likely mean that the Supreme Court's current balance is preserved. *See, e.g.*, Robert Barnes, *Supreme Court's Direction Hinges on Who Wins '08 Race*, WASH. POST, Oct. 6, 2008, at A2 (discussing the potential effects of the outcome of the 2008 presidential election on the makeup of the Supreme Court). President Bush's nominations to the lower federal courts have also pushed the composition of those courts to the right; President Obama is expected to roll back the conservative advantage in the lower federal courts, but creating a Democratic advantage in these courts will likely take until 2013. Charlie Savage, *Appeals Courts Pushed to Right by Bush Choices*, N.Y. TIMES, Oct. 29, 2008, at A1, A14.

25. *See* Dawn E. Johnsen, *A Progressive Agenda for Women's Reproductive Health and Liberty on* Roe v. Wade*'s Thirty-Fifth Anniversary*, AM. CONST. SOC'Y FOR L. & POL'Y, Jan. 2008, at 10, http://www.acslaw.org/files/Johnsen Issue Brief_01_08.pdf (arguing that a comprehensive progressive pro-choice agenda must include policies that support healthy pregnancies, prevent unintended pregnancy, and oppose "politicization and distortion of reproductive health care information and services"); *see also* JESSICA ARONS, MORE THAN A CHOICE: A PROGRESSIVE VISION FOR REPRODUCTIVE HEALTH AND RIGHTS (Center for American Progress 2006), http://images1.americanprogress.org/il80web20037/cap/more_than_a_choice.pdf (arguing for an expansive definition of reproductive rights that casts abortion as one of a wide range of reproductive rights issues).

26. Johnsen, *supra* note 25, at 6.

27. *See, e.g.*, *id.* at 9-10 (arguing that "[t]he obstacles to abortion . . . that are most underappreciated and in need of attention are those already in place or soon to come," including "the literally hundreds of state abortion restrictions that are designed both to sound reasonable and to stop the performance of abortions as effectively as a criminal ban").

28. *See, e.g.*, Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007)

constitutional theories,[29] or by using subconstitutional doctrines, such as administrative law, to challenge certain restrictions.[30]

This Article considers the viability of another litigation strategy: challenging abortion restrictions under state constitutions. In our federal system of dual sovereignty, although state courts are, of course, bound by Supreme Court decisions limiting federal constitutional guarantees, they may exercise independent judgment when construing provisions of their own constitutions.[31] During the past several decades, as the Warren Court revolution subsided and protection for individual rights under the Federal Constitution steadily waned, state courts have repeatedly invoked the liberty and equality guarantees of state constitutions to give broader protection than that available or likely available under the Federal Constitution.[32] In this way, states have protected individual rights in a wide range of areas,

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[hereinafter Siegel, *Sex Equality*] (discussing a sex equality approach to reproductive rights); Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991 [hereinafter Siegel, *The New Politics*] (arguing that abortion bans based on gender stereotypes violate the Equal Protection Clause). For other earlier scholarship advocating the use of sex equality theory in the abortion context, see Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1 (1992). *See generally* Reva B. Siegel, *Abortion as a Sex Equality Right: Its Basis in Feminist Theory*, *in* MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD 43, 64-65 (Martha Albertson Fineman & Isabel Karpin eds., 1995) (surveying equal protection arguments advanced by leading legal scholars in the 1980s and early 1990s).

29. *See, e.g.*, Eileen McDonagh, *The Next Step After* Roe*: Using Fundamental Rights, Equal Protection Analysis to Nullify Restrictive State-Level Abortion Legislation*, 56 EMORY L.J. 1173, 1181 (2007) (arguing that a promising way to challenge abortion restrictions "entails reframing abortion rights as the right of a woman to consent to pregnancy . . . and . . . invoking the fundamental rights model of equal protection analysis"); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939 (analyzing First Amendment freedom of speech implications of abortion laws that compel specific physician speech). *See generally* WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION'S TOP EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION (Jack M. Balkin ed., 2005) (collection of alternatives to the Court's opinion in *Roe* by leading constitutional law scholars).

30. *See* Gillian E. Metzger, *Abortion, Equality, and Administrative Regulation*, 56 EMORY L.J. 865, 906 (2007) (arguing that administrative law challenges to abortion restrictions "may hold greater promise" than federal constitutional law challenges).

31. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) ("State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law — for without it, the full realization of our liberties cannot be guaranteed.").

32. JEFFREY M. SHAMAN, EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW, at xvii (2008); Brennan, *supra* note 31, at 495.

including public school financing, same-sex marriage equality, and intimate association.[33] Historically, abortion has also been an area in which challenges have been brought under state constitutions.[34] Indeed, California's Supreme Court recognized "[t]he fundamental right of [a] woman to choose whether to bear children" in invalidating its ban on abortion four years before the Supreme Court decided *Roe*.[35] The post-*Roe* movement to litigate in state courts began soon after the Supreme Court allowed restrictions on poor women seeking abortions.[36] In the years between *Roe* and *Casey*, state constitutional challenges focused on laws that curtail young and poor women's access to abortion by requiring parental involvement or restricting public funding for abortion.[37] Following *Casey*, additional challenges have been brought outside these contexts.[38] As a result, a substantial body of state constitutional law jurisprudence in the area of reproductive rights has developed.

Are state constitutions a promising avenue for safeguarding abortion rights in individual states? Can they play a meaningful role in ultimately restoring *Roe*'s protections at the federal level? This Article looks back on thirty years of reproductive rights litigation under state constitutions to evaluate the strategy of using state constitutions to advance protection for abortion rights. Part I provides an overview of the major jurisprudential developments on abortion at the federal level and highlights the steady erosion of protection under the Due Process Clause of the Fourteenth Amendment and the multiple obstacles to successful legal challenges under current law. Part II reviews the sources of protection for abortion rights available under state constitutions and describes the history of reproductive rights litigation in the state courts, highlighting both selected state court decisions that have provided expansive protection for abortion rights and those that have not. Part III evaluates the advantages and drawbacks of a state constitutional law litigation strategy and offers suggestions for future reproductive rights litigation in state

33. For a comprehensive and useful overview of how state courts have used state constitutions to advance liberty and equality interests in these and other areas, see SHAMAN, *supra* note 32.

34. Steven A. Holmes, *Right to Abortion Quietly Advances in State Courts*, N.Y. TIMES, Dec. 6, 1998, at A1.

35. People v. Belous, 458 P.2d 194, 199-200 (Cal. 1969) (relying on both federal and state law precedent and emphasizing "[t]hat such a right is not enumerated in either the United States or California Constitutions is no impediment to the existence of the right").

36. *See supra* note 2.

37. *See generally infra* Part II.B (discussing state court challenges to parental involvement laws and restrictions on public funding for abortion).

38. *See infra* Part II.B (discussing post-*Casey* state court challenges to mandatory waiting periods, biased patient counseling provisions, and laws regulating the medical practice of abortion providers).

courts. The Article concludes that, although they are not a panacea, state constitutions are playing an important role in safeguarding abortion rights in individual states in an era of diminished federal constitutional protection and hold promise for influencing a return to expanded protection at the federal level.

I. THE EROSION OF PROTECTION FOR ABORTION RIGHTS UNDER THE FEDERAL CONSTITUTION

The Supreme Court's 1973 decision in *Roe v. Wade* represented the high-water mark for abortion rights in the United States.[39] During the thirty-six years that followed, an emerging conservative majority prevailed in sharply reducing the scope of protection available under the Due Process Clause of the Fourteenth Amendment.[40] Rulings from the Supreme Court and the lower federal courts have severely limited facial challenges to abortion restrictions, undermined protection for women's health, and weakened the *Casey* undue burden test by "imposing unattainable evidentiary burdens on plaintiffs."[41] Consequently, the ability of reproductive rights litigators to mount successful challenges under the Federal Constitution to the many governmental restrictions that hamper women's access to abortion has been substantially diminished. These obstacles to successful federal challenges are discussed below.

A. The Supreme Court's Framework for Assessing Restrictions on Abortion: From Roe*'s Strict Scrutiny to* Casey*'s Undue Burden Standard*

In its landmark seven to two ruling in *Roe*, the Court invalidated Texas's criminal ban on abortion.[42] The Court did far more, however, than prohibit the most draconian abortion laws. In fact, the Court found that the right to make decisions about whether to end a pregnancy is a fundamental right of privacy protected from governmental intrusion by the Due Process Clause of the Fourteenth Amendment.[43] As such, all restrictions on abortion were examined under the strict scrutiny standard.[44] Under this standard, only laws necessary and

39. GLORIA FELDT, THE WAR ON CHOICE: THE RIGHT-WING ATTACK ON WOMEN'S RIGHTS AND HOW TO FIGHT BACK 5 (2004).

40. Linda J. Wharton et al., *Preserving the Core of* Roe*: Reflections on* Planned Parenthood v. Casey, 18 YALE J.L. & FEMINISM 317, 385 (2006).

41. *Id.*

42. Roe v. Wade, 410 U.S. 113, 166 (1973).

43. *See id.* at 153-55 (relying on the liberty component of the Due Process Clause).

44. *See id.* at 155, 163.

narrowly tailored to serve the most compelling state interests pass constitutional review.[45] The Court recognized only two state interests as sufficiently compelling to justify governmental restrictions on abortion — the state's interests "in preserving and protecting the health of the pregnant woman" and "in protecting the potentiality of human life."[46] The Court crafted a trimester framework as a means of safeguarding the woman's interest in abortion while accommodating the government's interests.[47] Under this framework, restrictions on previability abortions were only permitted if the government could prove that they served to protect women's health.[48] The state's interest in potential life was not sufficiently compelling to override a woman's right to choose abortion until the point of viability.[49] Even then, the state interest was deemed paramount only in cases in which the woman's life or health was not endangered by continued pregnancy.[50]

In the two decades following *Roe*, the Court addressed the constitutionality of a wide variety of restrictions in more than a dozen cases. Soon after *Roe*, however, the Court's narrow application of its principles dealt a major setback to young and low-income women seeking abortions. In *Maher v. Roe* and *Harris v. McRae*, the Court sanctioned restrictions on public funding for abortion, declining to closely scrutinize them and explicitly permitting governments to discriminate between childbirth and abortion in their allocation of funds.[51] Privacy, the Court reasoned in *McRae*, was guaranteed for "the freedom of *a woman to decide* whether to terminate a pregnancy,"[52] but the government could support one decision and not the other.[53] The woman's privacy right was nonetheless constitutionally intact because "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not

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45. *Id.*

46. *Id.* at 162.

47. *Id.* at 163.

48. *Id.* The Court found that the state's interest in protecting the pregnant woman's health became compelling "at approximately the end of the first trimester." *Id.*

49. *Id.* Viability is the point in pregnancy at which the fetus can live outside the pregnant woman's womb. *Id.*

50. *Id.* at 163-64.

51. Harris v. McRae, 448 U.S. 297, 326 (1980); Maher v. Roe, 432 U.S. 464, 474 (1977); *see supra* note 2.

52. *McRae*, 448 U.S. at 312 (emphasis added).

53. *Id.* at 324-25. The Court also found no violation of the constitutional guarantee of equal protection because the Hyde Amendment neither impinged upon a fundamental constitutional right nor differentiated in its treatment of a suspect class. *Id.* at 322. Therefore, the Court declined to apply the strict scrutiny standard of review. *Id.* at 326. The Court found that the federal restrictions were rationally related to the government's "interest in protecting potential life." *Id.* at 325.

remove those not of its own creation."[54] Similarly, in *Bellotti v. Baird*,[55] the Court denied equal access to reproductive choice for young women when it allowed states to require minors seeking abortion to obtain parental consent so long as the state provided an alternative judicial bypass procedure through which women could seek a waiver of the requirement.[56]

These decisions severely hampered young and poor women's access to abortion. Yet, in other contexts during the 1970s and early and mid-1980s, a dwindling majority of the Court repeatedly applied *Roe*'s strict scrutiny to invalidate not only abortion bans, but also a vast array of restrictions that encumbered the abortion choice with delay, administrative hurdles or expense, or disproportionately harmed young, rural, low-income, or battered women.[57]

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54. *Id.* at 316. *But see id.* at 333-34 (Brennan, J., dissenting) ("[I]t is not simply the woman's indigency that interferes with her freedom of choice, but the combination of her own poverty and the Government's unequal subsidization of abortion and childbirth. . . . The fundamental flaw in the Court's due process analysis . . . is its failure to acknowledge that the discriminatory distribution of the benefits of governmental largesse can discourage the exercise of fundamental liberties just as effectively as can an outright denial of those rights through criminal and regulatory sanctions.").

55. Bellotti v. Baird (*Bellotti II*), 443 U.S. 622 (1979). In a plurality opinion, the Court justified its refusal to equate the rights of minor women seeking abortion with those of adult women on three grounds: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." *Id.* at 634. The Court also explained that an alternative judicial bypass procedure was necessary so that parental involvement would not amount to "an absolute, and possibly arbitrary, veto." *Id.* at 643. The *Bellotti II* standard was approved in subsequent opinions. *See, e.g.*, Planned Parenthood Ass'n of Kan. City, Mo. v. Ashcroft, 462 U.S. 476, 491-93 (1983) (sustaining Kansas parental consent requirement accompanied by judicial bypass because the bypass procedure complied with *Bellotti II*); *see also* Hodgson v. Minnesota, 497 U.S. 417, 417, 455 (1990) (invalidating two-parent notice requirement, but sustaining Minnesota law because of presence of judicial bypass procedure); Ohio v. Akron Ctr. for Reprod. Health (*Akron II*), 497 U.S. 502, 510 (1990) (sustaining one-parent notification requirement accompanied by judicial bypass procedure, but leaving open question whether judicial bypass procedures are required for *notice* statutes); H.L. v. Matheson, 450 U.S. 398, 398, 411, 412 n.22 (1981) (sustaining Utah law requiring physicians to notify the parents of a minor, "if possible," prior to performing an abortion, but not addressing whether Utah must provide alternatives to parental notification).

56. *Bellotti II*, 443 U.S. at 643. The Court stated that the question before it was whether the law provides for parental involvement "in a manner that does not unduly burden the right to seek an abortion." *Id.* at 640; *see also McRae*, 448 U.S. at 314 ("The doctrine of *Roe* v *Wade*, the Court held in *Maher*, 'protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy . . . .'" (quoting *Maher*, 432 U.S. at 473-74)); Bellotti v. Baird (*Bellotti I*), 428 U.S. 132, 147 (1976) ("[A] requirement of written consent . . . is not unconstitutional unless it unduly burdens the right to seek an abortion."), *aff'd*, 443 U.S. 622 (1979).

57. *See, e.g.*, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 759-72 (1986) (invalidating biased patient counseling and public disclosure requirements), *overruled in part by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); City of Akron v. Akron Ctr. for Reprod. Health, Inc. (*Akron I*), 462 U.S. 416, 426 (1983) (invalidating mandatory twenty-four hour delay, biased patient counseling, doctor-only

The "constitutional tide" began to turn with the elections of Ronald Reagan and George H. W. Bush and their appointments of a combined total of five new Justices to the Supreme Court.[58] More Justices began to criticize *Roe* in dissenting opinions.[59] Then, in 1989, in *Webster v. Reproductive Health Services*, a plurality of the Court called for "reconsideration" of *Roe*'s trimester framework and reviewed Missouri's abortion restrictions only to determine whether they were "reasonably designed" to advance a legitimate state interest.[60] The Court did not overrule *Roe* because, remarkably in light of her prior opinions,[61] Justice O'Connor, the critical fifth vote, concurred in sustaining the Missouri restrictions, but wrote separately to say the case was not the proper one for reconsidering *Roe*.[62]

Three years later, with two new Bush appointees, Justices Souter and Thomas, in place, the Court appeared poised to overturn *Roe* when it decided *Planned Parenthood of Southeastern Pennsylvania v.*

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counseling, and second-trimester hospitalization requirements), *overruled in part by Casey*, 505 U.S. 833; Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 67-75 (1976) (invalidating spousal and parental consent requirements); Doe v. Bolton, 410 U.S. 179, 193-200 (1973) (invalidating accredited hospitalization requirement, hospital review committee approval, and two-physician concurrence requirement).

58. *See* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 24 (2d ed. 1992). Presidents Reagan and Bush appointed five Justices: Justices O'Connor, Scalia, Kennedy, Souter, and Thomas. For detailed discussions of the changes in the composition of the Supreme Court during the 1980s and early 1990s, the political strategies that led to those changes, and how the Court's new composition affected its support for *Roe*, see DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE* V. *WADE* 637-89 (2d ed. 1998) and TRIBE, *supra*, at 16-20.

59. *See, e.g.*, *Thornburgh*, 476 U.S. at 782-83 (Burger, C.J., dissenting) ("[E]very Member of the *Roe* Court rejected . . . abortion on demand. The Court's opinion today, however, plainly undermines that important principle, and I regretfully conclude that some of the concerns of the dissenting Justices in *Roe* . . . have now been realized."); *id.* at 786 (White, J., dissenting, joined by Rehnquist, J.) ("I continue to believe that this venture has been fundamentally misguided since its inception."); *Akron I*, 462 U.S. at 458 (O'Connor, J., dissenting) ("The *Roe* framework . . . is clearly on a collision course with itself."). Justice O'Connor argued that the *Roe* trimester framework and strict scrutiny standard should be replaced by an undue burden standard. *Thornburgh*, 476 U.S. at 828-29 (O'Connor, J., dissenting); *Akron I*, 462 U.S. at 461-64 (O'Connor, J., dissenting); Planned Parenthood Ass'n of Kan. City, Mo. v. Ashcroft, 462 U.S. 476, 505 (1983) (O'Connor, J., dissenting in part).

60. Webster v. Reprod. Health Servs., 492 U.S. 490, 517-20 (1989) (Rehnquist, C.J., joined by White and Kennedy, JJ.) (arguing "that the rigid trimester analysis of the course of a pregnancy enunciated in *Roe* has [made] constitutional law in this area a virtual Procrustean bed" and urging "reconsideration" of the trimester framework because it had proven "'unsound in principle and unworkable in practice'"); *id.* at 521 (concluding that the case before it offered "no occasion to revisit the holding of *Roe*," thus leaving "it undisturbed," but acknowledging that "[t]o the extent indicated in our opinion, we would modify and narrow *Roe* and succeeding cases"). In contrast, Justice Scalia urged that *Roe* be overruled "explicitly." *Id.* at 532 (Scalia, J., concurring in part).

61. *See supra* note 59.

62. *Webster*, 492 U.S. at 525-26 (O'Connor, J., concurring in part).

Casey.[63] Instead, Justices Kennedy and O'Connor, with Justice Souter, co-authored a rare joint opinion that reaffirmed what they deemed the central tenets of *Roe*.[64] Relying heavily on the doctrine of *stare decisis*,[65] the joint opinion upheld "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State."[66] It also reaffirmed "the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health."[67] Finally, the joint opinion confirmed "the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."[68]

Departing from *Roe*, however, the *Casey* plurality rejected the strict scrutiny standard and the trimester framework, replacing them with a more permissive "undue burden" standard that allowed government greater authority to restrict previability abortions.[69] The *Casey* plurality emphasized that the state's interest in potential life exists "from the outset" of the pregnancy[70] and, therefore, unlike *Roe*,[71] allowed regulation of all previability abortions to promote the state's interest in *either* protecting potential life or preserving women's health, so long as the restrictions rationally further these state interests and do not unduly burden women's access to abortion.[72] Applying this new standard to the challenged Pennsylvania

63. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992). Following the *Webster* decision, Justices William J. Brennan, Jr. and Thurgood Marshall, strong supporters of *Roe v. Wade*, resigned from the Court. GARROW, *supra* note 58, at 688-89; TRIBE, *supra* note 58, at 243. President George H. W. Bush appointed David Souter to the Court in 1990 and Clarence Thomas in 1991. GARROW, *supra* note 58, at 688-89; TRIBE, *supra* note 58, at 243. *Casey* marked the first opportunity for these new Justices to consider the constitutionality of restrictions on abortion. *See* TRIBE, *supra* note 58, at 243. It was widely predicted that Justice Thomas, in particular, would provide the fifth vote needed to overturn *Roe*. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 795-96 (2d ed. 2002) ("It was thought that either [Souter or Thomas], and particularly Justice Clarence Thomas, might cast the fifth vote to overrule *Roe v. Wade*."); Linda Greenhouse, *The Evolution of a Justice*, N.Y. TIMES MAG., Apr. 10, 2005, at 28 ("As the country waited for an answer from the court [in *Casey*] and with a presidential campaign well under way, advocates on both sides gave Roe little prospect of surviving.").

64. *Casey*, 505 U.S. at 846. For a lengthy discussion of the *Casey* litigation history and a detailed analysis of the opinions of the Court and the evolution of the undue burden standard, see Wharton et al., *supra* note 40, at 323-42.

65. *Casey*, 505 U.S. at 853-69.

66. *Id.* at 846.

67. *Id.*

68. *Id.*

69. *Id.* at 872-79.

70. *Id.* at 869.

71. *See supra* note 49 and accompanying text.

72. *Casey*, 505 U.S. at 872. The *Casey* plurality also shifted the burden of proof, requiring challengers of abortion restrictions to show in the first instance that the statute

abortion restrictions, the Court for the first time upheld restrictions on abortion, including a mandatory twenty-four hour waiting period,[73] a biased patient counseling provision,[74] and detailed clinic reporting requirements,[75] which it previously had held unconstitutional.[76] In upholding these provisions, the plurality placed little weight on extensive findings by the district court that documented the serious burdens posed by these requirements and turned a blind eye to the outmoded and offensive stereotypes about women on which they rested.[77]

Yet, despite this reduction in protection, the *Casey* plurality also signaled that the new undue burden standard was meant to offer some degree of continued meaningful protection for women's reproductive autonomy. First, the plurality emphasized the link between reproductive autonomy and women's equality and thus moved the Court toward a firmer constitutional grounding for the abortion right that has long been championed by feminist legal scholars.[78] Second, in defining the undue burden standard, the joint opinion disavowed past iterations of the standard, including Justice O'Connor's prior, more narrow formulation,[79] and defined the test more broadly:

"unduly burdens" the abortion right. *See id.* at 877-79. In contrast, under *Roe*, once plaintiffs proved that a statute created more than a *de minimis* impact on a woman's right to choose abortion, the state bore the burden of demonstrating that the provisions were narrowly drawn to serve a compelling purpose. *Id.* at 929 & n.5 (Blackmun, J., concurring in part and dissenting in part); Roe v. Wade, 410 U.S. 113, 115 (1973).

73. *Casey*, 505 U.S. at 885-87.

74. *Id.* at 881-85.

75. *Id.* at 900-01. The Court also sustained Pennsylvania's narrow definition of "medical emergency" and its requirement that minor women seeking abortion obtain the informed consent of one parent before the abortion. *Id.* at 879-80, 899-900.

76. *See* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 760-63 (1986) (invalidating Pennsylvania's biased counseling provision and clinic reporting requirements); City of Akron v. Akron Ctr. for Reprod. Health, Inc. (*Akron I*), 462 U.S. 416, 450 (1983) (invalidating, inter alia, Ohio's physician-only biased counseling and mandatory twenty-four hour waiting period provisions).

77. Wharton et al., *supra* note 40, at 335-37.

78. *Casey*, 505 U.S. at 856 ("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."); *id.* at 851-52 ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. . . . Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law."); *id.* at 898 (rejecting the husband notice requirement, in part, on the grounds that it reflected "a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution"); *id.* at 928 (Blackmun, J., concurring) ("A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality."); *see supra* note 28; *see also* TRIBE, *supra* note 58, at 256 (arguing that through an "emphasis on equality, the [*Casey*] plurality sketched out a new jurisprudential foundation of the right to choose that is in many ways constitutionally firmer than the approach in *Roe*").

79. *See Casey*, 505 U.S. at 876 ("The concept of an undue burden has been utilized by the Court as well as individual Members of the Court, including two of us, in ways

> A finding of an undue burden is a 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. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.[80]

Therefore, as framed by the *Casey* plurality, the test ostensibly encompasses both regulations that unduly burden women seeking abortion and also those created by the government with that purpose in mind.[81] Third, the *Casey* plurality's application of the new standard showed that it was strong enough to require the facial invalidation of two of the challenged Pennsylvania restrictions: the husband notification requirement and its related reporting provision.[82] Importantly, in scrutinizing the husband notification provision, the joint opinion authors emphasized that the burden must be analyzed by looking at the group of women affected by the restriction, "not the group for whom the law is irrelevant."[83] The plurality thus explicitly repudiated an argument advanced by the Commonwealth of Pennsylvania that would have denied protection to the very women affected by the husband notification requirement because the group consisted of only a small number of women.[84] In invalidating the husband notification requirement on its face, without requiring proof that it would be invalid in *all* circumstances, the Court also implicitly rejected the application of the tough standard of *United States v. Salerno*, which requires facial challengers to prove that there is "no set of circumstances . . . under which [the challenged restriction] would be valid."[85] Instead, the plurality undertook a fact-bound, highly contextualized assessment of the evidentiary record and invalidated the husband notification requirement because the challengers had shown that "in a large

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that could be considered inconsistent. . . . [I]t is important to clarify what is meant by an undue burden.") (citations omitted); *id.* at 879 (noting that it was "refin[ing] the undue burden analysis" used by the lower court). As originally formulated in *Akron I*, Justice O'Connor had defined undue burden as an "absolute obstacle[] or severe limitation[] on the abortion decision." *Akron I*, 462 U.S. at 464 (O'Connor, J., dissenting).

80. *Casey*, 505 U.S. at 877 (emphasis added). Other than substituting the words "substantial obstacle" for undue burden in this passage, the joint opinion offered no clearer explanation of the meaning of the phrase "undue burden." *Id.*

81. While the addition of this "purpose prong" seemed to expand the scope of protection available under the undue burden standard, the joint opinion offered no guidance on its application or meaning.

82. *Casey*, 505 U.S. at 887-98, 901; *see* Wharton et al., *supra* note 40, at 332-35.

83. *Casey*, 505 U.S. at 894.

84. *Id.*

85. United States v. Salerno, 481 U.S. 739, 745 (1987), *rev'd*, 505 U.S. 317 (1992).

fraction of the cases in which [the legislation] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."[86] Fourth, while sustaining the other Pennsylvania restrictions, the plurality limited their conclusions about these provisions to the facts before them in the existing record,[87] thus leaving the door open to subsequent, as-applied challenges to the Pennsylvania provisions and facial challenges to similar laws in other states.[88]

To summarize, while the *Casey* plurality did not sanction the criminalization of abortion, it seriously eroded *Roe*. And although the *Casey* joint opinion offered some basis for optimism that abortion rights would be meaningfully protected in the future, the Court's description of the new undue burden standard and perplexingly inconsistent application of it left many unanswered questions that generated much uncertainty. Unlike *Roe*, whose standards were familiar and easily applied, the novel, fact-intensive, open-textured undue burden standard would need to be applied in subsequent cases before its full contours became clear.

*B. Post-*Casey *Judicial Application of the Undue Burden Standard*

Not surprisingly, following the *Casey* decision, those seeking to limit or deny women's access to abortion moved forward with full speed in adding new restrictions on abortion. Consequently, during the past seventeen years, laws targeted at both women seeking abortions and abortion providers have proliferated across the United States.[89]

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86. *Casey*, 505 U.S. at 895. In criticizing the *Casey* joint opinion, scholars have correctly noted the inconsistency between the plurality's careful assessment of the husband notification provision and its cursory review of most of the other provisions of the Pennsylvania law. *See, e.g.*, Gillian E. Metzger, Note, *Unburdening the Undue Burden Standard: Orienting* Casey *in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2035-36 (1994) (discussing inconsistent application of the undue burden standard in the *Casey* joint opinion).

87. For example, in upholding Pennsylvania's mandatory waiting period, the joint opinion authors noted that they were doing so based "on the record before [the Court] and in the context of this facial challenge." *Casey*, 505 U.S. at 887.

88. *See* Wharton, et al., *supra* note 40, at 338-39.

89. See *supra* note 13. For example, the number of states that force women to listen to state-prescribed information and then wait for a specified period, usually twenty-four hours, before the abortion is performed has nearly doubled since 1992. At the time of the *Casey* decision, thirteen states had mandatory waiting period laws on the books and none were being enforced because the Supreme Court had ruled them unconstitutional. Terry Sollom, *State Legislation on Reproductive Health in 1992: What Was Proposed and Enacted*, 25 FAM. PLAN. PERSP. 87, 88 (1993). Currently, twenty-four states impose these mandatory waiting periods on women seeking abortion. GUTTMACHER INST., STATE POLICIES IN BRIEF: COUNSELING AND WAITING PERIODS FOR ABORTION (2009), http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf. In thirty-three states, "women [must]

Reproductive rights litigators in turn responded with a steady stream of lawsuits that challenged the facial validity of these laws under the Federal Constitution. This section discusses a sampling of the lower court opinions in these challenges, as well as the Supreme Court's own post-*Casey* jurisprudence. These decisions illustrate the multiple barriers to broad and meaningful protection for abortion rights under prevailing federal constitutional law jurisprudence.

1. Lower Courts' Application of the Undue Burden Standard

Lower courts have had many opportunities to apply the *Casey* undue burden standard to assess the constitutionality of a wide range of restrictions on abortion.[90] The standard has provided strong protection against abortion bans[91] and laws requiring women to notify husbands and boyfriends before ending a pregnancy.[92] Also, at least up until the Supreme Court's recent decision in *Gonzales v. Carhart*,[93] discussed below, the lower courts consistently applied the principles of *Roe* and *Casey* to invalidate bans on specific abortion procedures.[94] With respect to most other kinds of abortion restrictions, however, (including waiting periods, biased counseling provisions, and laws regulating the medical practice of providers) the success rate in post-*Casey* challenges has been much lower.[95]

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receive counseling before an abortion is performed: 23 of these states" require women to receive state-prescribed counseling, often biased against abortion, before an abortion procedure. *Id.* As part of this biased counseling, six states force providers to give women information that "inaccurately assert[s] a link between abortion and an increased risk of breast cancer"; eight states require information on the fetus's purported ability to feel pain; nineteen states require information on possible physiological responses to abortion, with seven of these states including only alleged negative emotional responses. *Id.*

90. For a more thorough review and analysis of lower courts' application of the undue burden standard, see Wharton et al., *supra* note 40, at 353-85.

91. *See, e.g.*, Sojourner T. v. Edwards, 974 F.2d 27, 28 (5th Cir. 1992) (invalidating Louisiana's criminal abortion ban); Jane L. v. Bangerter, 809 F. Supp. 865, 880 (D. Utah 1992) (invalidating Utah's criminal abortion ban), *aff'd in part, rev'd in part*, 61 F.3d 1493 (10th Cir. 1995), *rev'd*, Leavitt v. Jane L., 518 U.S. 1377 (1996); Guam Soc'y of Obstetricians & Gynecologists v. Ada, 776 F. Supp. 1422, 1423 (D. Guam 1990) (invalidating Guam's criminal abortion ban), *aff'd*, 962 F.2d 1366 (9th Cir. 1992); *see also supra* notes 20-22 and accompanying text (discussing current efforts to enact abortion bans).

92. *See, e.g.*, Coe v. County of Cook, No. 96 C 2636, 1997 WL 797662, at *1 (N.D. Ill. Dec. 24, 1997) (dismissing a claim against a county hospital that performed an abortion on the plaintiff's girlfriend without notifying him), *aff'd*, 162 F.3d 491 (7th Cir. 1998); *Jane L.*, 809 F. Supp. at 877 (invalidating Utah's husband notification requirement).

93. Gonzales v. Carhart, 550 U.S. 124 (2007); *see infra* notes 155-76 and accompanying text; *see also* Richmond Med. Ctr. for Women v. Herring, 527 F.3d 128, 131 (4th Cir. 2008) (invalidating Virginia abortion procedure ban and distinguishing Virginia's ban from the federal abortion procedure ban upheld in *Carhart*).

94. *See* Wharton et al., *supra* note 40, at 374-77 (discussing lower court decisions that invalidated state bans on abortion procedures).

95. *See id.* at 357 n.221.

Challenges to mandatory waiting period and counseling provisions have failed in the lower courts even where challengers have supported their claims with strong evidence of their probable burdensome effects in pre-enforcement challenges.[96] In many of these cases, the courts misconstrued or narrowly applied the undue burden standard.[97] Some courts have made the mistake of mechanically imposing the result in *Casey* to sustain counseling and waiting periods, rather than assessing the specific evidentiary record to decide whether these provisions would unduly burden the women of a particular state.[98] This approach reflects a misunderstanding of *Casey*. Although *Casey* upheld Pennsylvania's waiting period and biased counseling provisions based on the limited record before the Court, these same provisions may still be invalidated if they prove burdensome in states where the number and location of abortion providers and other specific circumstances render a waiting period unduly burdensome due to long travel distances and consequent increases in cost and delay.[99]

While other courts correctly recognize that "*Casey* [did] not preordain [the] result"[100] in all subsequent challenges, many nonetheless

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96. *See id.* at 357-67 (analyzing post-*Casey* lower court decisions on mandatory waiting periods and biased counseling provisions and noting that research found only three cases with reported decisions that invalidated these provisions on federal constitutional privacy grounds).

97. *Id.* at 357-59.

98. *See, e.g.*, Utah Women's Clinic, Inc. v. Leavitt, 844 F. Supp. 1482, 1487 (D. Utah 1994) (sustaining Utah's mandatory waiting period, reasoning that "[b]ecause the two visit requirement is constitutional in Pennsylvania, it must also be constitutional in Utah — especially in the context of a facial challenge"), *rev'd in part and dismissed in part*, 75 F.3d 564 (10th Cir. 1995); Fargo Women's Health Org. v. Sinner, 819 F. Supp. 862, 864-65 (D.N.D. 1993), *aff'd sub nom.* Fargo Women's Health Org. v. Schafer, 18 F.3d 526 (8th Cir. 1994) (sustaining North Dakota's mandatory waiting period and counseling requirement based on similarities between North Dakota provisions and Pennsylvania provisions upheld in *Casey*); *see also* Barnes v. Mississippi, 992 F.2d 1335, 1341-42 (5th Cir. 1993) (applying facial challenge standard of *Webster* and sustaining Mississippi's mandatory waiting period and biased counseling provision based on *Casey*); Barnes v. Moore, 970 F.2d 12, 14 n.2 (5th Cir. 1992) (per curiam) (same).

99. *See supra* notes 87-88 and accompanying text (discussing how the joint opinion in *Casey* upheld Pennsylvania's mandatory waiting period); *see also* Planned Parenthood of Se. Pa. v. Casey (*Casey II*), 510 U.S. 1309, 1313 (1994) (opinion in chambers by Souter, J., as Circuit Justice for the 3d Cir.) (denying plaintiffs' application for a stay of mandate, but noting "that litigants are free to challenge similar restrictions in other jurisdictions, as well as these very provisions as applied"); Fargo Women's Health Org. v. Schafer, 507 U.S. 1013, 1014 (1993) (mem.) (O'Connor, J., concurring) (clarifying that lower courts must "specifically examine[] the record developed in the District Court" through a fact-intensive analysis of the particular restrictions before the court).

100. Eubanks v. Schmidt, 126 F. Supp. 2d 451, 453, 457 (W.D. Ky. 2000) (mem.) (sustaining Kentucky's mandatory waiting period and counseling provision based on a "presumption of constitutionality" established in *Casey*); *see also* A Woman's Choice — E. Side Women's Clinic v. Newman, 305 F.3d 684, 693 (7th Cir. 2002) (sustaining facial validity of Indiana's mandatory waiting period and demanding proof not "open to debate" that the restriction was "*bound to*" affect Indiana women in an unconstitutional manner).

raise the evidentiary bar in pre-enforcement challenges so high that mounting a successful challenge is virtually impossible. The decision of the Court of Appeals for the Sixth Circuit in *Cincinnati Women's Services, Inc. v. Taft* provides a recent example of the heavy burden of proof imposed by some lower courts. In *Cincinnati Women's Services*, the court of appeals affirmed a district court ruling that upheld Ohio's mandatory twenty-four hour waiting period and biased counseling provision.[101] The law forces Ohio women to make two in-person visits to their health provider in order to have the abortion procedure.[102] Plaintiffs challenged the burdensome impact of the law on battered women.[103] As described by the Sixth Circuit Court of Appeals, proof at trial showed that: (1) of the patients for whom an in-person counseling session warranted an exception under providers' own existing policies, approximately 25% were battered women;[104] (2) for these women, "appearing in person twice is difficult, and in some cases, life-threatening;"[105] (3) half of the battered patients (12.5% of the total number of women excused under existing protocol) "would be precluded altogether,"[106] and the requirement of two in-person visits would likely deter them "'from procuring an abortion as surely as if [Ohio] has outlawed abortion in all cases.'"[107] While acknowledging that plaintiffs had "amassed an impressive amount of data, akin to the data available in *Casey* on the issue of spousal notification,"[108] the court of appeals nonetheless rejected the challenge because it found that plaintiffs had not shown that a sufficient *number* of battered women would be denied access to abortion:

> [N]o circuit has found an abortion restriction to be unconstitutional under *Casey*'s large-fraction test simply because some small percentage of the women actually affected by the restriction were unable to obtain an abortion. Although a challenged restriction need not operate as a *de facto* ban for all or even most of the women actually affected, the term "large fraction," which, in a

101. Cincinnati Women's Servs., Inc. v. Taft, 468 F.3d 361, 372-74 (6th Cir. 2006).

102. *Id.* at 364-65.

103. *Id.* at 372.

104. *Id.* Prior to the enactment of the challenged law, providers typically required most patients to make two visits to the clinic — one for a counseling session and one for the abortion procedure. *Id.* at 365. Under the providers' existing protocol, however, approximately five to ten percent of patients are excused from having to make two visits because of personal circumstances, and in these instances informed consent counseling is done on the telephone. *Id.*

105. *Id.* at 373.

106. *Id.* at 372.

107. *Id.* at 373 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 894 (1992)) (alteration in original).

108. *Id.* at 372.

> way, is more conceptual than mathematical, envisions something more than the 12 out of 100 women identified here.[109]

This analysis is at odds with the holding of *Casey*. Indeed, in *Casey*, the Commonwealth of Pennsylvania made the identical argument that Ohio made in *Cincinnati Women's Services*: spousal-notification posed no undue burden because its effects would be "felt by only one percent of the women who obtain abortions. . . . [Moreover] some of these women will be able to notify their husbands without adverse consequences or will qualify for one of the exceptions."[110] The *Casey* plurality squarely rejected this argument, refusing to deny protection to the very women impacted by forced spousal notice because this group consisted of only a small number of women: "The analysis does not end with the one percent of women upon whom the statute operates; it begins there."[111]

Other lower courts have narrowed the scope of protection potentially available under *Casey* by failing to assess the effects of waiting periods, counseling mandates, and laws regulating the practice of abortion providers from a contextualized, fact-sensitive perspective that incorporates the real life circumstances of the girls and women actually impacted by these laws. As a result, many courts tend to minimize the burdensome impact of the cost increases, delays, travel burdens, and other hardships caused by abortion restrictions. In *Greenville Women's Clinic v. Bryant*,[112] for example, the Court of Appeals for the Fourth Circuit reversed a district court's entry of a permanent injunction against an onerous South Carolina law that singled out abortion providers for medical licensure[113] and conditioned

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109. *Id.* at 374.

110. *Casey*, 505 U.S. at 894; *see supra* notes 83-84 and accompanying text.

111. *Casey*, 505 U.S. at 894; *see also* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 328 (2006) (finding a constitutional violation if the statute is enforced without a health exception where "[i]n some very small percentage of cases . . . women[] need immediate abortions to avert serious and often irreversible damage to their health").

112. *See* Greenville Women's Clinic v. Bryant, 66 F. Supp. 2d 691 (D.S.C. 1999), *rev'd*, 222 F.3d 157 (4th Cir. 2000); *see also* Women's Med. Prof. Corp. v. Baird, 438 F.3d 595, 599, 604 (6th Cir. 2006) (sustaining Ohio licensing provision that required plaintiff-abortion provider to "have a written [patient] transfer agreement with a local hospital" even though the requirement would cause the provider, which served 3,000 women annually, to shut down completely); Planned Parenthood, Sioux Falls Clinic v. Miller, 860 F. Supp. 1409, 1420 (D.S.D. 1994) (rejecting the challenge to South Dakota's physician-only counseling requirement even though the requirement would raise the cost of abortion in a state with a high poverty rate and only one abortion provider), *aff'd*, 63 F.3d 1452 (8th Cir. 1995). *But see, e.g.*, Tucson Woman's Clinic v. Eden, 379 F.3d 531, 541 (9th Cir. 2004) ("A significant increase in the cost of abortion or the supply of abortion providers and clinics can, at some point, constitute a substantial obstacle to a significant number of women choosing an abortion.").

113. *Greenville Women's Clinic*, 66 F. Supp. 2d at 696. The licensing requirement applied to abortion providers who performed more than an occasional first-trimester abortion. *Id.* South Carolina did not generally require licensing of other medical facilities. *Id.* at 697.

the granting of the license on compliance with twenty-seven pages of detailed requirements relating to the operating practices of the provider, including the size, staffing and maintenance of the facility.[114] Following a lengthy bench trial and "after spending months reviewing all aspects of [the] case,"[115] the district court found that the law would likely impose an undue burden on South Carolina women seeking abortions because it would cause a substantial rise in the cost of abortion services, "at a minimum, between $30.00 and $75.00" and "[i]n one area of the state, [would] result in an increase of between $100 and $300, or result in the elimination of services altogether."[116]

In reversing the trial court, the Fourth Circuit disregarded that court's factual findings and substituted its own inferences about the likely impact of the price increases on South Carolina women.[117] In doing so, the court of appeals minimized the hardships posed by the cost increases and speculated that, if one clinic closed, women could easily travel seventy miles to another clinic.[118] These conclusions — drawn not from the evidentiary record but apparently from their personal life experience — ignored the real life challenges of poverty, youth, and violence that exacerbate the hardships of abortion restrictions for many South Carolina women.[119] Moreover, the errors of this approach are compounded by courts' tendency to examine the impact of each restriction in isolation from other restrictions. Women usually do not experience abortion restrictions one by one, but rather in conjunction with a raft of other restrictions that limit access to abortion. By ignoring the cumulative burdens of abortion restrictions, courts effectively "allow . . . state[s] to pile on 'reasonable regulation' after 'reasonable regulation' until a woman seeking an abortion first ha[s] to conquer a multi-faceted obstacle course."[120]

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114. *See id.* at 698-704. Prior to *Casey*, challenges to these kinds of laws were often successful. *See, e.g.*, Ragsdale v. Turnock, 841 F.2d 1358, 1369-75 (7th Cir. 1988) (invalidating Illinois statute imposing licensing and numerous other administrative requirements on abortion providers); Friendship Med. Ctr., Ltd. v. Chicago Bd. of Health, 505 F.2d 1141, 1151 (7th Cir. 1974) (invalidating city health board's regulations on abortion services); *see also* Wharton et al., *supra* note 40, at 367-74 (analyzing post-*Casey* challenges to laws targeting the medical practice of abortion providers).

115. *Greenville Women's Clinic*, 66 F. Supp. 2d at 732.

116. *Id.* at 735.

117. *See* Greenville Women's Clinic v. Bryant, 222 F.3d 157, 170 (4th Cir. 2000).

118. *Id.*

119. In his dissenting opinion, Judge Hamilton sharply criticized the majority for their narrow approach:

> While traveling seventy miles on secondary roads may be inconsequential to my brethren in the majority who live in the urban sprawl of Baltimore . . . such is not to be so casually addressed and treated with cavil when considering the plight and effect on a woman residing in rural Beaufort County, South Carolina.

Id. at 202 (Hamilton, J., dissenting).

120. Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The*

Finally, just as many lower federal courts have made it very difficult to show that an abortion restriction will have an actual impermissible effect on women's access to abortion, so too have they made challenges based on a law's improper purpose exceedingly difficult.[121] Lower courts tend either not to undertake a *Casey* "purpose prong [analysis] or to conflate it with [analysis of] the effects prong."[122] Other courts have rejected purpose prong challenges to waiting period and biased counseling provisions by reflexively imposing the result in *Casey* rather than undertaking a serious analysis of evidence of improper legislative motive.[123] Even where lower courts have been willing to engage in an independent "purpose prong" analysis, especially following the Supreme Court's treatment of this prong in *Mazurek v. Armstrong*,[124] discussed below, absent an express admission of improper purpose by defendants, courts have been extremely reluctant to invalidate abortion restrictions based on a finding of improper purpose.[125]

2. The Supreme Court's Application of the Undue Burden Standard

As the lower courts struggled to discern the meaning of the *Casey* undue burden standard and apply it to a vast array of abortion restrictions, the Supreme Court remained in a kind of holding pattern in its abortion jurisprudence in the first fifteen years after *Casey*, accepting few cases for full review. Since 1992, the Court has applied the undue burden standard in only four cases that produced full opinions: *Mazurek v. Armstrong*,[126] *Stenberg v. Carhart*,[127] *Ayotte v. Planned Parenthood of Northern New England*,[128] and *Gonzales v.*

Retreat from Roe v. Wade, 138 U. PA. L. REV. 83, 100 (1989).

121. For a thorough analysis of the implementation of the purpose prong in the lower federal courts, see Wharton et al., *supra* note 40, at 377-85.

122. *Id.* at 377-78.

123. *See, e.g.*, Karlin v. Foust, 975 F. Supp. 1177, 1212 (W.D. Wis. 1997) (rejecting the purpose prong challenge to Wisconsin's mandatory waiting period and biased counseling provisions because "the Supreme Court reviewed similar provisions in the Pennsylvania law and did not find that they revealed an impermissible legislative purpose"), *aff'd in part*, 188 F.3d 446 (7th Cir. 1999).

124. Mazurek v. Armstrong, 520 U.S. 968 (1997) (per curiam); *see infra* notes 149-54 and accompanying text.

125. *See, e.g.*, Jane L. v. Bangerter, 102 F.3d 1112, 1115-17 (10th Cir. 1996) (invalidating Utah's statute restricting abortions after twenty weeks' gestation where Utah conceded that the legislature acted with improper motive). *See generally* Wharton et al., *supra* note 40, at 378 n.349 (noting that research revealed only three lower court decisions invalidating an abortion restriction on the basis of improper purpose).

126. *Armstrong*, 520 U.S. 968.

127. Stenberg v. Carhart, 530 U.S. 914 (2000).

128. Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320 (2006).

Carhart.[129] As discussed below, while *Armstrong* increased uncertainty about the meaning of *Casey*'s purpose prong, during the years in which Justice O'Connor remained on the Court, by a slim margin, the Court otherwise largely reaffirmed the protection announced in *Casey*.[130] Importantly, the Court preserved the vital principle — first enunciated in *Roe* and steadfastly reaffirmed in *Casey* and other decisions — that abortion restrictions must never threaten women's health. In 2007, however, during the first full term following Justice O'Connor's retirement from the Court and Justice Alito's succession to her seat, the Court shifted course in *Gonzales v. Carhart*, severely eroding the protection previously available under *Roe*, *Casey*, and their progeny.[131]

a. Stenberg v. Carhart, Ayotte v. Planned Parenthood of Northern New England, Mazurek v. Armstrong

In *Stenberg v. Carhart*, the first post-*Casey* challenge to be fully briefed and argued to the Supreme Court, the Court considered the constitutionality of a criminal ban on certain abortion procedures.[132] Following *Casey*, abortion opponents successfully championed criminal bans on particular abortion procedures, which they labeled "partial birth abortions," thus gaining passage of these bans throughout the country.[133] In a five to four decision, the Supreme Court struck down Nebraska's abortion procedure ban,[134] in part, because it lacked a

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

130. *See generally* Wharton et al., *supra* note 40, at 342-52 (discussing the Supreme Court's post-*Casey* undue burden jurisprudence). In *Lambert v. Wicklund*, the Court sustained a Montana parental notification law, but did so on the ground that it was "indistinguishable" from the one upheld in *Ohio v. Akron Center for Reproductive Health*. Lambert v. Wicklund, 520 U.S. 292, 295 (1997) (citing Ohio v. Akron Ctr. for Reprod. Health (*Akron II*), 497 U.S. 502, 508 (1990)).

131. *See Carhart*, 550 U.S. at 125 (upholding Nebraska's Partial Birth Abortion Ban on the ground that it did not impose an undue burden on a woman's right to abortion based on overbreadth or lack of a health exception).

132. *Stenberg*, 530 U.S. at 914.

133. Thirty-one states and the federal government have enacted these bans. GUTTMACHER INST., STATE POLICIES IN BRIEF: BANS ON "PARTIAL BIRTH" ABORTION (2009), http://www.guttmacher.org/statecenter/spibs/spib_BPBA.pdf. The enactment of these abortion procedure bans was part of a long-range strategy of the anti-abortion movement to reframe the abortion debate: "By identifying the intact procedure and giving it the provocative label 'partial birth abortion,' the movement turned the public focus of the abortion debate from the rights of women to the fate of fetuses." Linda Greenhouse, *In Reversal of Course, Justices, 5-4, Back Ban on Abortion Method*, N.Y. TIMES, Apr. 19, 2007, at A1.

134. *Stenberg*, 530 U.S. at 922 (noting that Nebraska's ban applied to pre- and post-viability abortions "'in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery'" (quoting NEB. REV. STAT. ANN. § 28-328 (Supp. 1999)).

health exception.[135] In doing so, the *Stenberg* majority reaffirmed *Casey*.[136] A solid majority of the Court acknowledged that the undue burden standard, first drafted by a three Justice plurality in *Casey*, was the controlling standard.[137] The Court also reaffirmed the long standing principle that women's health is of paramount importance and cannot be compromised by abortion restrictions.[138] As in *Casey*, the Court did not require plaintiffs to prove that a large number of women would be harmed by Nebraska's abortion procedure ban, thus implicitly rejecting the application of the tough *Salerno* standard for facial challenges.[139] Yet, the *Stenberg* decision also highlighted the fragility of the three Justice coalition that formed the *Casey* plurality.[140] Although he had been one of the authors of the *Casey* joint opinion, Justice Kennedy dissented.[141] While agreeing that the *Casey* standard controlled, he vehemently objected to the majority's failure to give appropriate deference to the state's interest in regulating this particular abortion procedure.[142]

The *Stenberg* Court viewed the lack of a health exception as *per se* unconstitutional and had no trouble facially invalidating Nebraska's abortion procedure ban.[143] In *Ayotte v. Planned Parenthood of Northern*

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135. *Id.* at 930. The Court also found that the Nebraska ban failed to distinguish between two abortion procedures, the rarely used dilation and extraction ("D&X") procedure and the more commonly used second-trimester dilation and evacuation ("D&E") procedure. *Id.* at 939. Because the ban effectively applied to both procedures, it posed an undue burden on women's ability to choose D&E abortions. *Id.* at 938. Because a criminal ban on the most common method of second-trimester abortions would entirely foreclose access to abortion for some women, the Court concluded that the statute had the impermissible "'effect of placing a substantial obstacle in the path of a woman seeking an abortion.'" *Id.* (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992)).

136. *Id.* at 930.

137. Justice Breyer wrote the majority opinion and was joined by Justices Stevens, O'Connor, Souter and Ginsburg; Justices Rehnquist, Scalia, Kennedy, and Thomas dissented. *Id.* at 920, 952, 956, 980.

138. *Id.* at 938 ("[W]here substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health, *Casey* requires the statute to include a health exception when the procedure is '"necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."'" (quoting *Casey*, 505 U.S. at 879)).

139. *Id.* at 933-34; *see supra* note 85 and accompanying text.

140. The fragility of this coalition was also illustrated by Justice O'Connor's concurring opinion in which she emphasized that had Nebraska's law contained a health exception and had it been limited to D&X abortions, she would have voted to uphold the law. *Id.* at 950-51 (O'Connor, J., concurring).

141. *Id.* at 956 (Kennedy, J., dissenting).

142. *Id.* at 956-57 (Kennedy, J., dissenting). Foreshadowing his opinion in *Carhart*, Justice Kennedy emphasized: "States . . . have an interest in forbidding medical procedures which . . . might cause the medical profession or society as a whole to become insensitive . . . to life . . . . A State may take measures to ensure the medical profession and its members are viewed as healers . . . cognizant of the dignity and value of human life . . . ." *Id.* at 961-62; *see infra* note 163 and accompanying text.

143. *Id.* at 937-38.

New England, decided six years later, the Court struggled with the question of the appropriate remedy in a facial challenge to a New Hampshire parental notification law that lacked an explicit health exception.[144] Justice O'Connor wrote for a unanimous court that the statute, as written, would be unconstitutional under existing precedent, thus reaffirming the importance of protecting women's health and, again, implicitly declining to apply the *Salerno* standard.[145] On the question of remedy, however, perhaps in response to the concerns expressed by Justice Kennedy about judicial overreaching in his *Stenberg* dissent, the Court avoided the issue by remanding to the lower court to settle the question.[146] In her final opinion on the Court, Justice O'Connor thus avoided conflict within the Court by compromising on the question of remedy while otherwise maintaining the status quo in its abortion jurisprudence.[147]

While reaffirming key principles of *Casey*, these first post-*Casey* opinions failed to clarify the type of evidence necessary to establish an improper legislative purpose for restrictions on access to abortion.[148] In *Mazurek v. Armstrong*, decided several years before *Stenberg*, the Court offered a narrow and somewhat confusing reading of the purpose prong when it sustained a Montana law that restricted the performance of abortions to licensed physicians.[149] The plaintiffs argued that the motive for the Montana restriction was to make abortions more difficult by preventing the sole physician's assistant performing abortions in the state from doing so.[150] In a per curiam opinion, the Court rejected the argument, holding:

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144. Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 323 (2006).

145. *See id.* at 327-28.

146. *Id.* at 323 ("If enforcing a statute that regulates access to abortion would be unconstitutional in medical emergencies, what is the appropriate judicial response? We hold that invalidating the statute entirely is not always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief.").

147. *See* Wharton et al., *supra* note 40, at 351.

148. While the majority in *Stenberg* did not reach the question of whether the Nebraska abortion procedure ban violated the purpose prong, Justice Ginsburg, joined by Justice Stevens, wrote separately to emphasize the improper motive underlying Nebraska's abortion procedure ban. Stenberg v. Carhart, 530 U.S. 914, 951-52 (2007) (Ginsburg, J., concurring).

149. Mazurek v. Armstrong, 520 U.S. 968, 969 (1997) (per curiam). The Court of Appeals for the Ninth Circuit held that the district court erred in refusing to preliminarily enjoin the statute. The court found that the plaintiffs had met their burden of demonstrating "'a fair chance of success'" on their claim that Montana's physician-only law was invalid because its purpose was to create "a substantial obstacle to a woman seeking an abortion." Armstrong v. Mazurek, 94 F.3d 566, 567-68 (9th Cir. 1996) (quoting *Casey*, 505 U.S. at 878), *rev'd*, 520 U.S. 968 (1997). The Supreme Court granted certiorari and, in the same order, issued a summary ruling deciding the merits of plaintiffs' claims. *Armstrong*, 520 U.S. at 976.

150. *Armstrong*, 520 U.S. at 972, 974.

> [E]ven assuming the correctness of the Court of Appeals' implicit premise — that a legislative *purpose* to interfere with the constitutionally protected right to abortion without the *effect* of interfering with that right (here it is uncontested that there was insufficient evidence of a "substantial obstacle" to abortion) could render the Montana law invalid — there is no basis for finding a vitiating legislative purpose here.[151]

The Court put great weight on the absence of evidence establishing an adverse impact on women's access to abortion in Montana and the absence of direct evidence of improper motive on the part of Montana's legislature.[152] The Court explicitly declined to comment on the lower court's proposed method for determining improper legislative motive.[153] Thus, far from clarifying the meaning of the purpose prong, the Court injected uncertainty into its application by both refusing to provide guidance on a proper methodology for determining improper legislative motive and suggesting that an improper purpose to create a substantial obstacle can only be inferred if the intended obstruction is actually created. As noted above, following *Armstrong*, the lower courts have been extremely reluctant to invalidate abortion restrictions based upon the purpose prong.[154]

b. Gonzales v. Carhart

In 2007, in *Gonzales v. Carhart*, the Supreme Court revisited the question of whether an abortion procedure ban that lacks a health exception can survive a facial challenge.[155] This time the Court came to the opposite conclusion, upholding the Federal Partial-Birth Abortion Ban Act of 2003.[156] The different result was simply a matter of one vote — Justice Alito had replaced Justice O'Connor, and he supplied

151. *Id.* at 972 (emphasis in original).

152. *See id.* at 973-74 (rejecting arguments put forth by plaintiffs to support a finding of improper purpose).

153. *Id.* at 974 n.2. Relying on *Miller v. Johnson*, 515 U.S. 900 (1995) and *Shaw v. Hunt*, 517 U.S. 899 (1996), a pair of legislative redistricting challenges, the Court of Appeals for the Ninth Circuit held: "Legislative purpose to accomplish a constitutionally forbidden result may be found when that purpose was 'the predominant factor motivating the legislature's decision.'" *Armstrong*, 94 F.3d at 567 (quoting *Miller*, 515 U.S. at 916). The court of appeals also instructed that courts may find purpose in both "the structure of the legislation" and the legislative history. *Id.*

154. *See, e.g.*, Karlin v. Foust, 975 F. Supp. 1177, 1210 (W.D. Wis. 1997) ("After [*Armstrong*], the impermissible purpose prong of the undue burden test appears almost impossible to prove . . . .").

155. Gonzales v. Carhart, 550 U.S. 124, 132 (2007).

156. *Id.* at 132-33. For the text of the statute, see Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (Supp. IV 2000).

the fifth vote to uphold the first-ever federal ban on an abortion method.[157] Writing for the Court, Justice Kennedy held that the law was not void for vagueness and did not impose an undue burden on women seeking abortion.[158]

While insisting that the outcome was compelled by past precedent,[159] in fact, the majority's analysis in *Carhart* reflects a dramatic retreat from the core principles of *Roe*, *Casey*, and their progeny. Despite its unanimous holding just one year earlier in *Ayotte*, and for the first time since *Roe*, the Court sustained an abortion restriction with no exception for safeguarding women's health.[160] The Court did so by failing to apply *Stenberg*'s holding that "where *substantial medical authority* supports the proposition that [a statute] banning a particular abortion procedure could endanger women's health," the statute must include an exception to protect women's health.[161] Instead, the Court held that Congress could omit a health exception because there was some "medical uncertainty" over the need for one.[162] This new, more lenient standard enabled the Court to give "short shrift" to the trial court's findings that "'the majority of highly-qualified experts on the subject believe intact D&E to be the safest, most appropriate procedure under certain circumstances.'"[163]

A palpable hostility to facial challenges pervaded the Court's analysis. The Court admonished "that these facial attacks should not have been entertained in the first instance."[164] Without distinguishing *Stenberg*, the Court summarily concluded, with no logical explanation, that the federal ban was valid on its face because plaintiffs failed to demonstrate that it would be unconstitutional "'in a

157. *Carhart*, 550 U.S. at 131.

158. *Id.* at 168. The Court found that the statute did not pose an undue burden because of either overbreadth or the absence of a health exception. *Id.*

159. *See id.* at 163 ("The Court's precedents instruct that the Act can survive this facial attack.").

160. *Id.* at 164-68.

161. Stenberg v. Carhart, 530 U.S. 914, 938 (2000) (emphasis added).

162. *Carhart*, 550 U.S. at 164 ("The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.").

163. *Id.* at 179-80 (Ginsburg, J., dissenting) (quoting Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 1034 (N.D. Cal. 2004)). The Court also failed to look meaningfully at the Act's purpose. *But see id.* at 174 n.4 (Ginsburg, J., dissenting) ("The Act's sponsors left no doubt that their intention was to nullify our ruling in *Stenberg*."). For an analysis of the unconstitutional purpose underlying the federal abortion procedure ban, see Caroline Burnett, Note, *Dismantling* Roe *Brick by Brick — The Unconstitutional Purpose Behind the Federal Partial-Birth Abortion Act of 2003*, 42 U.S.F. L. REV. 227, 230-31 (2007).

164. *Id.* at 167. The Court acknowledged that the applicability of *Salerno* "has been a subject of some question," but declined to resolve the debate, purportedly applying *Casey*'s "large fraction" standard. *Id.*

large fraction of the cases in which [it] is relevant.'"[165] The Court left the door "open to a proper as-applied challenge in a discrete case,"[166] but as Justice Ginsburg argued, this unsatisfactory option may "jeopardize[] women's health and place[] doctors in an untenable position" of risking criminal prosecution if they choose the safest medical procedure for their patients in an emergency situation.[167]

The *Carhart* Court also departed from past precedent by explicitly expanding the range of governmental interests that can justify restrictions on abortion.[168] Most significantly, embracing a woman-protectionist rationale championed by anti-abortion advocates,[169] the Court reasoned that government is justified in protecting women from choices they might later regret:

> Respect for human life finds an ultimate expression in the bond of love the mother has for her child.... Whether to have an abortion requires a difficult and painful moral decision. 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. Severe depression and loss of esteem follow.
>
> In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used [to terminate the pregnancy] ....

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165. *Id.* (quoting *Casey*, 505 U.S. at 895) (alteration in original). Justice Ginsburg highlighted the flaws in the majority's reasoning on this point:

> It makes no sense to conclude that this facial challenge fails because respondents have not shown that a health exception is necessary for a large fraction of second-trimester abortions, including those for which a health exception is unnecessary: The very purpose of a health *exception* is to protect women in *exceptional* cases.

Id. at 188-89 (Ginsburg, J., dissenting) (emphasis in original).

166. *Id.* at 168.

167. *Id.* at 190 (Ginsburg, J., dissenting).

168. In addition to governmental interests acknowledged in *Roe* and *Casey*, the Court invoked "the government['s] . . . 'interest in protecting the integrity and ethics of the medical profession.'" *Id.* at 157 (quoting Washington v. Glucksberg, 521 U.S. 702, 731 (1997)). The Court also emphasized the "ethical and moral concerns" raised by the abortion method in question. *Carhart*, 550 U.S. at 158. *But see* Lawrence v. Texas, 539 U.S. 558, 571 (2003) ("For many persons [objections to homosexual conduct] are not trivial concerns but profound and deep convictions accepted as ethical and moral principles .... [T]he power of the State [may not be used] to enforce these views on the whole society through operation of the criminal law."); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992) ("Our obligation is to define the liberty of all, not to mandate our own moral code.").

169. For an excellent history of the anti-abortion movement's efforts to cast abortion restrictions as legislation that protects women, see Siegel, *The New Politics*, *supra* note 28, at 1002-29.

> . . . The State has an interest in ensuring so grave a choice is well informed.[170]

Justice Ginsburg objected vehemently to this reasoning, highlighting the paternalism and outmoded stereotypes about women's decision-making capacity that underlay it:

> This way of thinking reflects ancient notions about women's place in the family and under the Constitution — ideas that have long since been discredited.
>
> Though today's majority may regard women's feelings on the matter as "self-evident," this Court has repeatedly confirmed that "[t]he destiny of the woman must be shaped . . . on her own conception of her spiritual imperatives and her place in society."[171]

Finally, the tone and rhetoric of Justice's Kennedy opinion in *Carhart* bears little resemblance to the plurality opinion he co-authored in *Casey*. The opinion merely "assume[s]" the applicability of *Casey*,[172] but offers no explicit reaffirmation or positive endorsement of its principles. Moreover, the opinion is filled with anti-abortion rhetoric, terminology and pejorative labels.[173] As Professors Post and Siegel have written:

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170. *Carhart*, 550 U.S. at 159 (citations omitted); *see also Casey*, 505 U.S. at 882 ("In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the 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."). The only support provided by Justice Kennedy in *Carhart* for the proposition that abortion harms women's mental health was an amicus curiae brief filed by the Justice Foundation, a conservative legal organization. *Carhart*, 550 U.S. at 159 (citing Brief of Sandra Cano, the Former "Mary Doe" of *Doe v. Bolton*, and 180 Women Injured by Abortion as Amici Curiae Supporting Petitioner, Gonzales v. Carhart, 550 U.S. 124 (2007) (No. 05-380), 2006 WL 1436684). *But see id.* at 183 n.7 (Ginsburg, J., dissenting) ("[A]bortion is a painfully difficult decision. But neither the weight of the scientific evidence to date nor the observable reality of 33 years of legal abortion in the United States comports with the idea that having an abortion is any more dangerous to a woman's long-term mental health than delivering and parenting a child that she did not intend to have . . . .") (citation omitted). Justice Ginsburg's skepticism about the link between abortion and increased mental health disorders was subsequently validated by a study of the American Psychological Association's Task Force on Mental Health and Abortion. *See* REPORT OF THE APA TASK FORCE ON MENTAL HEALTH & ABORTION 5-6 (2008), http://www.apa.org/releases/abortion-report.pdf (concluding "that among adult women who have an *unplanned pregnancy the* relative risk of mental health problems is no greater if they have a single elective first-trimester abortion than if they deliver that pregnancy") (emphasis in original).

171. *Carhart*, 550 U.S. at 185 (Ginsburg, J., dissenting) (citations omitted).

172. *Id.* at 146; *see also id.* at 156 ("accept[ing] [*Casey*'s principles] as controlling").

173. *See, e.g.*, *id.* at 134 (describing fetus as "the unborn child"); *id.* at 159 (describing fetus as "the infant life"); *id.* at 154 (referring to obstetrician-gynecologists and surgeons who perform abortions as "abortion doctors").

> In stark contrast to *Casey*, which took great pains to signal to both sides of the controversy that the Court can be trusted to craft a form of constitutional law that acknowledges their values, *Carhart* conspicuously affirms the concerns of antiabortion advocates without signaling similar respect for the concerns of abortion rights advocates.[174]

While the import of *Carhart* beyond the context of abortion procedure bans remains unclear,[175] the decision undoubtedly further weakens federal constitutional protection for abortion, giving the green light to a vast array of women-protective abortion restrictions[176] and potentially insulating them from facial challenge even where the weight of medical opinion counsels that they endanger women's health.

II. STATE CONSTITUTIONAL LAW CHALLENGES TO ABORTION RESTRICTIONS

Given the difficulty of mounting successful challenges to abortion restrictions under the Federal Constitution, state constitutional remedies have the potential to play an increasingly important role in protecting abortion rights. This section examines the extent to which state constitutions are fulfilling their potential for enhancing protection for abortion beyond that currently available under the Federal Constitution.

A. An Overview of State Constitutional Guarantees of Privacy and Equality

Although no state constitution currently affirmatively protects a right to abortion,[177] states offer a vast array of constitutional protection

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174. Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 431 (2007).

175. Some commentators have urged caution in assuming that *Carhart*'s rationale extends beyond the context of the particular abortion procedure ban before the Court. *See, e.g.*, David J. Garrow, Op-Ed., *Don't Assume the Worst*, N.Y. TIMES, Apr. 21, 2007, at A15.

176. *See, e.g.*, Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 726, 734-35 (8th Cir. 2008) (relying on *Carhart* in upholding a South Dakota biased counseling law that forces doctors to give women a written statement that tells them, inter alia, "[t]hat the abortion will terminate the life of a whole, separate, unique, living human being" and that the "known medical risks" of abortion include "depression" and "increased risk of suicide").

177. To the extent that state constitutions explicitly refer to abortion, they do so in negative terms. Four state constitutions explicitly limit protection for abortion. *See* ARK. CONST. amend. 68, § 2 ("The policy of Arkansas is to protect the life of every unborn child

for individual rights of liberty and equality that provide fertile ground for protecting reproductive rights.[178] Privacy rights are protected by a variety of state guarantees. Ten state constitutions contain explicit protection for privacy rights.[179] In other states, courts have found protection for individual privacy implicit in a variety of other constitutional texts, such as an inalienable and natural rights clause, a preamble, or a due process guarantee.[180]

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from conception until birth, to the extent permitted by the Federal Constitution."); *id.* § 1 ("No public funds will be used to pay for any abortion, except to save the mother's life."); COLO. CONST. art. V, § 50 ("No public funds shall be used by the State of Colorado, its agencies or political subdivisions to pay or otherwise reimburse, either directly or indirectly, any person, agency or facility for the performance of any induced abortion . . . ."); FLA. CONST. art X, § 22 ("The legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. Notwithstanding a minor's right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification."); R.I. CONST. art. I, § 2 (stating that due process and sex equality guarantees "shall [not] be construed to grant or secure any right relating to abortion or the funding thereof").

178. Although this Article focuses on state privacy and equality guarantees, abortion restrictions may also run afoul of other state constitutional provisions, including prohibitions against interference with freedom of speech. *See* Kevin Francis O'Neill, *The Road Not Taken: State Constitutions as an Alternative Source of Protection for Reproductive Rights*, 11 N.Y.L. SCH. J. HUM. RTS. 1, 61-76 (1993) (discussing potential free speech and freedom of conscience challenges to abortion restrictions). *See generally* Rachael N. Pine & Sylvia A. Law, *Envisioning a Future for Reproductive Liberty: Strategies for Making the Rights Real*, 27 HARV. C.R.-C.L. L. REV. 407, 431-33 (1992) (discussing a broad variety of constitutional grounds for protecting reproductive liberty); Post, *supra* note 29 (analyzing freedom of speech implications of abortion regulations that compel specific physician speech). Although no state constitutions contain explicit positive protection for abortion rights, eight states — California, Connecticut, Hawaii, Maine, Maryland, Nevada, Vermont, and Washington — have enacted broad statutory protection for the abortion right. Many of these laws essentially codify *Roe*'s core protections. *See* CTR. FOR REPROD. RIGHTS, WHAT IF ROE FELL? 118-23 (2007), http://reproductiverights.org/sites/crr.civicactions.net/files/documents/Roe_PublicationsPF4a_0.pdf.

179. ALASKA CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23; HAW. CONST. art. I, § 6; ILL. CONST. art. I, §§ 6, 12; LA. CONST. art. I, § 5; MONT. CONST. art. II, §§ 9-10; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7. *See generally* 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW §§ 2.01-02 (4th ed. 2006). In five of these states, "Alaska, California, Florida, Hawaii, and Montana, privacy is both expressly enumerated as an individual right, and, as matter of structure, separated from related protections . . . ." *Id.* § 2.02[1]. The remaining states "protect some formulation of privacy by including it in a section also intended to limit searches and seizures of persons and property by government officials." *Id.* Most of these privacy guarantees were added to state constitutions following the United States Supreme Court's decision in *Griswold v. Connecticut*, in which the Court held that the right of married couples to use contraceptives is a privacy interest protected under the Federal Constitution. Griswold v. Connecticut, 381 U.S. 479, 479 (1965); John M. Devlin, *State Constitutional Autonomy Rights in an Age of Federal Retrenchment: Some Thoughts on the Interpretation of State Rights Derived from Federal Sources*, 3 EMERGING ISSUES ST. CONST. L. 195, 205-13 (1990).

180. FRIESEN, *supra* note 179, §§ 2.02[2], 2.05[2].

State constitutions also offer rich protection for equality rights. Fifteen states have mandatory equal protection clauses much like that contained in the Federal Constitution's Fourteenth Amendment.[181] Other state constitutions protect equality interests through "natural rights declarations, bans on unequal privileges and immunities," or a variety of other provisions that recognize individual equality.[182] Significantly, unlike the Federal Constitution, many state constitutions also contain equal rights amendments (ERAs) — provisions that explicitly protect against sex-based discrimination.[183] The texts of these provisions — inspired largely by the Federal Equal Rights Amendment campaign of the 1970s and early 1980s — vary from state-to-state, but twenty states have sex equality guarantees that could potentially be used to strengthen protection for abortion rights.[184]

B. Abortion Rights Litigation Under State Constitutions

The new judicial federalism has supported the development of these state guarantees of liberty and equality as independent, broad-based sources of protection.[185] Embracing their authority to interpret state constitutions independent of federal constitutional law, state court judges in the past several decades have repeatedly "stepped into the breach to revitalize those rights" in areas in which the Supreme

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181. *See* CAL. CONST. art. I, § 7(a); CONN. CONST. art. I, § 20; GA. CONST. art. I, § 1, para. 2; HAW. CONST. art. I, § 5; ILL. CONST. art. I, § 2; LA. CONST. art. I, § 3; ME. CONST. art. I, § 6-A; MICH. CONST. art. I, § 2; MONT. CONST. art. II, § 4; NEB. CONST. art. I, § 3; N.M. CONST. art. II, § 18; N.Y. CONST. art. I, § 11; N.C. CONST. art. I, § 19; R.I. CONST. art. I, § 2; S.C. CONST. art. I, § 3.

182. FRIESEN, *supra* note 179, § 3.01[2].

183. For a thorough analysis of the judicial application of state equal rights amendments in a variety of contexts, see Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201 (2005).

184. ALASKA CONST. art. I, § 3; COLO. CONST. art. II, § 29; CONN. CONST. art. I, § 20; FLA. CONST. art. I, § 2; HAW. CONST. art. I, § 3; ILL. CONST. art. I, § 18; IOWA CONST. art. I, § 1; LA. CONST. art. I, § 3; MD. CONST., Decl. Of Rts., art. 46; MASS. CONST. pt. I, art. I; MONT. CONST. art. II, § 4; N.H. CONST. art. 2; N.J. CONST. art. I, para. 1 & art. X, para. 4; N.M. CONST. art. II, § 18; PA. CONST. art. I, § 28 ; TEX. CONST. art. I, § 3a; UTAH CONST. art. IV, § 1; VA. CONST. art. I, § 11; WASH. CONST. art. XXXI, § 1; WYO. CONST. art. I, § 2. Florida, however, has placed specific limits on protection for abortion rights under its constitution and Rhode Island explicitly excludes abortion from protection under its ERA. *See supra* note 177. In addition, as discussed *infra*, in two states — New Mexico and Texas — state supreme courts have rejected efforts to protect abortion rights under their state ERAs in the context of challenges to restrictions on public funding of medically necessary abortions. *See infra* notes 219, 234-238 and accompanying text.

185. *See generally* SHAMAN, *supra* note 32; G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS (1998); Randall T. Shepard, *The Maturing of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421 (1996); Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U. L. REV. xiii (1996).

Court's own commitment to liberty and equality fell short.[186] In the area of reproductive rights, state law challenges to restrictions on public funding for abortion and restrictions on young women's access to abortion have enjoyed considerable success. Following *Casey*, litigators also invoked the principles of independent state constitutional interpretation in urging state courts to assess waiting periods, biased counseling provisions, and other restrictions based on more exacting *Roe*-like standards and to forego application of the less protective, undue burden standard.[187] While the results in these cases have been mixed, here too some state courts have been willing to extend greater protection to abortion rights than that available under *Casey* and its progeny.

1. Expanding Public Funding for Abortions

Shortly after the Supreme Court's decisions in *Harris v. McRae* and *Maher v. Roe*, reproductive rights litigators turned to state courts for expanded protection. In a series of cases beginning in the early 1980s, litigators brought state constitutional law challenges to state laws that severely restricted public funding for medically necessary abortions while fully funding childbirth. Although some courts have upheld these laws,[188] challenges to abortion funding restrictions have frequently been successful. Relying on either privacy or equality guarantees, the majority of courts, including eight courts of last resort, have interpreted their state constitutions to provide greater protection

186. SHAMAN, *supra* note 32, at xvii.

187. For commentary, written shortly after *Casey*, on the potential for state constitutions to provide greater protection for abortion rights, see Catherine Albisa, *The Last Line of Defense: The Tennessee Constitution and the Right to Privacy*, 25 U. MEM. L. REV. 3 (1994); Kathryn Kolbert & David H. Gans, *Responding to* Planned Parenthood v. Casey*: Establishing Neutrality Principles in State Constitutional Law*, 66 TEMP. L. REV. 1151 (1993); O'Neill, *supra* note 178.

188. Renee B. v. Fla. Agency for Health Care Admin., 790 So. 2d 1036, 1037 (Fla. 2001); A Choice for Women, Inc. v. Fla. Agency for Health Care Admin., 872 So. 2d 970, 973 (Fla. Dist. Ct. App. 2004) (per curiam); Planned Parenthood of Idaho, Inc. v. Kurtz, No. CVOC0103909D, 2002 WL 32156983, at *4 (Idaho Dist. Ct. June 12, 2002); Doe v. Childers, No. 94CI02183, slip op. at 13 (Ky. Cir. Ct. Aug. 3, 1995); Doe v. Dep't of Soc. Servs., 487 N.W.2d 166, 168 (Mich. 1992); Rosie J. v. N.C. Dep't of Human Res., 491 S.E.2d 535, 538 (N.C. 1997); Fischer v. Dep't of Pub. Welfare, 502 A.2d 114, 126 (Pa. 1985); Bell v. Low Income Women of Tex., 95 S.W.3d 253, 266 (Tex. 2002); *see also* Humphreys v. Clinic for Women, Inc., 796 N.E.2d 247, 259-60 (Ind. 2003) (holding that the Indiana Constitution requires public funding for abortion only where "pregnancies create [a] serious risk of substantial and irreversible impairment of a major bodily function"); *cf.* Hope v. Perales, 634 N.E.2d 183, 184 (N.Y. 1994) (holding that a public funding program that pays for medically necessary abortions for women eligible for its Medicaid program, but not for women with higher incomes who can afford abortions, does not violate New York Constitution).

for full public funding of abortion than the Federal Constitution.[189] These decisions invalidated limitations on public funding of abortion in thirteen states.[190] The opinions highlighted below illustrate the varying analytical and theoretical approaches courts have taken in these cases.

Some courts have held that the differential treatment of women who need medical care to continue their pregnancies and women for

189. Alaska Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc., 28 P.3d 904, 908 (Alaska 2001) (invalidating Alaska's restrictions on public funding of medically necessary abortions based on "the state constitutional guarantee of 'equal rights, opportunities and protection under the law'" (quoting ALASKA CONST. art. I, §1)); Simat Corp. v. Ariz. Health Care Cost Containment Sys., 56 P.3d 28, 32, 37 (Ariz. 2002) (invalidating Arizona's restrictions on public funding of medically necessary abortions based on the state constitution's equal privileges and immunities clause); Comm. to Defend Reprod. Rights v. Myers, 625 P.2d 779, 798-99 (Cal. 1981) (invalidating California's restrictions on public funding of medically necessary abortions based on state constitutional guarantee of privacy); Doe v. Maher, 515 A.2d 134, 162 (Conn. Super. Ct. 1986) (invalidating Connecticut's restrictions on public funding of medically necessary abortions based on state ERA, equal protection and due process clauses); Doe v. Wright, No. 91 CH 1958, slip op. (Ill. Cir. Ct. Dec. 2, 1994) (granting plaintiff's motion for summary judgment because the statutes at issue violate the Illinois Constitution to the extent that they deny reimbursement for an abortion necessary to protect a woman's health); Moe v. Sec'y of Admin. & Fin., 417 N.E.2d 387, 390 n.4, 397 (Mass. 1981) (invalidating Massachusetts's restrictions on public funding of medically necessary abortions based on protection for privacy under the state's Declaration of Rights, which guarantees due process of the law); Women of Minn. v. Gomez, 542 N.W.2d 17, 31-32 (Minn. 1995) (invalidating Minnesota's restrictions on public funding of medically necessary abortions based on state constitutional guarantees of privacy); Jeannette R. v. Ellery, No. BDV-94-811, 1995 Mont. Dist. LEXIS 795, at * 21-28 (Mont. Dist. Ct. May 22, 1995) (invalidating Montana's restrictions on public funding of medically necessary abortions based on state constitutional guarantees of privacy and equal protection); Right to Choose v. Byrne, 450 A.2d 925, 941 (N.J. 1982) (invalidating New Jersey's restrictions on public funding of medically necessary abortions based on state constitutional guarantee of equal protection); N.M. Right to Choose/NARAL v. Johnson, 1999-NMSC-005, ¶ 61, 975 P.2d 841, 859 (invalidating New Mexico's restrictions on public funding of medically necessary abortions based on state ERA); Planned Parenthood Ass'n v. Dep't of Human Res. of Or., 663 P.2d 1247, 1258-61 (Or. Ct. App. 1983) (invalidating Oregon's restrictions on public funding of medically necessary abortions based on state privileges and immunities clause), *aff'd en banc on statutory grounds*, 687 P.2d 785 (Or. 1984); Doe v. Celani, No. S81-84CnC, slip op. at 8-12 (Vt. Super. Ct. May 23, 1986) (holding regulation that denies reimbursement for medically necessary abortions unconstitutional under the Vermont Constitution); Women's Health Ctr. of W. Va., Inc. v. Panepinto, 446 S.E.2d 658, 663-67 (W. Va. 1993) (invalidating West Virginia's restrictions on public funding of medically necessary abortions based on state constitutional guarantee of "safety" and common benefit and due process clauses); *see also* Feminist Women's Health Ctr. v. Burgess, 651 S.E.2d 36, 39 (Ga. 2007) (holding that abortion providers have standing to challenge Georgia's restrictions on public funding of medically necessary abortions).

190. Currently, seventeen states use state Medicaid funds to provide all or most medically necessary abortions. Four states provide funding voluntarily; thirteen do so pursuant to court order. GUTTMACHER INST., STATE POLICIES IN BRIEF: STATE FUNDING OF ABORTION UNDER MEDICAID (2009), http://www.guttmacher.org/statecenter/spibs/spib_SFAM.pdf. Thirty-two states and the District of Columbia follow the Federal Medicaid standard and provide state funding for abortion only in cases of life endangerment, rape or incest. *Id.*

whom abortion is medically necessary impermissibly interferes with constitutionally protected privacy guarantees. In *Women of Minnesota v. Gomez*, for example, the Minnesota Supreme Court invalidated Minnesota's restrictions on public funding of medically necessary abortions based on its state constitution's privacy guarantees, which the court found encompassed the abortion right.[191] Most significantly, in defining the scope of the abortion right, the court rejected the narrow reasoning of *McRae*, in which the Supreme Court found no impermissible interference with the abortion right where "government action . . . simply fails to remove a preexisting barrier."[192] Opting to interpret its constitution "to offer greater protection . . . than [that] afforded under the federal constitution,"[193] the Minnesota court reasoned that the fundamental right to an abortion requires government neutrality not only when government acts to control abortion directly, but also when it seeks to influence reproductive choice through more indirect legislative action.[194] Through its discriminatory distribution of government benefits, Minnesota had sought to influence reproductive choices and thereby impermissibly infringed on the fundamental right of privacy:

> [T]he right of privacy under our constitution protects not simply the right to an abortion, but rather it protects the woman's *decision* to abort; any legislation infringing on the decision-making process, then, violates this fundamental right. In the present case, the infringement is the state's offer of money to women for health care services necessary to carry the pregnancy to term, and the state's ban on health care funding for women who choose therapeutic abortions. . . . We simply cannot say that an indigent woman's decision whether to terminate her pregnancy is not significantly impacted by the state's offer of comprehensive medical services if the woman carries the pregnancy to term.[195]

Having concluded that Minnesota's funding restriction infringed on a fundamental right of privacy, the court reviewed the law under the strict scrutiny standard.[196] The court found that the state's interest in protecting potential life — the sole justification proffered by

191. Women of Minn. v. Gomez, 542 N.W.2d 17, 26-27, 31-32 (Minn. 1995).
192. *Id.* at 28; *see supra* notes 51-54 and accompanying text.
193. *Women*, 542 N.W.2d at 30-31.
194. *Id.* at 31.
195. *Id.*
196. *Id.* Although decided after the Supreme Court's decision in *Casey*, the Minnesota court adhered to (and specifically cited) *Roe*'s holding that the state's interest in potential life does not become compelling until the point of viability. *Id.* at 31-32.

Minnesota — could not justify governmental intrusion into a woman's decision whether to terminate her pregnancy prior to viability.[197]

In departing from *McRae*, the Minnesota court emphasized its independent responsibility to safeguard Minnesota citizens and justified its broad protection of individual liberty as consistent with Minnesota's historical traditions and precedent.[198] Specifically, the court invoked Minnesota's "long tradition of affording persons on the periphery of society a greater measure of government protection and support than . . . available elsewhere"[199] and prior decisions in which it had "expand[ed] the protective reach of the Minnesota Constitution beyond that of the U.S. Constitution."[200]

Women of Minnesota is consistent with the approach of other courts that have rejected funding limitations on privacy grounds. These courts consistently undertake an independent analysis in applying their state constitutions to the case before them. In *Committee to Defend Reproductive Rights v. Myers*, for example, the California Supreme Court emphasized its "solemn and independent constitutional *obligation* to interpret the safeguards guaranteed by the California Constitution in a manner consistent with the governing principles of California law."[201] The court explained:

> "[J]ust as the United States Supreme Court bears the ultimate judicial responsibility for determining matters of federal law, this court bears the ultimate judicial responsibility for resolving questions of state law, including the proper interpretation of provisions of the state Constitution. In fulfilling this difficult and grave responsibility, we cannot properly relegate our task to the judicial guardians of the federal Constitution, but instead must recognize our personal obligation to exercise independent legal judgment in ascertaining the meaning and application of state constitutional provisions."[202]

In rejecting *McRae* and concluding "that each woman in this state — rich or poor — is guaranteed the constitutional right to make [the abortion] decision *as an individual*, uncoerced by governmental intrusion,"[203] the court looked to the language of California's Constitution,

197. *Id.* at 31-32. The court acknowledged that although the state has an interest in potential life, it does not become compelling until the point of viability. *Id.*

198. *Id.* at 30-31.

199. *Id.* at 30.

200. *Id.*

201. Comm. to Defend Reprod. Rights v. Myers, 625 P.2d 779, 784 (Cal. 1981) (emphasis in original).

202. *Id.* (quoting People v. Chavez, 605 P.2d 401 (Cal. Ct. App. 1980)).

203. *Id.* at 798 (emphasis in original).

which explicitly protects the right of privacy,[204] as well as a long line of precedent, including its historic 1969 decision in *People v. Belous*,[205] as indicative of the state's strong commitment to autonomy in private decision making.

As in *Women of Minnesota* and *Committee to Defend Reproductive Rights*, the principle of governmental neutrality infuses other courts' application of state privacy guarantees. In *Doe v. Maher*,[206] for example, a Connecticut court flatly rejected the argument — drawn from *McRae* — that Connecticut's differential treatment of pregnant women carrying to term and those choosing abortion did not constitute impermissible government interference with the abortion right: "'Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.'"[207] Likewise, in *Moe v. Secretary of Administration & Finance*,[208] the Massachusetts Supreme Court invalidated its limitations on public funding of medically necessary abortions, emphasizing the requirement that the state act even-handedly when distributing benefits associated with reproductive choice:

> As an initial matter, the Legislature need not subsidize any of the costs associated with child bearing, or with health care generally. However, once it chooses to enter the constitutionally protected area of choice, it must do so with genuine indifference. It may not weigh the options open to the pregnant woman by its allocation of public funds; in this area, government is not free to "achieve with carrots what [it] is forbidden to achieve with sticks."[209]

Significantly, in assessing the impact of their funding schemes, these courts undertook a highly contextualized analysis that focused on the realities of affected women's lives and the cumulative burden of laws that limit options and exacerbate existing hardships. In *Maher*, for example, the court emphasized that "infringement must be measured in the light of . . . . the 'practical considerations' of the person the regulation affects"[210] and gave thoughtful consideration to the impact on poor women of Connecticut's failure to act even-handedly in distributing health benefits.

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204. *Id.* (citing CAL. CONST. art. I, § 1).

205. *Id.* at 784, 790 n.2, 792, 796 (citing People v. Belous, 458 P.2d 194 (Cal. 1969)); *see also Belous*, 458 P.2d at 199-200; *supra* note 35.

206. Doe v. Maher, 515 A.2d 134, 151-52 (Conn. Super. Ct. 1986).

207. *Id.* at 151-52.

208. Moe v. Sec'y of Admin. & Fin., 417 N.E.2d 387 (Mass. 1981).

209. *Id.* at 402 (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 933 n.77 (1978)) (alteration in original).

210. *Maher*, 515 A.2d at 153; *see also Moe*, 417 N.E.2d at 401 ("We are not free to disregard the practical realities.").

> The state has placed her in a trap. The cash welfare allowance (AFDC) the state grants is barely sufficient to maintain an adequate level of living for her and her family. Her benefits from the state are substantially under the poverty levels, and the cash allotment is hardly enough to cover food, shelter and clothing. Through an intricate network of statutes, she is not allowed to receive funds from other sources without those funds being deducted from her welfare cash allowance the following month.... And if she should fail to report the receipt of other income and assets, she could become disqualified for future benefits and subject to criminal charges. Because payments are made directly to the provider and no cash allowance is given for medical assistance, she is not even given the choice of being able to forego other medical necessities in favor of the abortion. In short, the state has boxed her into accepting the pregnancy and carrying the fetus to term, notwithstanding the sometimes substantial impairment to her health.[211]

The court went on to carefully catalog the multiple fact situations in which Connecticut's denial of medically necessary abortions posed grave consequences for women's physical and mental health.[212]

Other courts have held that the differential treatment of two classes of poor, pregnant women violates state equal protection guarantees. These decisions, much like those relying on privacy guarantees, are noteworthy for their independent approach to state constitutional interpretation, their insistence on government neutrality toward abortion, their exacting scrutiny of the government's justifications, and their emphasis on the primacy of women's health. In *Simat Corp. v. Arizona Health Care Cost Containment System*[213] and *Department of Health & Social Services v. Planned Parenthood of Alaska*,[214] for example, two post-*Casey* decisions, the high courts of Arizona and Alaska held that their state constitutions protect the right to nondiscriminatory treatment more robustly than does the Federal Constitution. Because their states' funding restrictions selectively denied a benefit to women exercising a fundamental right, both courts held that the restrictions could only be upheld if they were necessary to serve a compelling governmental interest.[215] Importantly,

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211. *Id.* at 153-54 (footnotes omitted).

212. *Id.* at 154-55.

213. Simat Corp. v. Ariz. Health Care Cost Containment Sys., 56 P.3d 28, 31-32 (Ariz. 2002).

214. Dept. of Health & Soc. Servs. v. Planned Parenthood of Alaska, 28 P.3d 904, 910 (Alaska 2001).

215. *Simat*, 56 P.3d at 32-33; *Planned Parenthood of Alaska*, 28 P.3d at 909-10. Other courts have used a balancing test to determine whether restrictions on funding medically

in scrutinizing the justifications offered by Arizona and Alaska for denying funding to medically necessary abortions, both courts held that no state interest can "'outweigh the superior interest in the life *and health* of the mother.'"[216] Because the discriminatory funding restrictions gave "priority to potential life at the expense of maternal health,"[217] they could not be sustained under either state's equal protection guarantees.

Courts have been more divided on whether restrictions on public funding for medically necessary abortions violate state ERAs, but on two occasions courts have found that funding restrictions impermissibly discriminate on the basis of sex.[218] Most recently, in *New Mexico Right to Choose/NARAL v. Johnson*, the New Mexico Supreme Court held that New Mexico's restrictions on state funding for medically necessary abortions violated its state ERA.[219] Explicitly declining to follow federal equal protection precedent,[220] the court reasoned that

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necessary abortions run afoul of state equal protection provisions. *See, e.g.*, Right to Choose v. Byrne, 450 A.2d 925, 937 (N.J. 1982) ("In balancing the protection of a woman's health and her fundamental right to privacy against the asserted state interest in protecting potential life, we conclude that the governmental interference is unreasonable."); Planned Parenthood Ass'n v. Dep't of Human Res. of Or., 663 P.2d 1247, 1260 (Or. App. 1983) ("We conclude that the state's interest in protecting potential human life before viability of the fetus, by means of the challenged rule, is of a limited nature and is not sufficient to outweigh the woman's interest in her health.").

216. *Simat*, 56 P.3d at 35 (quoting *Right to Choose*, 450 A.2d at 935).

217. *Id.*; *see Planned Parenthood of Alaska*, 28 P.3d at 913 ("[A]lthough the State has a legitimate interest in protecting a fetus, at no point does that interest outweigh the State's interest in the life and health of the pregnant woman."); *id.*(citing Roe v. Wade, 410 U.S. 113 (1973)).

218. Doe v. Maher, 515 A.2d 134, 162 (Conn. 1986); N.M. Right to Choose/NARAL v. Johnson, 1999-NMSC-005, ¶ 61, 975 P.2d 841, 859; *cf.* Colo. Civil Rights Comm'n v. Travelers Ins. Co., 759 P.2d 1358, 1359 (Colo. 1988) (en banc) (excluding the costs of normal pregnancy care from an otherwise comprehensive insurance policy constitutes sex discrimination in violation of the Colorado ERA). *But see* A Choice for Women, Inc. v. Fla. Agency for Health Care Admin., 872 So. 2d 970, 973 (Fla. Dist. Ct. App. 2004) (Florida restrictions on funding for medically necessary abortions do not violate Florida's ERA); Fischer v. Dep't of Pub. Welfare, 502 A.2d 114, 126 (Pa. 1985) (Pennsylvania restrictions on funding for medically necessary abortions do not violate Pennsylvania's ERA); Bell v. Low Income Women of Tex., 95 S.W.3d 253, 266 (Tex. 2002) (Texas restrictions on funding medically necessary abortions do not violate Texas's ERA).

219. *New Mexico Right to Choose*, 1999-NMSC-005, ¶ 61, 975 P.2d at 859.

220. The New Mexico Supreme Court explicitly declined to follow *Geduldig v Aiello*, 417 U.S. 484, 497 (1975), in which the Supreme Court held that the exclusion of pregnancy-related disabilities from a state disability insurance program did not violate the Equal Protection Clause. *See New Mexico Right to Choose*, 1999-NMSC-005, ¶ 39, 975 P.2d at 854. The *Geduldig* Court reasoned that because "pregnancy is an objectively identifiable physical condition with unique characteristics," not every classification concerning pregnancy constitutes invidious sex-based discrimination. 417 U.S. at 496 n.20. Thus, "[a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination," lawmakers were "free" to "exclude pregnancy from coverage" under the insurance program "on any reasonable basis." *Id.*

distinctions based on pregnancy may constitute a form of sex-based discrimination subject to strict scrutiny review,[221] where they operate to disadvantage women: "'The question at hand is whether government has the power to turn th[e] capacity [to bear children], limited as it is to one gender, into a source of social disadvantage.'"[222] The court then analyzed New Mexico's funding restriction by considering it in the larger historical context of laws that disadvantaged women because of their sex.[223] The court emphasized that New Mexico's restriction was part and parcel of a long history in which "'women's biology and ability to bear children have been used as a basis for discrimination against them.'"[224] The court cited examples, drawn from case law precedent, of lawmakers' similar past efforts to justify such "discrimination on the grounds that it is 'benign' or 'protective' of women."[225] The court emphasized that the funding scheme jeopardized women's health, highlighting that the record in the trial court established the "profound [potential] health consequences" of pregnancy.[226] The law also discriminated against women by singling them out for "less favorable" treatment than men with respect to medically necessary health services: "[T]here is no comparable restriction on medically necessary services relating to physical characteristics or conditions that are unique to men. Indeed, we can find no provision . . . that disfavors any comparable, medically necessary procedure unique to the male anatomy."[227] Applying the strict scrutiny standard of review, the court found that New Mexico had produced no compelling justification for its discriminatory treatment of women seeking medically necessary abortions.[228]

The *New Mexico Right to Choose* decision is noteworthy for its thorough and careful analysis of whether divergence from federal precedent was appropriate in light of distinct characteristics of New Mexico law.[229] The New Mexico Supreme Court examined both the

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221. The court also explicitly rejected the less stringent, intermediate standard of review that the Supreme Court has applied to sex-based classifications. *New Mexico Right to Choose*, 1999-NMSC-005, ¶ 36, 975 P.2d at 853.

222. *Id.* ¶ 40, 975 P.2d at 854 (quoting Sunstein, *supra* note 28) (alteration in original).

223. *Id.* ¶ 41, 975 P.2d at 854.

224. *Id.* (quoting Doe v. Maher, 515 A.2d 134, 159 (Conn. Sup. Ct. 1986)).

225. *Id.*

226. *Id.* ¶ 42, 975 P.2d at 855.

227. *Id.* ¶ 46, 975 P.2d at 856.

228. *Id.* ¶ 49, 975 P.2d at 856. The court rejected the state's argument that the funding restriction was justified as a cost-saving measure because the costs of carrying a pregnancy to term (covered under New Mexico's Medicaid program) are typically much greater than the cost of abortion. *Id.* The court also found that the state's interest in protecting potential life did not justify a funding limitation that jeopardized women's health. *Id.* ¶ 53, 975 P.2d at 857.

229. *Id.* ¶¶ 29-35, 975 P.2d at 851-53.

text of the New Mexico ERA and its history and meaning in the context of protection from sex discrimination under New Mexico law from territorial times to the present.[230] The court noted that the ERA was passed in 1973 "by an overwhelming margin" and represented a "culmination of a series of state constitutional amendments that reflect an evolving concept of gender equality."[231] Based on the distinctive text and legislative history of the New Mexico ERA, the court found that the ERA was added to the New Mexico Constitution with the specific intention of providing broader protection against sex discrimination than that afforded under the Federal Constitution.[232] Thus, the court concluded that "the federal equal protection analysis [was] inapposite with respect to [the] claim of gender discrimination."[233]

In contrast to the independent approach of the courts that have rejected limitations on the funding of medically necessary abortions, those courts that have sustained such limitations rely heavily on federal precedent. Recent decisions from the Texas and Florida Supreme Courts illustrate this approach. In *Bell v. Low-Income Women of Texas*, the Texas Supreme Court held that Texas's failure to fund medically necessary abortions did not violate the Texas ERA.[234] While noting that the Texas ERA "was 'designed expressly to provide protection which supplements the federal guarantees of equal treatment,'" and insisting that federal precedent was therefore not controlling, the Texas court went on to rely heavily — indeed almost exclusively — on it.[235] Accordingly, unlike the New Mexico Supreme Court in *New Mexico Right to Choose*, the Texas Supreme Court refused to find that the state's decision to single out abortion for different treatment amounted to sex discrimination:

> [I]t is true that the funding restrictions affect only women, but that is because only women can become pregnant. If the State were to deny funding of all medically necessary pregnancy-related services, the classification might be comparable to [an] overt gender-based distinction . . . . The classification here is not so much directed at

230. *Id.*

231. *Id.* ¶¶ 29-31, 975 P.2d at 851-52; *see* Doe v. Maher, 515 A.2d 134, 160 (Conn. Super. Ct. 1986) ("[B]y adopting the ERA, Connecticut determined that the state should no longer be permitted to disadvantage women because of their sex including their reproductive capabilities.").

232. *New Mexico Right to Choose*, 1999-NMSC-005, ¶¶ 29-37, 975 P.2d at 851-54; *see Maher*, 515 A.2d at 160-61 ("To equate our ERA with the equal protection clause of the federal constitution would negate its meaning given that our state adopted an ERA while the federal government failed to do so.").

233. *New Mexico Right to Choose*, ¶ 28, 975 P.2d at 851.

234. Bell v. Low Income Women of Tex., 95 S.W.3d 253, 266 (Tex. 2002).

235. *Id.* at 257 (quoting TEXAS LEGISLATIVE COUNCIL, 14 PROPOSED CONSTITUTIONAL AMENDMENTS ANALYZED FOR ELECTION 24 (1972)).

> women as a class as it is abortion as a medical treatment, which, because it involves potential life, has no parallel as a treatment method.[236]

Instead, relying on federal equal protection precedent, the court required proof that the funding restriction was based on an invidious discriminatory purpose.[237] Because plaintiffs failed to demonstrate a purpose to discriminate because of sex, the court refused to apply heightened scrutiny and reviewed the funding restriction only to determine whether it was rationally related to a legitimate state interest.[238] Similarly, in *Renee B. v. Florida Agency for Health Care Administration*, the Florida Supreme Court failed to undertake an analysis that was truly independent of federal law when it sustained Florida's restrictions on funding medically necessary abortions.[239] That court had previously invalidated restrictions on young women's access to abortion based on Florida's explicit constitutional protection of privacy, extending broader protection for privacy than that afforded by the Federal Constitution.[240] Yet, in *Renee B.*, decided twelve years later, the court gave short shrift to this important past precedent and reflexively applied the rationale of *McRae*.[241]

2. Protecting the Rights of Young Women

A majority of states restrict young women's access to abortion by requiring parental involvement in their decision to have an abortion.[242]

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236. *Low Income Women of Texas*, 95 S.W.3d at 258; *id.* at 262-63 (citing Harris v. McRae, 448 U.S. 297, 325 (1980) and Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 273 (1993)); *see also* Fischer v. Dep't of Pub. Welfare, 502 A.2d 114, 125 (Pa. 1985) ("The mere fact that only women are affected by this statute does not necessarily mean that women are being discriminated against on the basis of sex. . . . [The Pennsylvania ERA] 'does not prohibit differential treatment among the sexes when, as here that treatment is reasonably and genuinely based on physical characteristics unique to one sex.'").

237. *Low Income Women of Texas*, 95 S.W.3d at 258-60 (citing, inter alia, Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979) and Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977)).

238. *Id.* at 264.

239. Renee B. v. Fla. Agency for Health Care Admin., 790 So. 2d 1036, 1040 (Fla. 2001).

240. *In re* T.W., 551 So. 2d 1186, 1196 (Fla. 1989); *see infra* notes 273-77 and accompanying text.

241. *Renee B.*, 790 So. 2d at 1040 (distinguishing *T.W.* on the ground that a governmental decision not to fund abortion is not the same as "government affirmatively impos[ing] some barrier or obstacle between a woman and her physician in terms of making a decision as to whether to have an abortion"); *see also* N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 615 (Fla. 2003) (reaffirming *T.W.* and invalidating Florida's parental notification law).

242. Thirty-four "states require some parental involvement in a[n] [unemancipated] minor's decision to have an abortion." GUTTMACHER INST., STATE POLICIES IN BRIEF:

Under *Bellotti v. Baird*[243] and subsequent Supreme Court decisions, these laws pass muster under the Federal Constitution so long as they provide an alternative judicial bypass mechanism.[244] In contrast, state privacy and equality guarantees have protected young women's access to abortion by extending far broader protection than that available under federal law. Although parental involvement laws have not been challenged on state constitutional law grounds often, the success rate in such challenges has been high. Indeed, most of the state courts that have evaluated parental involvement mandates under their state constitutions have invalidated them and, in doing so, have explicitly rejected the judicial bypass procedure as an adequate safeguard for young women's rights.[245]

PARENTAL INVOLVEMENT IN MINORS' ABORTIONS (2009), http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf. Twenty-two of these states require parental consent; ten states require parental notification. *Id.* Parental consent laws require young women to obtain the consent, usually written, of at least one parent before the abortion. *Id.* Parental notification laws require a pregnant minor to notify at least one parent of her intention to undergo an abortion before the procedure, but do not require the parent to consent. All states include a judicial bypass procedure, which allows a young woman to obtain approval from a court. *Id.* Several states allow grandparents or other adults to be involved in place of the young woman's parents. *Id.*

243. Bellotti v. Baird, 443 U.S. 622 (1979).

244. *See supra* notes 55-56 and accompanying text.

245. *See* State v. Planned Parenthood of Alaska (*Planned Parenthood of Alaska II*), 171 P.3d 577, 585 (Alaska 2007) (invalidating parental consent law under state privacy guarantee); State v. Planned Parenthood of Alaska (*Planned Parenthood of Alaska I*), 35 P.3d 30, 32 (Alaska 2001) (holding that parental consent law is constitutional only if it can survive strict scrutiny and remanding to lower court for further fact finding); Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797, 800 (Cal. 1997) (invalidating parental consent law under state privacy guarantee); N. Fla. Women's Health & Counseling Servs., Inc. v. Florida, 866 So. 2d 612, 615 (Fla. 2003) (invalidating parental notification law under state privacy guarantee); *In re* T.W., 551 So. 2d 1186, 1196 (Fla. 1989) (invalidating parental consent law under state privacy guarantee); Wicklund v. State, No. ADV 97-671, 1999 Mont. Dist. LEXIS 1116, *23 (Mont. Dist. Ct. Feb. 11, 1999) (granting summary judgment and invalidating parental consent law under state equal protection guarantee); Planned Parenthood of Cent. N.J. v. Farmer, 762 A.2d 620, 621 (N.J. 2000) (invalidating parental notification law under equal protection guarantee); *see also* Planned Parenthood League of Mass., Inc. v. Attorney Gen., 677 N.E.2d 101, 109 (Mass. 1997) (sustaining parental consent law, but invalidating provision requiring consent of both parents under due process and equal protection provisions); State v. Koome, 530 P.2d 260, 263 (Wash. 1975) (en banc) (invalidating parental consent requirement under *both* federal and state privacy and equal protection guarantees). *But see* Pro-Choice Miss. v. Fordice, 95-CA-00960-SCT (¶¶ 73-75) (Miss. 1998) (sustaining parental consent law under state constitution); NARAL PRO-CHOICE AMERICA, WHO DECIDES? THE STATUS OF WOMEN'S REPRODUCTIVE RIGHTS IN THE UNITED STATES: MICHIGAN (2009), http://www.prochoiceamerica.org/choice-action--center/in_your_state/who-decides/state-profiles/michigan.html?templateName=lawdetails&issueID=6&ssumID=2652 (discussing Planned Parenthood of Mid-Mich., Inc. v. Attorney Gen., No. D 91-0571 AZ (Mich. Cir. Ct. Apr. 29, 1994) (sustaining parental consent law under state constitution)); *but see also In re* Doe, 407 So. 2d 1190, 1190 (La. 1981) (per curiam) (sustaining parental consent law, but not clarifying constitutional grounds).

The state supreme courts of Alaska, California, and Florida have relied on explicit privacy guarantees as the basis for invalidating parental involvement laws. In *American Academy of Pediatrics v. Lungren*, the California Supreme Court wrote a particularly strong opinion rejecting California's one-parent consent law.[246] The court first addressed the state's contention that it should adhere to federal decisions that had sustained laws similar to California's.[247] In refusing to do so, the court emphasized the independent status of the California Constitution, noting "that the rights embodied in and protected by the state Constitution are not invariably identical to the rights contained in the federal Constitution."[248] The text of the California Constitution, which explicitly protects the right of privacy, revealed a voter intention to provide strong protection for the right.[249] Moreover, the court's past decisions, including *Committee to Defend Reproductive Rights*,[250] established that "the scope and application of the state constitutional right of privacy is broader and more protective of privacy than the federal constitutional right of privacy as interpreted by the federal courts."[251]

The court next applied a three-prong test to determine whether plaintiffs had met their threshold burden of establishing their privacy claim.[252] First, the court found that the parental consent law implicated a legally protected privacy interest.[253] In doing so, the court rejected the state's argument that because the law only applied to pregnant minors, it should not be viewed as intruding on a protected privacy interest.[254] The court noted that California's privacy guarantee applies to "'*[a]ll people*,'"[255] and that the ballot pamphlet that accompanied the measure specified that the privacy right would extend to "'*every* Californian,' including 'every man, woman and *child* in this state.'"[256] The court also cited a long line of California decisions that had extended privacy protection to minors as well as adults.[257] Next, the court found that minors have a "'reasonable

246. *American Academy of Pediatrics*, 940 P.2d 797.

247. *Id.* at 807-08.

248. *Id.* at 808.

249. *Id.*

250. *See supra* notes 201-05 and accompanying text.

251. *American Academy of Pediatrics*, 940 P.2d at 808.

252. *Id.* at 812. A plaintiff must establish: "'(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy.'" *Id.* at 811.

253. *Id.* at 814.

254. *Id.*

255. *Id.* (quoting CAL. CONST. art. I, § 1) (alteration and emphasis in original).

256. *Id.*

257. *Id.* at 814. The court recognized that, as a general matter, parents have the authority "to exercise a child's privacy right on the child's behalf." *Id.* at 815. The court

expectation of privacy'" in the abortion context.[258] The court reasoned that although there is a general statutory rule that parents must consent to medical procedures for their children, it "would defeat the voters' fundamental purpose in establishing a *constitutional* right of privacy" if previous practices or general statutory schemes could override constitutional protection.[259] Lastly, the court determined that the parental consent mandate "significantly intrudes" upon young women's privacy interests.[260] In particular, the court emphasized that the requirement would likely delay minors' access to a medically safe procedure, thereby increasing the health risks posed by abortion.[261] Moreover, a young woman who feared informing a parent might "attempt to terminate the pregnancy herself or seek a 'back-alley abortion'" or "to postpone action until it is too late to terminate her pregnancy, leaving her no choice but to bear an unwanted child."[262]

The court then determined that because the law impinged upon a fundamental privacy interest, California precedent required the application of the strict scrutiny standard.[263] The court rejected the state's argument that in a facial challenge it need only demonstrate that "the statute constitutionally may be applied in even a single circumstance covered by the statute."[264] The court relied on both California and federal precedent in declining to adopt this restrictive approach to facial challenges.[265] Instead, the court held "that when a statute broadly and directly impinges upon the . . . rights of a substantial portion of those persons to whom the statute applies," the state must demonstrate that "the compelling justifications for the statute outweigh the statute's impingement on constitutional privacy rights and cannot be achieved by less intrusive means."[266]

The court agreed that the state's asserted interests in protecting the physical, emotional and psychological health of minors and preserving parent-child relationships constituted compelling interests.[267]

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distinguished the abortion decision from other decisions, however, emphasizing that it "has . . . a substantial effect on a pregnant minor's control over her personal bodily integrity, has . . . serious long-term consequences in determining her life choices, . . . and (unlike many other choices) *is a decision that cannot be postponed until adulthood.*" *Id.* at 816 (emphasis in original).

258. *Id.* at 817.

259. *Id.* (emphasis in original).

260. *Id.* at 817-18.

261. *Id.* at 817.

262. *Id.*

263. *Id.* at 818-19.

264. *Id.* at 819-20.

265. *Id.* at 819-23; *see also* State v. Planned Parenthood of Alaska (*Alaska I*), 35 P.3d 30, 34-35 (Alaska 2001) (rejecting application of "*Salerno*'s 'no set of circumstances'" standard in a facial challenge to Alaska's parental consent law).

266. *American Academy of Pediatrics*, 940 P.2d at 823.

267. *Id.*

The court concluded, however, that the state had failed to show that the parental consent requirement was necessary to further those interests.[268] The court reasoned that the state's contention that the statute was necessary to protect young women's health was undermined by the existence of a variety of other California statutes that "authorize[] a minor, without parental consent, to obtain medical care and make other important decisions in analogous contexts that pose . . . equal or greater risks" to a young woman's health than those posed by the decision to terminate a pregnancy.[269] The court also cited evidence amassed at trial that "overwhelmingly indicated that [the parental consent law] would not serve — but rather would impede — the state's interests in protecting the health of minors and enhancing the parent-child relationship."[270] Finally, parting paths with federal precedent, the court found that the judicial bypass procedure was not sufficient to save the consent statute because evidence at trial demonstrated that resort to the judicial procedure would delay a young woman's access to abortion, thereby increasing the medical risks posed by the abortion procedure.[271]

In addition to California precedent, the *American Academy of Pediatrics* court also relied heavily on the Florida Supreme Court's 1989 decision in a nearly identical case.[272] In that decision, *In re*

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268. *Id.* at 827-28.

269. *Id.* at 826. The court noted that California law authorizes a minor, without parental consent, to continue a pregnancy and give birth to a child and to decide whether to give a child up for adoption. *Id.* at 826-27. The court also emphasized that "over the past 30 years the Legislature has enacted a series of statutes authorizing minors, *without parental consent*, to obtain medical care related to the diagnosis or treatment *of sexually transmitted diseases*, *rape*, and *sexual assault*." *Id.* at 827 (citations omitted).

270. *Id.* at 828-29. In particular, the court highlighted trial testimony that established that most pregnant minors voluntarily consult with their parents before obtaining an abortion, and that those who do not "have good reason to fear that informing their parents will result in physical or psychological abuse to the minor (often because of previous abusive conduct or because the pregnancy is the result of intrafamily sexual activity)." *Id.* at 829. Moreover, the evidence

> indicated that to the extent [the parental consent law provisions] were to cause a pregnant minor from an abusive or potentially abusive family to seek parental consent, the statute would endanger the minor by leading her to place herself at physical or mental risk and would exacerbate the instability and dysfunctional nature of the family relationship.

Id.

271. *Id.* The court also noted that

> witnesses testified that past experience in other jurisdictions demonstrates that at least some minors who are too frightened or ashamed to consult their parents also will be too frightened or ashamed to go to court . . . and may resort to the dangerous alternatives of either attempting to terminate their pregnancy themselves or seeking an illegal, back-alley abortion.

Id.

272. *Id.* at 825-26.

T.W., the Florida court held that a parental consent statute violated the express right of privacy contained in the Florida Constitution.[273] The Florida court looked closely at the language and history of its privacy guarantee in concluding that it encompassed young women seeking abortion and that it offered more protection than the Federal Constitution.[274] The court applied the strict scrutiny standard of review and found that the state's interests in protecting the well-being of immature minors and preserving family integrity were not sufficiently compelling to justify the law.[275] Significantly, in evaluating these asserted governmental interests, the court was deeply troubled by the state's different treatment of abortion.[276] As in *American Academy of Pediatrics*, the court was unable to reconcile Florida's alleged interest in a minor's well-being in the context of abortion with the state's silence on a minor's decision to give birth or to give up a child for adoption:

> [A] minor may consent, without parental approval, to any medical procedure involving her pregnancy or her existing child — no matter how dire the possible consequences — except abortion. . . . In light of this wide authority that the state grants an unwed minor to make life-or-death decisions concerning herself or an existing child without parental consent, we are unable to discern a special compelling interest on the part of the state under Florida law in protecting the minor only where abortion is concerned.[277]

Following *T.W.*, the Florida legislature enacted a parental *notification* law.[278] In 2003, the Florida Supreme Court revisited the issues raised in *T.W.* when it considered the constitutionality of this statute. In *North Florida Women's Health & Counseling Services, Inc. v. State*, the Florida Supreme Court reaffirmed *T.W.* and struck down the notification statute.[279] The decision is noteworthy in several

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273. *In re* T.W., 551 So. 2d 1186, 1194, 1196 (Fla. 1989). For a more thorough discussion of *T.W.*, see Jeffrey M. Shaman, *The Right of Privacy in State Constitutional Law*, 37 RUTGERS L.J. 971, 1017-20 (2005).

274. *See T.W.*, 551 So. 2d at 1191-93.

275. *Id.* at 1193-95.

276. *Id.* at 1195.

277. *Id.* at 1193-95. The court also concluded that the law's judicial bypass procedure failed to provide adequate procedural safeguards for young women because it made no provision for a lawyer or for a record hearing to memorialize the trial court's reasons for its decision. *Id.* at 1196.

278. *See* Parental Notice of Abortion Act, FLA. STAT. § 390.01115 (2004). The Act prohibited a young woman from obtaining an abortion until at least forty-eight hours after actual notice of the abortion was given to one parent by either the attending or referring physician. *Id.* The Act provided for an alternative judicial bypass procedure. *Id.*

279. N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 615 (Fla. 2003). After the decision in *North Florida Women's Health*, Florida state legislators

respects. First, the court rejected the state's argument that it should "recede" from *T.W.* and replace the strict scrutiny standard with the *Casey* undue burden standard.[280] In declining to do so, the court reasoned that continued application of the more protective strict scrutiny standard was consistent with the text of Florida's express privacy guarantee.[281] The court also emphasized that application of the familiar strict scrutiny standard was well supported by long standing Florida precedent and consistent with the will of Florida voters:

> In order to adopt the "undue burden" standard . . . we would have to abandon an extensive body of clear and settled Florida precedent in favor of an ambiguous federal standard. Most important, however, we would have to forsake the will of the people. If Floridians had been satisfied with the degree of protection afforded by the federal right of privacy, they never would have adopted their own freestanding Right of Privacy Clause. In adopting the privacy amendment, Floridians deliberately opted for substantially more protection than the federal charter provides.[282]

Second, the court rejected the state's attempt to distinguish *T.W.* on the grounds that the new notification law was less burdensome than a consent law.[283] In dismissing this argument, which has gained some traction in federal abortion jurisprudence,[284] the court credited the

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passed a joint resolution to amend the state constitution to establish that the legislature may require parental notification for abortion as long as the law provides for certain exceptions and a judicial bypass procedure. *See* NARAL PRO-CHOICE AMERICA, WHO DECIDES? THE STATUS OF WOMEN'S REPRODUCTIVE RIGHTS IN THE UNITED STATES: FLORIDA (2009), http://www.prochoiceamerica.org/choice-action-center/in_your_state/ who-decides/ state-profiles/florida.html?templateName=lawdetails&issueID=6&ssumID=2525. The resolution, which then became a ballot initiative, was approved by Florida voters in 2004, thereby amending the Florida Constitution to allow parental notification. *Id.*; *see also supra* note 177 (describing how other state constitutions treat abortion). The Florida legislature reenacted a parental notification law in 2005. *See* Womancare of Orlando, Inc. v. Agwunobi, 448 F. Supp. 2d 1293, 1309, 1329-30 (N.D. Fla. 2005) (sustaining notification statute under Federal Constitution).

280. *North Florida Women's Health*, 866 So. 2d at 634.

281. *Id.* at 634-35 ("'[The Florida privacy] amendment embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution.'" (citing *In re* T.W., 551 So. 2d 1186, 1192 (Fla. 1989))).

282. *Id.* at 635-36.

283. *Id.* at 631-32.

284. *See, e.g.*, H.L. v. Matheson, 450 U.S. 398, 411 n.17 (1981) (rejecting the notion that notice statutes are equivalent to consent statutes); Planned Parenthood of the Blue Ridge v. Camblos, 155 F.3d 352, 367 (4th Cir. 1998) (upholding parental notification law with a discretionary bypass provision because there was "substantial authority from the Court emphasizing the fundamental differences between consent and notice statutes, . . . the Constitution does not require . . . 'mere notice' statutes [to contain] the full panoply of safeguards required by the Court in *Bellotti II* for parental consent statutes"); *see also* Ohio v. Akron Ctr. for Reprod. Health (*Akron II*), 497 U.S. 502, 510 (1990) (declining to rule on whether parental notification laws must contain a judicial bypass provision). For

trial court's finding that the "intended and expected effect" of a notification law is the same as that of a consent law and that notification, like consent, "constitutes a significant intrusion on a minor's right of privacy."[285] Finally, the court restated its concern that in enacting the notification law, the state had again singled out abortion for regulation without compelling justification:

> Critical to the trial court's decision — and to our decision today — is the fact that nothing whatsoever has changed in this statutory scheme since *T.W.* was decided. . . .
>
> "The contrast between the Legislature's treatment of a minor's decision to choose an abortion and its treatment of comparable decisions by a minor is as stark today as it was [then]."[286]

Most recently, the Alaska Supreme Court invalidated a parental consent law under that state's explicit privacy guarantee.[287] The court agreed that the state's asserted interests in "protecting minors . . . and aiding parents in fulfilling their parental responsibilities. . . . are compelling interests," but rejected the statutory scheme because it was not the least restrictive means of achieving those interests.[288] The court reasoned that the consent requirement improperly "shifts" a minor's right to choose abortion to her parents.[289] The court found that the bypass mechanism did not effectively relieve young women of the burden of parental consent because that "procedure[] build[s] in delay that may prove 'detrimental to the physical health of the minor,' particularly for minors in rural Alaska who 'already face logistical obstacles to obtaining an abortion.'"[290] Unlike the Florida Supreme Court, however, the Alaska court spoke approvingly of notification laws, accepting the notion that such laws are "less burdensome" than consent statutes.[291]

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a thorough analysis of federal abortion jurisprudence on parental notification laws, see Amanda M. Lanham, Note, *Parental Notification Under the Undue Burden Standard: Is a Bypass Mechanism Required?*, 37 RUTGERS L.J. 551 (2006).

285. *North Florida Women's Health*, 866 So. 2d at 631-32.

286. *Id.* at 633.

287. State v. Planned Parenthood of Alaska (*Alaska II*), 171 P.3d 577, 579 (Alaska 2007). In an earlier opinion, the Alaska Supreme Court held that its express privacy guarantee extended to minors. State v. Planned Parenthood of Alaska (*Alaska I*), 35 P.3d 30, 39-41 (Alaska 2001) (relying upon "the Alaska Constitution's language and values," Alaska precedent, and decisions in other states). The court remanded the case "for an evidentiary hearing to determine whether the parental consent or judicial authorization act actually furthers compelling state interests using the least restrictive means." *Id.* at 46.

288. *Alaska II*, 171 P.3d at 582, 585.

289. *Id.* at 583.

290. *Id.* at 584.

291. *Id.* at 579; *see, e.g.*, *id.* at 585 ("[A] notification requirement may actually better serve the State's compelling interests.").

Other courts have extended broad protection to young women via state constitutional provisions other than explicit privacy clauses. In *Planned Parenthood of Central New Jersey v. Farmer*, the New Jersey Supreme Court struck down a parental notification law on equal protection grounds because the law unconstitutionally distinguished between young women who sought abortions and those who sought medical care relating to their pregnancies.[292] In stark contrast to the federal decisions highlighted in Part I,[293] the *Planned Parenthood of Central New Jersey* court's analysis is especially noteworthy for its willingness to assess the impact of the law in the context of the real life challenges that make access to abortion difficult for young women.[294] The court also carefully considered the ways in which abortion laws exploit and exacerbate those difficulties, emphasizing that "additional impediments added to existing impediments may well prevent the exercise of a fundamental right altogether."[295] The court concluded that both the notice requirement and the bypass mechanism significantly burdened young women seeking abortion by threatening their health and potentially "operat[ing] as a functional bar to a minor's exercise of her constitutional right" of privacy.[296] As in the privacy-based opinions of the California and Florida courts, the New Jersey Supreme Court also rejected the state's effort to justify the burdensome law on the ground that "'abortion is different.'"[297] The court reasoned that the state's asserted interest in young women seeking abortion was "difficult to justify" given "that the State has recognized a minor's maturity in matters relating to her sexuality, reproductive decisions, substance-abuse treatment, and placing her children for adoption."[298]

A Montana court used this same reasoning when it invalidated Montana's parental notification law[299] after the Supreme Court declined to do so in *Lambert v. Wicklund*.[300] Significantly, in finding that the Montana consent law "create[d] unequal and unfair application to pregnant minors who want to terminate their pregnancy," the Montana court emphasized the unique challenges confronting Montana teens as they seek to access abortion services:

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292. Planned Parenthood of Cent. N.J. v. Farmer, 762 A.2d 620, 621 (N.J. 2000).

293. *See supra* notes 112-20 and accompanying text.

294. *See Planned Parenthood of Central New Jersey*, 762 A.2d at 632-38.

295. *Id.* at 636.

296. *Id.* at 634.

297. N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 634 (Fla. 2003); *Planned Parenthood of Central New Jersey*, 762 A.2d at 636.

298. *Planned Parenthood of Central New Jersey*, 762 A.2d at 636.

299. Wicklund v. State, No. ADV 97-671, 1999 Mont. Dist. LEXIS 1116 (Mont. Dist. Ct. Feb. 11, 1999).

300. Lambert v. Wicklund, 520 U.S. 292, 293 (1997) (per curiam); *see supra* note 130.

> Montana is particularly difficult in availability of abortion providers. Thirty percent of women seeking abortions have to travel at least 100 miles, due to geographical distances and scarcity of abortion providers. Burdens on adolescents are much greater than on adults for traveling such distances. The added burdens on these minors create greater risks of delayed abortions and consequential medical problems.[301]

The Massachusetts Supreme Court relied on both equal protection and implied privacy provisions in striking down an onerous two-parent consent statute.[302] While the court agreed that the state was justified in requiring the consent of one parent, it specifically rejected federal precedent that sustained two-parent consent mandates.[303] In contrast, in *Pro-Choice Mississippi v. Fordice*, the Mississippi Supreme Court upheld Mississippi's requirement that young women seeking abortion obtain the consent of both parents.[304] Oddly, the court began its analysis by noting that it had previously declared the right of privacy "the most comprehensive and guarded right emanating from the Mississippi Constitution" and in past opinions had applied the strict scrutiny standard in evaluating governmental interference with this right.[305] The court also concluded that its constitutional guarantee of "privacy includes an implied right to choose whether or not to have an abortion."[306] Nonetheless, in evaluating the two-parent consent mandate, the court turned to precedent from the Supreme Court and lower federal courts, opting to apply *Casey*'s undue burden standard and finding that the judicial bypass alternative cured any burdens posed by the statute.[307] Thus, despite its rhetoric about the breadth and importance of Mississippi's privacy guarantee, the court with scant analysis construed its constitution consistent with

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301. *Wicklund*, 1999 Mont. Dist. LEXIS 1116, at *18-19 (citation omitted).

302. Planned Parenthood League of Mass., Inc. v. Attorney Gen., 677 N.E.2d 101, 109 (Mass. 1997).

303. *Id.* The court reasoned that requiring both parents to consent was an unjustified burden on young women's right to abortion, particularly in cases of incest or where the parents never married or never lived together. *Id.* at 107. Rejecting the Supreme Court's analysis in *Hodgson v. Minnesota*, 497 U.S. 417 (1990), the court found that the presence of the judicial bypass option did not cure the unconstitutionality of the two-parent requirement because it simply added unnecessary "delay and emotional stress" when the purpose of the statute had already been fulfilled by the consent of one parent. *Id.* at 108.

304. Pro-Choice Miss. v. Fordice, 95-CA-00960-SCT (¶ 75) (Miss. 1998).

305. *Id.* ¶¶ 29, 34 (citing *In re* Brown, 478 So. 2d 1033, 1039 (Miss. 1985)).

306. *Id.* ¶ 30. The court rejected the State of Mississippi's argument that the framers of the Mississippi Constitution intended to omit protection for abortion because it found that at the time the constitution was adopted, abortion was in fact legal until the point of quickening. *Id.* ¶¶ 20-21.

307. *Id.* ¶¶ 35, 40-53.

the Federal Constitution, declining a broader, more independent interpretation in the specific context of abortion rights.[308]

3. Challenging Mandatory Waiting Periods, Biased Counseling Provisions, Laws Targeting the Medical Practice of Providers and Other Abortion Restrictions

The unwillingness of most federal courts to apply the undue burden standard so as to provide a reasonable measure of protection against laws similar to those upheld in *Casey* has led reproductive rights litigators to turn to state courts for enhanced protection against these restrictions. While most state courts have upheld waiting period and counseling provisions under state constitutions,[309] in two noteworthy instances state courts rejected them.[310] The Tennessee Supreme Court's opinion in *Planned Parenthood of Middle Tennessee v. Sundquist*[311] represents the strongest rejection of the *Casey* plurality's analysis by a state court.

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308. The court explained:

> While we have previously analyzed cases involving the state constitutional right to privacy under a strict scrutiny standard . . . we are not bound to apply that standard in all privacy cases. The abortion issue is much more complex . . . . We are placed in the precarious position of both protecting a woman's right to terminate her pregnancy before viability and protecting unborn life.

Id. ¶ 34. The court rejected the plaintiffs' reliance on *T.W.* and *American Academy of Pediatrics* because "both Florida and California have State Constitutions with explicit right to privacy clauses, while Mississippi's Constitution has only an inferred right to privacy." *Id.* ¶ 52.

309. Clinic for Women, Inc. v. Brizzi, 837 N.E.2d 973, 975 (Ind. 2005) (sustaining eighteen-hour waiting period and biased counseling provision under declaration of rights clause of state constitution); Mahaffey v. Attorney Gen., 564 N.W.2d 104, 107-08, 111 (Mich. Ct. App. 1997) (per curiam) (sustaining twenty-four hour waiting period and biased counseling provision on grounds that Michigan "does not guarantee a right to abortion that is separate and distinct from the federal right"); *Pro-Choice Mississippi*, 95-CA-00960-SCT (¶ 74) (sustaining twenty-four hour waiting period and biased counseling provision under implicit privacy guarantee of state constitution); Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon, 185 S.W.3d 685, 687-88, 691-92 (Mo. 2006) (en banc) (sustaining both twenty-four hour waiting period and biased counseling provision under due process and equal rights clauses of state constitution); Preterm Cleveland v. Voinovich, 627 N.E.2d 570, 573-84 (Ohio Ct. App. 1993) (sustaining twenty-four hour waiting period and biased counseling provision under inalienable rights, equal protection, freedom of speech and freedom of worship clauses of state constitution); *see also* State v. Presidential Women's Ctr., 937 So. 2d 114, 115-16 (Fla. 2006) (sustaining counseling provision as not unconstitutionally vague based on narrowing construction agreed to by the State).

310. Planned Parenthood of Missoula v. State, No. BDV 95-722, 1999 Mont. Dist. LEXIS 1117, at *8-9, *21-22 (Mont. Dist. Mar. 12, 1999) (invalidating Montana's twenty-four hour waiting period on state constitutional privacy grounds and declaring portion of counseling provision unconstitutionally vague); Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1, 4, 10-11, 22-24 (Tenn. 2000) (invalidating a two-day waiting period under both state implied privacy guarantee and *Casey*'s undue burden standard).

311. *See Planned Parenthood of Middle Tennessee*, 38 S.W.3d at 14-17.

In *Planned Parenthood of Middle Tennessee*, decided in 2000, the court continued its tradition — begun in its decision in *Davis v. Davis*[312] — of extending broad state constitutional protection to procreational autonomy.[313] The court reaffirmed its analysis in *Davis* that the Tennessee Constitution's Declaration of Rights extends greater protection to the right of privacy than the Federal Constitution.[314] Invoking *Davis* and its progeny, the court held that because a woman's right to abortion "is closely aligned with matters of marriage, child rearing, and other procreational interests that have previously been held to be fundamental,"[315] restrictions on abortion are subject to exacting scrutiny.[316] The court also firmly rejected the application of the *Casey* undue burden standard, denouncing it as "essentially no standard at all" that "allows judges to impose their own subjective views of the propriety of the legislation."[317] Moreover, in the court's view, the undue burden standard afforded woefully inadequate protection to its citizens:

> [T]he *Casey* test offers our judges no real guidance and engenders no expectation among the citizenry that governmental regulation of abortion will be objective, evenhanded, or well-reasoned. This Court finds no justification for exchanging the long established constitutional doctrine of strict scrutiny for a test . . . that would relegate a fundamental right of the citizens of Tennessee to the personal caprice of an individual judge.[318]

Applying the strict scrutiny standard, the *Planned Parenthood of Middle Tennessee* court found that neither Tennessee's two-day

312. Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992). In *Davis*, involving a divorced couple's dispute over the control of frozen embryos, the court held that the Tennessee Constitution's implied protection of the right to privacy encompassed a right of procreational autonomy that included the right to decide for oneself whether or not to become a parent. *Id.* at 598-604. The court ruled in favor of the husband who sought to stop his former wife from donating their frozen embryos to another couple for implantation. *Id.* at 604-05.

313. *Planned Parenthood of Middle Tennessee*, 38 S.W.3d at 10, 12.

314. *Id.* at 12-15. The court highlighted the distinct text of the Tennessee Constitution, which "recognizes that our government serves at the will of the people of Tennessee, and expressly advocates active resistence [sic] against the government when government no longer functions to serve the people's needs." *Id.* at 14. In the court's view, "[t]his provision exemplifies the strong and unique concept of liberty embodied in our constitution." *Id.*

315. *Id.* at 15. The court emphasized that since *Davis*, Tennessee courts had extended privacy protection to a variety of other areas, including child custody and consensual adult homosexuality. *Id.* at 10.

316. *Id.* at 17.

317. *Id.* at 16.

318. *Id.* at 17; *see also* Planned Parenthood of Missoula v. State, No. BDV 95-722, 1999 Mont. Dist. LEXIS 1117, *2-3, *7-8 (Mont. Dist. Mar. 12, 1999) (applying strict scrutiny standard to evaluate constitutionality of waiting period and finding that the state had advanced no compelling interest to support it).

waiting period nor its counseling provision was constitutionally justifiable.[319] The court held that the counseling provision, which required that women must be orally informed of state-prescribed information by their attending physicians, was not narrowly tailored to further a compelling state interest.[320] Although the court agreed that it was important for women to be adequately informed about the abortion procedure, it found that other health professionals were competent to provide the required information, and therefore it was not necessary for a physician personally to convey the information.[321]

Relying on *Akron I*, in which the Supreme Court struck down a forced waiting period under the *Roe* strict scrutiny and trimester framework, the court held that the Tennessee waiting period was likewise constitutionally deficient because it failed to further the state's interest in protecting women's health.[322] The court acknowledged that "'a woman . . . should be allowed "sufficient time for reflection,"'" before she decides to have an abortion.[323] However, the court echoed the trial court's determination that what constitutes sufficient time for reflection "'varies with each individual woman'" and that trial testimony established that "'most women have seriously contemplated their decision'" to have an abortion before making their initial appointment with the physician.[324] "'To *mandate* that she wait even longer,'" declared the court, "'insults the intelligence and decision-making capabilities of a woman.'"[325] The court also emphasized that the waiting period exacerbated the existing hardships of obtaining an abortion given that "many women must travel long distances" and take time off from work to have an abortion.[326] The two-visit

319. *Planned Parenthood of Middle Tennessee*, 38 S.W.3d at 21-22. The court also found that a requirement that second trimester abortions be performed in hospitals was not narrowly tailored to serve the state's compelling interest in protecting the woman's health and was therefore invalid under the Tennessee Constitution. *Id.* at 18-19. The court reasoned that this requirement was unconstitutional under the federal undue burden standard because it lacked a medical emergency exception. *Id.* at 19.

320. *Id.* at 21. The court recognized two state interests as sufficiently compelling to overcome the woman's right to abortion — the state's interest in the woman's health, which it deemed compelling from the beginning of the pregnancy, and the state's interest in potential life, which becomes compelling only at the point of fetal viability. *Id.* at 17.

321. *Id.* at 21-22. The court also concluded that the physician-only counseling provision was invalid under the undue burden standard. *Id.* at 22. Because the information could be provided by another health professional, with the same result achieved, the court found that "the purpose or effect of the physician-only requirement is to 'place a substantial obstacle in the path of a woman seeking an abortion.'" *Id.* (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992)).

322. *Id.* at 23-24 (citing City of Akron v. Akron Ctr. for Reprod. Health, Inc. (*Akron I*), 462 U.S. 416 (1983)); *see supra* note 57 and accompanying text.

323. *Planned Parenthood of Middle Tennessee*, 38 S.W.3d at 23.

324. *Id.*

325. *Id.*

326. *Id.* at 24.

requirement was "especially problematic for women who suffer from poverty or abusive relationships."[327]

Other courts — including three state supreme courts — have sustained waiting periods and biased counseling provisions.[328] Most of these courts resist a truly independent analysis of these laws and, as in the lower federal court decisions discussed in Part I, incorrectly apply the outcome in *Casey* to sustain them.[329] In *Pro-Choice Mississippi v. Fordice*, for example, the Mississippi Supreme Court upheld the state's counseling and waiting period provision along with its two-parent consent requirement.[330] The court offered virtually no analysis other than to cite *Casey* and *Barnes v. Moore*, an earlier federal appeals court decision that sustained a facial challenge to the Mississippi law.[331] In *Barnes*, however, the Fifth Circuit Court of Appeals denied the plaintiff-providers the opportunity to put on proof of the specific burdens imposed on Mississippi women by these provisions.[332] The *Barnes* court reasoned that the *Casey* analysis and

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327. *Id.* The court held that the waiting period also failed the undue burden standard, reasoning that the burdensome length of the waiting period — the longest in the nation — "suggests that the waiting period requirement is not intended as an opportunity for reflection, but is actually intended as an obstacle to abortion." *Id.*

328. *See, e.g.*, Clinic for Women, Inc. v. Brizzi, 837 N.E.2d 973, 976, 981 (Ind. 2005) (upholding an Indiana statute requiring counseling and a waiting period before a woman may obtain an abortion); Pro-Choice Miss. v. Fordice, 95-CA-00960-SCT (¶¶ 36-39) (Miss. 1998) (rejecting a challenge to Mississippi's counseling and waiting period statute); Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Nixon, 185 S.W.3d 685, 687, 691-92 (Mo. 2006) (en banc) (per curiam) (upholding Missouri's counseling and waiting period statute).

329. *See, e.g.*, *Pro-Choice Mississippi*, 95-CA-00960-SCT (¶¶ 31-39) (discussing *Casey* and applying it directly to state constitutional analysis). In one deviation from this pattern, a Michigan appeals court upheld a waiting period and counseling provision after undertaking an independent analysis of its constitution and found no protection whatsoever for the right to abortion. Mahaffey v. Attorney Gen., 564 N.W.2d 104, 111 (Mich. Ct. App. 1997) ("[T]he Michigan Constitution does not guarantee a right to abortion that is separate and distinct from the federal right.").

330. *Pro-Choice Mississippi*, 95-CA-00960-SCT (¶¶ 73-75); *supra* notes 304-08 and accompanying text. Plaintiffs had framed their challenge as both facial and as applied. *Pro-Choice Mississippi*, 95-CA-00960-SCT (¶ 79) (Sullivan, J., dissenting).

331. *Pro-Choice Mississippi*, 95-CA-00960-SCT (¶¶ 37-38) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) and Barnes v. Moore, 970 F.2d 12 (5th Cir. 1992)). The court concluded: "Because the mandatory consultation and twenty-four hour delay ensures that a woman has given thoughtful consideration in deciding whether to obtain an abortion, [the statute] does not create an undue burden and is therefore constitutional." *Id.* ¶ 39; *see also Clinic for Women*, 837 N.E.2d at 975, 980 (rejecting facial challenge to counseling and waiting period based on *Salerno* and finding that provisions would also survive an as applied challenge because they imposed no "material burden" on Indiana women); *Nixon*, 185 S.W.3d at 691-92 (applying *Casey* analysis in upholding counseling and waiting period under the Missouri Constitution); Preterm Cleveland v. Voinovich, 627 N.E.2d 570, 577 (Ohio Ct. App. 1993) (relying on *Casey* in sustaining waiting period and counseling provisions).

332. Barnes v. Moore, 970 F.2d 12, 15 (5th Cir. 1992).

outcome controlled because the Mississippi provisions were substantially the same as Pennsylvania's had been, and therefore the plaintiffs could not satisfy the "'heavy burden'" of the *Salerno* standard, which it deemed applicable in that facial challenge.[333] The court in *Pro-Choice Mississippi* erred both in applying *Barnes* to the as-applied challenge before it and in repeating its methodological mistake of imposing *Casey*'s result instead of *Casey*'s standard. In a stinging dissent, Justice Sullivan argued that the undue burden standard required an analysis of the actual impact of the law on Mississippi women and that the plaintiffs had met their burden — via affidavits documenting the actual effects of the law — of showing genuine fact issues sufficient to warrant a trial on the merits.[334]

Post-*Casey* state court challenges outside the context of counseling and waiting period provisions have proven more successful. In two particularly strong opinions, state supreme courts held that efforts to stop the performance of abortions by certain providers violated their state constitutions. In *Armstrong v. State*, the Montana Supreme Court struck down a Montana law that prohibited physician assistants from performing abortions;[335] whereas, in *Mazurek v. Armstrong*, discussed in Part I, the Supreme Court had sustained this same law under the *Casey* undue burden standard.[336] In *Valley Hospital Association v. Mat-Su Coalition for Choice*, the Alaska Supreme Court invalidated a community hospital's ban on most abortion services.[337] In both instances, these courts unanimously found broader protection for the right to abortion than that available under *Casey* based on the express guarantees of privacy contained in their state constitutions and held that restrictions on abortion must survive the strict scrutiny standard.[338] Significantly, in applying the strict scrutiny standard, both courts emphasized the requirement of government evenhandedness in policy making that affects reproductive rights.[339]

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333. *Id.* at 14-15 (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).

334. *Pro-Choice Mississippi*, 95-CA-00960-SCT (¶¶ 78-83) (Sullivan, J., dissenting). Justice Sullivan highlighted affidavits submitted by the plaintiffs, which established that "after the law went into effect, the number of Mississippi women obtaining abortions decreased by 13%" and "the number of abortions . . . performed in the second trimester increased by 18%." *Id.* ¶ 81.

335. Armstrong v. State, 1999 MT 261, ¶ 75, 296 Mont. 361, ¶ 75, 989 P.2d 364, ¶ 75.

336. Mazurek v. Armstrong, 520 U.S. 968, 969, 971, 976 (1997) (per curiam); *see supra* notes 149-54 and accompanying text.

337. Valley Hospital Ass'n v. Mat-Su Coal. for Choice, 948 P.2d 963, 965-69, 971-72 (Alaska 1997); *see also* Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1, 18-19 (Tenn. 2000) (invalidating second trimester hospitalization requirement under Tennessee Constitution). The hospital's policy prohibited abortion except where the fetus had a fatal anomaly, the woman's life was endangered, or the pregnancy was the result of rape or incest. *Valley Hospital*, 948 P.2d at 965.

338. *Valley Hospital*, 948 P.2d at 966-69; *Armstrong*, 1999 MT 261, ¶ 41.

339. *See Valley Hospital*, 948 P.2d at 968, 972; *Armstrong*, 1999 MT 261, ¶¶ 67-72.

In *Armstrong*, the court declared that a key aspect of the "right of procreative autonomy is a woman's moral right and moral responsibility to decide, up to the point of fetal viability, what her pregnancy demands of her in the context of her individual values, her beliefs as to the sanctity of life, and her personal situation."[340] The state, on the other hand, "has no more compelling interest . . . for interfering with . . . this right if the woman chooses to terminate her pre-viability pregnancy than it would if she chose to carry the fetus to term."[341] The court rejected the state's contention that its effort to stop physician assistants from performing abortions was necessary to protect women's health.[342] In an analysis strikingly similar to that of the *American Academy of Pediatrics* and *T.W.* courts,[343] the *Armstrong* court found that this contention was undermined by the fact that Montana allowed physician assistants to perform "other more risky medical procedures such as uncomplicated deliveries of babies, inserting IUDs, and prescribing and administering most drugs."[344] Instead, based on the legislative record, the court found that the law — which prevented the only physician's assistant performing abortions in Montana from doing so — was impermissibly motivated by "unrelenting pressure from individuals and organizations promoting their own particular values" who specifically intended to make abortion as difficult as possible for Montana women.[345] On this basis, the court found that the ban was not supported by any constitutionally permissible governmental interest.[346]

Similarly, in *Valley Hospital*, the Alaska Supreme Court held that a community hospital had not demonstrated a compelling interest to justify its refusal to perform most abortions.[347] The hospital had offered no health justification, and its assertion that the policy was justified as a matter of conscience was deemed insufficient because a nonsectarian hospital cannot assert a free exercise claim.[348]

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340. *Armstrong*, 1999 MT 261, ¶ 49.

341. *Id.*

342. *Id.* ¶ 66.

343. *See supra* notes 246-77 and accompanying text.

344. *Armstrong*, 1999 MT 261, ¶ 64 (footnote omitted).

345. *Id.* ¶¶ 20, 65.

346. *Id.* ¶¶ 63-66.

347. Valley Hosp. Ass'n v. Mat-Su Coal. for Choice, 948 P.2d 963, 965, 971 (Alaska 1997). The court found that the hospital was a "quasi-public institution" subject to the provisions of the Alaska Constitution because: (1) the hospital had a "special relationship with the State through the State's Certificate of Need program" and this was the only hospital approved under the program to serve the Mat-Su Valley area; (2) the construction of the hospital was financed with state, local, and federal funds; and (3) a significant portion of funds received for hospital services came from public funds. *Id.* at 970-71. Moreover, "the hospital [was] a community hospital whose board is elected by a public membership." *Id.* at 971.

348. *See id.* at 971-72 & n.20.

The court emphasized that although the hospital had "a 'sincere moral belief' that elective abortion is wrong. . . . constitutional rights 'cannot be allowed to yield simply because of disagreement with them.'"[349]

Finally, principles of neutrality also underlay a Tennessee court's decision to strike down a law that imposed burdensome administrative, professional qualification, and facilities requirements on abortion providers that were not imposed on other health care providers.[350] Relying on *Planned Parenthood of Middle Tennessee*, the court applied a strict scrutiny standard of review and found that the state had offered no compelling justification for singling out abortion providers for different treatment than that of other health care providers:

> There is evidence in the record showing that first trimester abortions are less likely to result in complications than many other surgical procedures that are routinely performed in doctor's [sic] offices. . . . A tonsillectomy carries a risk of death twice as high as that of a legal abortion. The proof would justify a conclusion that there is no medical justification for treating abortions differently from other medical procedures of similar complexity and risk.[351]

Other state courts have rejected challenges to laws that target the medical practice of abortion for special regulation based on principles of deference to the government's broad power to regulate health matters.[352]

III. EVALUATING THE STRATEGY OF CHALLENGING ABORTION RESTRICTIONS IN STATE COURTS

As the decisions highlighted in Part II demonstrate, the strategy of invoking the protections of state constitutions to vindicate abortion

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349. *Id.* at 972 (quoting Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955)) (footnote omitted). The *Valley Hospital* court held that a state statute which allowed hospitals and individuals to refuse to participate in abortions was unconstitutional to the extent it applied to quasi-public institutions. *Id.* at 971-72.

350. Tenn. Dep't of Health v. Boyle, No. M2001-01738-COA-R3-CV, 2002 WL 31840685, at *1, *7-8 (Tenn. Ct. App. Dec. 19, 2002). Under the statute, any facility used to terminate a pregnancy at any stage was deemed an "ambulatory surgical treatment center" ("ASTC"). TENN. CODE ANN. § 68-11-201(3) (West 2008). The statute exempted only those private physicians' offices that did not perform a "substantial number" of abortions. *Id.* The "enormous" consequences of being an ASTC designation included the requirements of Department of Health licensing and obtaining a certificate of need prior to establishing a health care facility. *Boyle*, 2002 WL 31840685, at *1.

351. *Boyle*, 2002 WL 31840685, at *7-8.

352. *See, e.g.*, Tucker v. State Dep't of Pub. Health, 650 So. 2d 910, 912-14 (Ala. Civ. App. 1994) (upholding Alabama law that required private abortion providers to obtain licenses as reproductive health centers for their office facilities).

rights has yielded impressive victories in many state courts and resounding losses in others. This section analyzes the promises and pitfalls of this litigation strategy and offers some suggestions for future reproductive rights litigation in the state courts.

A. The Advantages of State Constitutional Protection

The many positive outcomes in state courts over the past thirty years demonstrate that state constitutions are providing a significant alternative avenue for relief from restrictive abortion laws. Of course, the success of this strategy hinges on state courts' willingness to adopt broad and independent interpretations of state privacy and equality guarantees. When state courts are willing to do this, the likelihood of advocates mounting successful legal challenges increases dramatically. As discussed in Part I, the fact-intensive *Casey* undue burden standard places a heavy burden on litigators to document that abortion restrictions pose substantial obstacles to women's access to abortion. In applying this standard, many federal courts have imposed unattainable evidentiary burdens on plaintiffs.[353] In contrast, state courts that undertake a more protective approach to reproductive autonomy adopt the strict scrutiny standard of review, and many apply it more stringently than the federal courts did under *Roe*.[354] Once plaintiffs meet their threshold burden of showing that an abortion restriction has some impact on abortion access, these state courts shift the burden to the government to demonstrate that compelling governmental interests justify the infringement on individual rights and that the law is narrowly tailored to achieve those interests.[355] Moreover, in contrast to the Supreme Court's increasing tolerance for laws that infringe on reproductive liberty by heavy-handedly intruding on women's decision-making capacity,[356] state courts have enhanced

353. *See supra* notes 96-123 and accompanying text.

354. *See generally supra* Part II.B (discussing state court challenges to restrictions on public funding, parental involvement laws, waiting periods, and other abortion laws).

355. *See, e.g.*, Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1, 18 (Tenn. 2000) ("Under the strict scrutiny standard, it is the State's burden to show that the regulation is justified by a compelling state interest and narrowly tailored to achieve that interest."); *Boyle*, 2002 WL 31840685, at *8 (holding that "the statute adversely impacts a constitutionally protected right without a compelling state reason to justify it" because it negatively impacts the availability of abortions, although "[t]he proof with respect to the actual burden on a woman's right to an abortion is sketchy").

356. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 872 (1992) ("Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance . . . ."); Webster v. Reprod. Health Servs., 492 U.S.

protection for the abortion right by insisting on governmental neutrality toward abortion and emphasizing the paramount importance of protecting women's health.[357] Consequently, state courts have frequently rejected arguments that public funding restrictions, parental involvement laws, and other restrictions on previability abortions are justified because "abortion is different."[358] Unlike the approach of some federal courts, many state courts have also undertaken highly contextualized, fact-sensitive analyses of abortion restrictions that incorporate the perspectives of the women and girls actually affected by these laws.[359] In these and other ways, the progressive approach of many state courts maximizes protection for reproductive liberty and in doing so makes the task of challenging abortion restrictions more readily achievable.

Victories in individual states make an enormous difference in the lives of the women and girls of those states by fully protecting their right to abortion. The impact of these victories may also spread beyond an individual state's borders. In the public funding and parental involvement decisions discussed in Part II, state courts repeatedly noted that they were positively influenced in their decision making by the outcomes in sister states.[360] Cutting-edge state law precedent

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490, 511 (1989) ("'[T]he Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth . . . .'" (quoting Poelker v. Doe, 432 U.S. 519, 521 (1977))); Maher v. Roe, 432 U.S. 464, 474 (1977) (clarifying that the state may "make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds"). *See generally supra* Part I.A (discussing *McRae*, *Maher*, *Bellotti II*, *Webster*, *Casey*, and *Carhart*).

357. *See generally supra* Part II.B (discussing state court challenges to restrictions on public funding, parental involvement laws, waiting periods, and other abortion laws).

358. *See, e.g.*, Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797, 826 (Cal. 1997); Doe v. Maher, 515 A.2d 134, 144 (Conn. Super. Ct. 1986); N. Fla. Women's Health & Counseling Servs. v. State, 866 So. 2d 612, 633 (Fla. 2003); *In re* T.W., 551 So. 2d 1186, 1195 (Fla. 1989); Women of Minn. v. Gomez, 542 N.W.2d 17, 31 (Minn. 1995); Armstrong v. State, 1999 MT 261, ¶¶ 64-65, 296 Mont. 361, ¶¶ 64-65, 989 P.2d 364, ¶¶ 64-65; Planned Parenthood of Cent. N.J. v. Farmer, 762 A.2d 620, 638 (N.J. 2000).

359. *See, e.g.*, *American Academy of Pediatrics*, 940 P.2d at 816-17; *Maher*, 515 A.2d at 153-54; Moe v. Sec'y of Admin. & Fin., 417 N.E.2d 387, 400-01 (Mass. 1981); Wicklund v. State, No. ADV 97-671, 1999 Mont. Dist. LEXIS 1116, at *9-10 (Mont. Dist. Ct. Feb. 11, 1999); *Planned Parenthood of Central New Jersey*, 762 A.2d at 632-38; *Planned Parenthood of Middle Tenn.*, 38 S.W.3d at 24.

360. *See, e.g.*, State Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc., 28 P.3d 904, 905 (Alaska 2001) ("Our conclusion is supported by the majority of jurisdictions that have considered comparable restrictions on state funding of medically necessary abortions . . . ."); Valley Hosp. Ass'n v. Mat-Su Coal. for Choice, 948 P.2d 963, 967 n.7 (Alaska 1997) ("Other states have interpreted their constitutions to protect reproductive rights more extensively than does the federal constitution."); Simat Corp. v. Ariz. Health Care Cost Containment Sys., 56 P.3d 28, 35 (Ariz. 2002) ("The majority of states that have examined similar Medicaid funding restrictions have determined that their state statutes or constitutions offer broader protection of individual rights than does the United States Constitution and have found that medically necessary abortions should be funded if the state also funds medically necessary expenses related to childbirth.");

may also influence federal courts, including the Supreme Court itself. Indeed, in *Lawrence v. Texas*, the Supreme Court noted that its decision to overturn its opinion in *Bowers v. Hardwick*[361] was influenced, in part, by the fact that "[t]he courts of five different States ha[d] declined to follow it in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment."[362] Similarly, state court decisions that reject the reasoning of *Casey* and other federal precedent may, over the course of time, influence the Court to strengthen protection for abortion rights under the Federal Constitution.

State court venues also allow reproductive rights litigators to advance legal claims not typically made in federal court where abortion rights have primarily been grounded in privacy theory.[363] Professor Reva Siegel, for example, has argued compellingly that sex equality theory offers great promise for solidifying and strengthening constitutional protection for abortion rights:

> The equality framework supplies explicit, textual authority for a right that many have attacked as "unenumerated." As importantly, the equality framework identifies powerful constitutional values at stake in the abortion right's preservation that persist even if *Roe* is eviscerated or reversed. Courts can enforce equal citizenship values by evaluating restrictions on reproductive decision making to ensure that such restrictions do not reflect or enforce gender stereotypes about women's agency or their sexual and family roles. Legislatures can vindicate equal citizenship values through policies that promote the equal freedom of men and women in sex, reproduction, and parenting. The equality

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Am. Acad. of Pediatrics, 940 P.2d at 826 ("In our view, the Florida Supreme Court's reasoning in [*T.W.*] is persuasive."); *Planned Parenthood of Central New Jersey*, 762 A.2d at 630 ("California and Massachusetts have rejected, on state constitutional grounds, . . . parental consent statutes [even though they] contain[ed] judicial bypass provisions.").

361. Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

362. *Lawrence*, 539 U.S. at 576 (citing Jegley v. Picado, 80 S.W.3d 332 (Ark. 2002)); Powell v. State, 510 S.E.2d 18 (Ga. 1998); Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992); Gryczan v. State, 942 P.2d 112 (Mont. 1997); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. App. 1996)). The Court reasoned that these state precedents, along with a variety of other sources, showed "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Id.* at 572. *See generally* SHAMAN, *supra* note 32, at 215-22 (discussing state court decisions that influenced the Supreme Court's decision in *Lawrence*).

363. As discussed in Part I, although *Roe* and subsequent cases located protection for abortion rights in the privacy theory, in *Casey*, the Court highlighted the link between reproductive autonomy and equality. *See supra* note 78 and accompanying text. For a comprehensive history of advocates' efforts to advance sex equality as a legal basis for the abortion right before and after *Roe*, see Siegel, *Sex Equality*, *supra* note 28, at 823-34.

> framework serves as a reminder, in law and in politics, that justifications for limiting women's freedom that were constitutionally reasonable in 1860 or 1960 may no longer be so today.[364]

Judicial recognition of a sex equality theory is especially important now as anti-abortion advocates increasingly assert "women-protectionist" arguments to justify a wide range of restrictions on abortion, including bans.[365] These arguments, which influenced Justice Kennedy's reasoning in *Carhart*,[366] may be effectively countered by a sex equality approach:

> The equality framework invites courts to analyze this new woman-protective justification . . . to ensure it does not enforce views of women associated with traditions of gender paternalism the nation has renounced. Woman-protective restrictions on abortion, like any other seemingly benign form of sex-based state action, may neither reflect nor enforce stereotypical assumptions about women's capacities as decision makers or their role as mothers.[367]

As noted in Part II of this Article, reproductive rights advocates have asserted sex discrimination arguments in several state court challenges to restrictive abortion laws.[368] Admittedly, some state courts have been more receptive than others to sex equality arguments.[369] Especially in those states with explicit guarantees of sex equality,[370] however, state courts provide a fertile testing ground for these claims. Pioneering opinions, such as the New Mexico Supreme Court's opinion in *New Mexico Right to Choose*,[371] could positively influence other courts, both state and federal, to apply sex equality analysis in limiting restrictions on abortion.

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364. Siegel, *Sex Equality*, *supra* note 28, at 833-34 (footnotes omitted).

365. *See* Siegel, *The New Politics*, *supra* note 28, at 993; *supra* note 169 and accompanying text.

366. *See supra* note 170 and accompanying text.

367. Siegel, *Sex Equality*, *supra* note 28, at 836. Indeed, these very arguments were advanced by Justice Ginsburg in her dissenting opinion in *Carhart*. Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) ("[Legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."); *supra* note 171 and accompanying text; *see also* Siegel, *The New Politics*, *supra* note 28, at 1053 (arguing that if the Supreme Court were to reverse *Roe*, abortion bans such as the one proposed in South Dakota in 2006 would violate equal protection guarantees).

368. *See supra* notes 218-33 and accompanying text.

369. *See supra* note 218.

370. *See supra* notes 183-84 and accompanying text.

371. N.M. Right to Choose/NARAL v. Johnson, 1999-NMSC-005, 975 P.2d 841; *see supra* notes 219-33 and accompanying text.

B. The Limitations and Pitfalls of Securing Abortion Rights in State Courts

In an era of diminished federal constitutional protection for abortion, a state court strategy is an important component of a broad-based campaign to strengthen protection for reproductive autonomy. However, this strategy is not in any sense an abortion rights panacea. A state court approach ultimately yields far more limited protection than a federal litigation strategy: only women in states in which judges are willing to undertake a progressive approach to reproductive autonomy are directly impacted. As others have argued, securing full protection for reproductive autonomy under the Federal Constitution, and thereby guaranteeing protection for *all* women, is far preferable.[372] Efforts to restore full protection for abortion rights at the federal level must continue. In other words, state court litigation must go forward, as it has in the past, in tandem with continued federal court litigation, legislative strategies to safeguard reproductive rights, and an electoral strategy that targets high impact political campaigns with the goal of increasing the number of pro-choice politicians and judges.

Moreover, from a practical standpoint, the strategy of safeguarding abortion rights through state constitutions involves difficult challenges and potential pitfalls. Despite its successes, the reality remains that many state court judges are simply not willing to engage in a truly independent analysis that leads to protection beyond that required by the Federal Constitution. As *Pro-Choice Mississippi v. Fordice*,[373] *Bell v. Low-Income Women of Texas*,[374] and other opinions highlighted in Part II illustrate, many state courts place heavy, unexamined reliance on federal abortion precedent. State constitutional law scholars have frequently criticized this tendency of state courts to reflexively rely on federal precedent in interpreting their own constitutions.[375] Although state courts can and should seek

372. *See, e.g.*, Johnsen, *supra* note 25, at 7 ("Fundamental liberties essential to equality should not vary state-by-state, despite the necessity for state-by-state efforts to protect them."); Pine & Law, *supra* note 178, at 436 ("To permit a right that is at the core of individual dignity, autonomy and equality to be subject to state discretion, undercuts the foundation of our constitutional democracy.").

373. Pro-Choice Miss. v. Fordice, 95-CA-00960-SCT (Miss. 1998); *see supra* notes 304-08 and accompanying text.

374. Bell v. Low-Income Women of Tex., 95 S.W.3d 253 (Tex. 2002); *see supra* notes 234-38 and accompanying text.

375. *See, e.g.*, TARR, *supra* note 185, at 208 ("[T]oo many states continue to rely automatically on federal law when confronted with rights issues. Even when they interpret state guarantees, too many frame their analysis in federal doctrinal categories, making state constitutional law merely a poor relation, stuck with ill-fitting hand-me-downs.");

guidance from federal court opinions, including those of the Supreme Court,[376] "'state constitutions are [not] mirror images of the federal constitution,'" and therefore federal decisional law should not act plainly as "a lid on the protections guaranteed under . . . state constitution[s]."[377]

Nonetheless, the tendency of state courts to engage in reflexive adoption of federal analysis often occurs in abortion cases where personal ideology and fear of reprisal may inhibit independent constitutional analysis.[378] Indeed, as Professor Gillian Metzger has argued: "The politics of abortion may prove even more important in state courts, where judges are often elected and decisions favoring abortion providers may rally antiabortion groups to oppose a judge's reelection."[379] Given these political realities, the task of convincing state judges to engage in independent constitutional analysis may be especially challenging in the abortion context. The admonition of Justice Hans Linde, uttered nearly three decades ago, is especially apt in this

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Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1505 (2005) (criticizing the "'unreflective adoptionism'" or "'kneejerk lockstepping'" approach in which state courts apply "federal analysis to a state clause without acknowledging the possibility of a different outcome, or considering arguments in favor of such a different, or more protective, outcome") (citations omitted).

376. *See, e.g.*, Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1063-64 (1997) ("State constitutional provisions need not, and should not, be reduced to a 'row of shadows' through too *much* reliance on federal precedent. Swinging the pendulum in the other direction, however, where too *little* reliance on federal precedent will 'render State practice incoherent,' is also unnecessary."); Posting of Robert Schapiro to American Constitution Society Blog, http://www.acsblog.org/federalism-guest-blogger-progressivism-and-state-constitutional-law.html (July 6, 2005, 15:26 EST) (arguing that "a narrow focus on text and history [of state constitutions is] limiting" and that a "fruitful dialogue" between state and federal courts is desirable). Following *Casey*, for example, some state courts looked to *Roe*, *Akron I*, and other pre-*Casey* opinions for valuable guidance in applying the strict scrutiny standard to evaluate abortion restrictions. *See, e.g.*, Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1, 23 (Tenn. 2000) (relying on *Akron I* in rejecting a mandatory waiting period); Tenn. Dep't of Health v. Boyle, No. M2001-01738-COA-R3-CV, 2002 WL 31840685, at *6-7 (Tenn. Ct. App. 2002) (relying, in part, on pre-*Casey* federal court precedent in rejecting certain abortion statutes).

377. Doe v. Maher, 515 A.2d 134, 147 (Conn. Super. Ct. 1986).

378. *See* Metzger, *supra* note 30, at 904.

379. *Id.*; *see* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 725-29, 738-39 & n.147 (1995) (arguing that elected judicial officers are more subject to majoritarian influences that may lead them to compromise the rights of individuals and recounting a specific instance in which anti-abortion groups targeted a Florida justice in a reelection campaign). According to the National Center for State Courts, the vast majority of states (thirty-nine) elect at least some of their judges and eighty-seven percent of all state court judges must run in popular elections. Adam Liptak, *Rendering Justice, With One Eye on Re-election*, N.Y. TIMES, May 25, 2008, at A1.

regard: "[T]o make an independent argument under the state clause takes homework — in texts, in history, in alternate approaches to analysis."[380] Reproductive rights advocates must place heavy emphasis on the distinct text, history, and past judicial interpretations of state equality and privacy guarantees, breaking free of the prevailing narrow federal approach to abortion rights.[381] As the Tennessee Supreme Court's decision in *Planned Parenthood of Middle Tennessee*[382] illustrates, even in the absence of express guarantees of privacy or sex equality, some courts will honor their state's rich judicial legacy of strong protection for individual privacy by extending it to abortion rights.

Finally, advocates must consider the possibility of backlash against favorable state court abortion rights decisions in the form of constitutional amendments. Unlike the Federal Constitution, which is difficult to amend, many state constitutions are quite easily amended.[383] State court rulings concerning same-sex marriage, school desegregation, school financing, and other controversial civil liberties issues have been the target of public opposition in the form of efforts to reverse them by amending state constitutions.[384] State court decisions protecting abortion rights have met with similar, although limited, opposition. In Florida, following the state supreme court's decisions in *T.W.*[385] and *North Florida Women's Health & Counseling Services, Inc. v. Florida*,[386] the Florida Constitution was successfully

380. Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 392 (1980).

381. *See* FRIESEN, *supra* note 179, § 1.08[3] ("One way to break the state tie is to imagine a world in which there is no federal law."). For a thoughtful reflection on the difficult work and challenges arising in the "third stage" of the New Judicial Federalism, see Robert F. Williams, *The Third Stage of the New Judicial Federalism*, 59 ANN. SURV. AM. L. 211, 219-23 (2003).

382. Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1 (Tenn. 2000); *see supra* notes 311-27 and accompanying text.

383. *See generally* TARR, *supra* note 185, at 23-27 (discussing differences between federal and state constitutional practice with regard to mechanism of revision and amendment). While the Federal Constitution has rarely been amended, state constitutions are regularly revised or amended. *See id.* at 24 (noting that while the Federal Constitution has only been amended twenty-seven times, as of 1996, over 5,900 amendments had been added to state constitutions, "an average of almost 120 amendments per state").

384. *See generally* SHAMAN, *supra* note 32, at 246-53 (discussing legislative and popular backlash against the recognition of new rights by state courts).

385. *In re* T.W., 551 So. 2d 1186 (Fla. 1989); *see supra* notes 273-77 and accompanying text.

386. N. Fla. Women's Health & Counseling Servs., Inc. v. Florida, 866 So. 2d 612 (Fla. 2003); *see supra* notes 279-86 and accompanying text. Following the recent departure of one member of the Alaska Supreme Court and the appointment of a new justice to that court by Governor Sarah Palin, the governor and some members of the state legislature are supporting a bill to restore a parental consent requirement for young women in Alaska. *See Our View: Parental Consent? Teens Seeking Abortion Must Make Their Own Decisions*, ANCHORAGE DAILY NEWS, Feb. 28, 2009.

amended to permit parental notification for abortion.[387] Ballot measures aimed at overturning the California Supreme Court's decision in *American Academy of Pediatrics*,[388] however, have been rejected three times by California voters,[389] including a failed initiative in November 2008.[390] The possibility of backlash against progressive state court decisions expanding protection for abortion is real and must be anticipated and countered through public education initiatives that educate voters about the true intent behind and dangers posed by abortion restrictions.[391]

CONCLUSION

As Justice Brennan wrote over three decades ago, "the very premise of the [Supreme Court's] cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach."[392] The path from *Roe* to *Casey* to *Carhart* has been a steady downward spiral of diminishing federal constitutional protection for abortion rights. The history of reproductive rights litigation in state courts powerfully demonstrates that state courts have played an important role in strengthening protection for abortion rights in many states. In future years, state court decisions may also positively influence federal courts to change course and revitalize federal protection for abortion rights. Although independent state constitutional adjudication is not without limitations and pitfalls, it offers a fruitful alternative venue for continued litigation as one component of a broad-based strategy that includes litigation in federal courts, legislative advocacy, public education, political action, and grass roots organizing.

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387. *See supra* note 279.

388. Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797 (Cal. 1997); *see supra* notes 246-68 and accompanying text.

389. *See* Sharples, *supra* note 21.

390. *Id.* California's "Proposition 4, which would have required parental notification for [young women] under 18 seeking an abortion and mandated a 48-hour waiting period before the procedure, [was defeated] by a vote of 52% to 48%." *Id.*

391. *See* Johnsen, *supra* note 25, at 9 (arguing that "[p]ro-choice advocates have not . . . found effective ways to communicate . . . [the] harms [posed by abortion regulations] to a public that favors keeping abortion legal, but not too easily available").

392. Brennan, *supra* note 31, at 503.