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Lynn D. Wardle

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THE PRO-LIFE SPRING AND THE FUTURE OF *ROE V. WADE*

LYNN D. WARDLE*

ABSTRACT

After decades of repression of pro-life legal activity, there was an extraordinary harvest of pro-life legislation enacted in the United States in 2011-2013. It was followed, as the night follows the day, by an eruption of judicial rulings invalidating many of the new pro-life laws. This article reviews each of the abortion decisions comprising the abortion jurisprudence of the Supreme Court of the United States (dozens of decisions spread over four decades). It traces the major themes in and theories that underlie the abortion jurisprudence. It notes the checkered free-speech jurisprudence of the Court regarding expressions by pro-life critics, protesters and demonstrators. It reviews the pro-life legislation passed in the pro-life Spring of 2011-13, and considers reasons for the flourishing of legislative efforts to protect pre-natal human life. The scandal of convicted Dr. Kermit Gosnell and “house of horrors” abortion clinic in Philadelphia, Pennsylvania, and the controversy of abortion coverage in Obamacare have called attention to the filthy practice of abortion and generated responsive pro-life legislation. But judicial protection of abortion-on-demand will continue, as must pro-life efforts to stop the carnage.

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I. INTRODUCTION

Spring is the season in which the cold, lifeless dreariness of winter gives way to sunshine, warmth, extending daylight, rebirth of nature, and new growth. Shakespeare poetically described spring as:

When daisies pied and violets blue
And lady-smocks all silver-white
And cuckoo-buds of yellow hue
Do paint the meadows with delight,
The cuckoo then, on every tree,
Mocks married men; for thus sings he,
Cuckoo;
Cuckoo, cuckoo: Oh word of fear,
Unpleasing to a married ear!1

So the term “spring” has long symbolized rebirth, renewal, and revitalization, and is symbolically used that way in many disparate contexts. For example, the term “Prague Spring” is a well-known reference to a brief period of political liberalization in Czechoslovakia in 1968, during which rigid Communist regulations were relaxed or withdrawn for several months, until Russian military forces re-invaded the country and reestablished the old Communist rule and rules.² Similarly, the term “Arab Spring” refers to

1. William Shakespeare, *Spring*, POETRY FOUNDATION, available at <http://www.poetryfoundation.org/poem/182368>. A major implication of Shakespeare’s poem is that Spring is torment for married men because it is the season of flirting and wooing and courting from which married men are excluded by their marital commitments. Another implication of Shakespeare’s description of the lament and sadness that Spring causes married men is that married women do not lament; that marriage is joy to women, as it is bondage and sorrow for men (at least in Springtime). That gender disparity and the reasons for it, and whether it still exists today might be well worth examining, but they are beyond the scope of this paper.

2. *Prague Spring*, BRITANNICA ACADEMIC EDITION, available at <http://www.britannica.com/EBchecked/topic/473793/Prague-Spring>.

Soon after he became first secretary of the Czechoslovak Communist Party on Jan. 5, 1968, [Alexander] Dubček granted the press greater freedom of expression; he also rehabilitated victims of political purges during the Joseph Stalin era. In April he promulgated a sweeping reform program that included autonomy for Slovakia, a revised constitution to guarantee civil rights and liberties, and plans for the democratization of the government. Dubček claimed that he was offering “socialism

a short period “of pro-democracy protests and uprisings that took place in the Middle East and North Africa beginning in 2010 and 2011, challenging some of the region’s entrenched authoritarian regimes,” but these protests proved as transitory as the season.³

Three characteristics of spring make it an apt metaphor for the surprising flowering of pro-life legislation in the United States in 2011 through 2013, and particularly for the pro-life laws enacted in the state of North Dakota in 2013. First, spring follows a season of dark, cold, apparently lifelessness (dormant if not dead) winter. Second, spring is filled with promise, potential, hope, and positive expectations; it is a time of sprouting, budding, and new growth. Finally, spring ends; it is only a short, cyclical season that passes into summer, then on towards another autumn, and then onward to another winter. Spring is a reminder that winter will come again. But the memory of spring can sustain us in the coldest winters; we can enjoy roses in the winter as we remember that last spring and look forward to the next season of springtime.

We have experienced a “springtime” of pro-life legislative activity for several years. There has been an eruption of legislation regulating and restricting abortion in the past two years. That explosion of anti-abortion legislation may be related to several significant and stunning scandals that were widely noticed by pro-life observers (albeit largely neglected by the media).

There also has been an eruption of courts invalidating abortion restrictions in 2013, which may also directly relate to the explosion of publicity about abortion abuses in recent years. When people read or hear about unsafe, deadly, or abusive practices, they tend to react, and legislators tend to react by passing laws to deter or eliminate the safety hazards and abuses. This was especially apparent during the Dr. Kermit Gosnell trial.⁴

The eruption of courts invalidating abortion restrictions in 2013 may also directly relate to the Supreme Court’s same-sex marriage decisions in

with a human face.” By June many Czechs were calling for more rapid progress toward real democracy. Although Dubček insisted that he could control the country’s transformation, the Soviet Union and other Warsaw Pact countries viewed the developments as tantamount to counterrevolution. On the evening of Aug. 20, Soviet armed forces invaded the country and quickly occupied it. As hard-line communists retook positions of power, the reforms were curtailed, and Dubček was deposed the following April. *Id.*

3. *Arab Spring*, BRITANNICA ACADEMIC EDITION, available at <http://www.britannica.com/EBchecked/topic/1784922/Arab-Spring> (“Demonstrators expressing political and economic grievances faced violent crackdowns by their countries’ security forces.”).

4. Steven Ertelt, *Kermit Gosnell Receives Third Consecutive Life Term for Killing Baby*, LIFENEWS.COM, May 15, 2013, <http://www.lifenews.com/2013/05/15/kermit-gosnell-receives-third-consecutive-life-term-for-killing-baby/>.

*United States v. Windsor*⁵ and *Hollingsworth v. Perry*.⁶ The ethic underlying both the aggressive judicial invalidation of laws restricting and regulating abortion and the aggressive judicial invalidation of laws denying legal recognition to same-sex marriage is the same: it is the ethic of unrestrained “judicial activism.” “Judicial activism” refers to policy-making by judicial decision; it is legislation by judicial decree. When judges undertake to establish their preferred public policies (the policies they would enact if they were legislators or executive order authors) they engage in judicial activism. When the Supreme Court engages in judicial activism (as it did in *Windsor* and *Perry*) and when there are other notable incidents or significant incidence of lower courts engaging in judicial activism, it is contagious. Other courts feel liberated to engage in judicial activism themselves. So the same-sex marriage decisions of the Supreme Court raised the flag of judicial activism, and served as a rallying cry for lower courts to do the same. Thus, it should come as no surprise that lower courts have invalidated the North Dakota abortion restrictions (which are at least unpopular with, if not offensive to, the policy values of the intellectual and liberal elite).

This article begins in Part II with a review of the decades long repression of pro-life restrictions of abortion-on-demand. This examination begins on January 22, 1973 — the date *Roe v. Wade*,⁷ and *Doe v. Bolton*⁸ were decided — and extends through the abortion regulations enacted in 2012 and 2013 by the North Dakota Legislature. North Dakota has arguably been the leading state to push the envelope in enacting laws designed to prevent irresponsible and dangerous abortion practices. Part III reviews the “Pro-Life Spring of 2011-2013” by summarizing legislation nationally and North Dakota’s remarkable legislative production. Part IV looks ahead to “The Coming of Another Winter of Repression of Pro-Life Public Legislation and Activity.” This section is a reminder that political seasons, like climatic seasons, change and that it is wise to plan for such changes when seeking to enact pro-life laws. Part V contains the conclusion, which reminds us that we may have roses in winter by planning ahead.

5. 133 S. Ct. 2675 (2013).

6. 133 S. Ct. 2652 (2013).

7. 410 U.S. 113 (1973).

8. 410 U.S. 179 (1973).

II. THE WINTER OF ROE V. WADE AND DECADES OF REPRESSION OF EFFORTS TO PROTECT PRE-NATAL HUMAN LIFE

Between 1973 and 2013, the Supreme Court of the United States rendered decisions in at least thirty-six major abortion cases, (cases dealing with abortion restrictions and regulations)⁹ and at least ten other secondary or collateral abortion cases that effectively invalidated all significant restrictions upon or regulations of elective abortion on demand.¹⁰ The Court struck down prohibitions of abortion, restrictions of abortion, and regulations of abortion dealing with adult women, married women, single women, husbands and fathers, daughters and parents, informed consent, parental and spousal consent, parental and spousal notification, disposal of fetal remains, public funding of abortion, pro-life protests against abortion, pro-life speech, and every over conceivable type of abortion regulation.

The history of Supreme Court abortion litigation dates from 1971. In *United States v. Vuitch*,¹¹ the Supreme Court upheld a District of Columbia abortion law that prohibited all abortions “except those necessary for the preservation of the mother’s life.”¹² A lower federal court had dismissed the prosecution of a doctor accused of performing illegal abortions on the

9. See, e.g., *Gonzales v. Carhart*, 550 U.S. 124 (2007); * *Scheidler v. Nat’l Org. for Women, Inc.*, 537 U.S. 393 (2003); *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320 (2006); *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Hill v. Colorado*, 530 U.S. 703 (2000); *Mazurek v. Armstrong*, 520 U.S. 968 (1997); *Lambert v. Wicklund*, 520 U.S. 292 (1997); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997); * *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753 (1994); * *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994); * *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); * *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263 (1993); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Ohio v. Akron Ctr. for Reprod. Health, Inc.*, 497 U.S. 502 (1990); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); * *Webster v. Reprod. Health Serv.*, 492 U.S. 490 (1989); *Frisby v. Schultz*, 487 U.S. 474 (1988); *Diamond v. Charles*, 476 U.S. 54 (1986); *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Simopoulos v. Virginia*, 462 U.S. 506 (1983); *Planned Parenthood Ass’n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476 (1983); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983); *H. L. v. Matheson*, 450 U.S. 398 (1981); *Williams v. Zbaraz*, 448 U.S. 358 (1980); *Harris v. McRae*, 448 U.S. 297 (1980); *Bellotti v. Baird (II)*, 443 U.S. 622 (1979); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Poelker v. Doe*, 432 U.S. 519 (1977); *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Bellotti v. Baird (I)*, 428 U.S. 132 (1976); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976); *Connecticut v. Menillo*, 423 U.S. 9 (1975); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Doe v. Bolton*, 410 U.S. 179 (1973); *Roe v. Wade*, 410 U.S. 113 (1973) (* indicates pro-life free speech or expression case).

10. See, e.g., * *Lefemine v. Wideman*, 133 S.Ct. 9 (2012) (per curiam); * *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449 (2007); * *Lawson v. Murray*, 525 U.S. 955 (1998); *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174 (1996); * *Lawson v. Murray*, 515 U.S. 1110 (1995); *Leavitt v. Jane L.*, 518 U.S. 137 (1996); *Fargo Women’s Health Org. v. Schafer*, 507 U.S. 1013 (1993); *Hartigan v. Zbaraz*, 484 U.S. 171 (1987); * *Guste v. Jackson*, 429 U.S. 399 (1977); *Arnold v. Sendak*, 429 U.S. 968 (1976); (* pro-life free speech or expression case).

11. 402 U.S. 62 (1971).

12. *Id.* at 68-71.

ground that the phrase “necessary” was unconstitutionally vague.¹³ The Supreme Court reversed, noting that general usage and modern understanding of the term within the medical profession rendered the statute adequately discernable.¹⁴ Thus, in its first case involving the constitutionality of abortion laws, the Court upheld a traditional categorical proscription of abortion.

Two years later, however, in 1973, the United States Supreme Court did an abrupt about-face when it announced its landmark decision in *Roe v. Wade*,¹⁵ which established a woman’s right to obtain an abortion as part of a constitutional right of privacy. The case involved a challenge, brought by an indigent, pregnant single woman, to the Texas abortion laws that prohibited abortions except when necessary to save the life of the mother.¹⁶ A federal district court concluded that the Texas law was unconstitutional, and the Supreme Court affirmed.¹⁷

Justice Blackmun began his opinion for the Court with the declaration that: “[i]t perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage.”¹⁸ To support this introduction, Justice Blackmun expounded for approximately twenty pages his perception of the world history of abortion laws. The Court then analyzed three reasons proponents of the restrictive abortion laws gave in support of these laws. The first was to discourage extramarital sex, and neither the State of Texas nor the Court took this argument seriously.¹⁹ The second state interest — maternal health — received much more serious attention by the Court because it was argued that abortion was a risky medical procedure.²⁰ The Court reasoned that the major motivation behind the restrictive laws was to protect a pregnant woman from “a procedure that placed her life in serious jeopardy.”²¹ The Court, however, concluded that this interest was not compelling because it found that mortality rates appeared to be lower for women undergoing early, legal abortions than for childbirth.²² The third reason advanced for laws prohibiting abortion was the protection of prenatal life.²³ The Court

13. *Id.* at 68.

14. *Id.* at 71-72.

15. 410 U.S. 113 (1973).

16. *Id.* at 117-18.

17. *Id.* at 167.

18. *Id.* at 129.

19. *Id.* at 148.

20. *Id.* at 148-49.

21. *Id.* at 149.at 149.

22. *Id.* at 149-150, 163.

23. *Id.* at 150.

suggested, however, that the major purpose of abortion laws was merely to protect the pregnant woman, not the fetus.²⁴ The Court further opined that, because philosophers and theologians were still debating about when life begins, the interest in protecting prenatal life did not justify laws prohibiting abortion.²⁵ Consequently, the Court held:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.²⁶

The Court did not hold that the woman's right to terminate her pregnancy was absolute. Instead, the Court said that the state has a valid interest in regulating medical procedures in order to safeguard the pregnant woman's health.²⁷ Another significant qualification on the woman's privacy right is the state's interest in protecting potential life: "[a]t some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision."²⁸ The Court concluded that the point at which the State's important and legitimate interest in the health of the mother became sufficiently compelling was the end of the first trimester because, until then, mortality rates for abortion may be lower than for childbirth. After the first trimester, the abortion procedure may be reasonably regulated for the purpose of protecting the woman's health.²⁹ "With respect to the State's important and legitimate interest in potential life," the Court held that the "compelling point is at viability."³⁰ The Court ruled that the State may prohibit abortions that are not necessary to save the mother's life "or health" after the fetus has become viable or, in other words, biologically developed to the point that it is capable of sustaining meaningful life outside the mother's uterus.³¹

Thus, the Court divided pregnancy into three periods (the famous – or infamous – "trimester" scheme). Under the trimester scheme, states are only able to prohibit abortions during the last trimester (after viability) of a

24. *Id.* at 151.

25. *Id.* at 133 n.22.

26. *Id.* at 153.

27. *Id.* at 154.

28. *Id.*

29. *Id.*

30. *Id.* at 163.

31. *Id.* at 163-65.

woman's pregnancy. Each state, however, must permit any abortions that are recommended by a doctor to preserve a woman's life or health. Before viability, the states may not prohibit abortion. But, after the first trimester, states may regulate the medical aspects of how abortions are performed to the extent that such regulations are necessary to protect the health of women seeking abortions. And, during the first trimester, no regulation of abortions performed by doctors are permitted whatsoever.

Justice Rehnquist dissented by arguing that nothing in the language or history of the Constitution supported the creation of a sweeping constitutional right to abortion, and that the legality of abortion is more appropriately left to legislative rather than judicial judgment.³² Justice Rehnquist feared that confusion would result from the Court's utilization of a compelling state interest test because "the asserted right to an abortion is not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"³³ He characterized the majority decision as "judicial legislation."³⁴ Justice White, in a separate dissent also joined by Justice Rehnquist, saw the decision as "an exercise of raw judicial power."³⁵ He characterized the issue as whether there is a right to an abortion for "pregnancies that pose no danger whatsoever to the life or health of the mother but are, nevertheless, unwanted for any one or more of a variety of reasons—convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc."³⁶ In his view, it did not violate the Constitution for states to prohibit abortions that were sought for reasons of convenience rather than to protect maternal life or health.³⁷

In the companion case, *Doe v. Bolton*,³⁸ which was decided the same day as *Roe*, the United States Supreme Court struck down Georgia's attempt to impose several procedural impediments to obtaining an abortion.³⁹ The Georgia statute at issue contained three key procedural prerequisites to obtaining an abortion: hospital setting, hospital committee approval, and two doctor concurrence.⁴⁰ The first requirement was that the abortion be performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals, which was a private organization.⁴¹ These

32. *Id.* at 173 (Rehnquist, J., dissenting).

33. *Id.* at 174 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 101 (1934)).

34. *Id.*

35. *Id.* at 221 (White, J., dissenting with Rehnquist, J., joining).

36. *Id.*

37. *Id.* at 222.

38. 410 U.S. 179 (1973).

39. *Id.* at 193.

40. *Id.* at 184.

41. *Id.*

hospitals, however, were only available in fifty-four of Georgia's one hundred and fifty-nine counties.⁴² The Court reasoned that there was no restriction on the performance of non-abortion surgery in unaccredited hospitals, which indicated that the requirement was not reasonably related to the purpose of the accreditation act because the act did not address medical problems peculiar to abortion.⁴³ Similarly, the Court invalidated the procedural requirement that a hospital committee approve each abortion because it lacked a constitutionally justifiable purpose.⁴⁴ The Court predicated this decision upon its belief that the requirement interfered with the woman's right to receive the medical care that was in her physician's best medical judgment and that such a requirement was redundant with regard to the protection of potential life, since the woman's physician already made the relevant diagnosis.⁴⁵ A third procedural impediment in the Georgia statute required the concurrence of two doctors besides the woman's own physician.⁴⁶ The Court rejected this requirement, reasoning that approval by two other physicians had no rational connection to the patient's needs, unduly infringed on the doctor's right to practice, and was unprecedented because no other medical procedure required a similar consultation.⁴⁷ Thus, the Court struck down the Georgia statute.⁴⁸

As a result of the sweeping decisions of the United States Supreme Court in *Roe* and *Doe*, all existing abortion laws in all states were effectively invalidated, at least in part. Faced with the need to revise their abortion laws, some states nevertheless retained their original abortion statutes. Other states amended their laws to conform to *Roe*, but expressed hostility to *Roe* and *Doe* either by an explicit statement or by including provisions that would automatically reenact a statute of the type invalidated in *Roe* if the United States Supreme Court opinion in *Roe* was reversed or overruled by a constitutional amendment. Most states simply attempted to conform their statutes to the standards set out in *Roe*, sometimes providing a graduated scale of regulation for the second and third trimesters.

Three years after *Roe* was decided, the Supreme Court addressed, *inter alia*, the issues of spousal and parental consent to abortion. In *Planned Parenthood of Central Missouri v. Danforth*,⁴⁹ Missouri's comprehensive

42. *Id.* at 192 n.11.

43. *Id.* at 193-94.

44. *Id.* at 198.

45. *Id.*

46. *Id.* at 184.

47. *Id.* at 198-200.

48. *Id.* at 193.

49. 428 U.S. 52 (1976).

abortion regulation act was declared to be unconstitutional — for the most part.⁵⁰ Again, Justice Blackmun wrote the opinion for the Court and stated that a spousal consent requirement for married women violated a woman's right to privacy inasmuch as it gave their spouses a state-conferred "veto" power over their private decisions to have abortion.⁵¹ Likewise, a requirement of parental consent before an abortion could be performed upon an unmarried minor was declared unconstitutional as inconsistent with the privacy right of minor women.⁵² A prohibition of amniocentesis abortions was also invalidated.⁵³ The Court, however, upheld a simple informed consent requirement and simple medical record keeping and reporting requirements.⁵⁴ Four dissenting justices⁵⁵ and two concurring justices,⁵⁶ however, separately wrote to emphasize that the parental and spousal interests were more substantial than the majority opinion seemed to suggest.

The following year, the Supreme Court upheld the constitutionality of state and federal laws restricting the public funding of abortions. In *Maher v. Roe*,⁵⁷ the Supreme Court upheld a Connecticut regulation limiting public assistance for abortions — but not childbirth — to those situations certified to be medically or psychiatrically necessary.⁵⁸ The Court rejected the argument that the restriction violated the Equal Protection Clause of the Fourteenth Amendment or the right of privacy of indigent women.⁵⁹ In this regard, the Court distinguished the use of state funds to encourage an alternative (i.e., childbirth) from the use of criminal sanctions to prohibit abortion.⁶⁰ The Court opined that:

The State may have made childbirth a more attractive alternative [than abortion], thereby influencing the woman's decision, but it has imposed no restriction on access to abortion that was not already there. The indigency that may make it difficult and in some cases, perhaps, impossible, for some women to have

50. *Id.* at 83-84.

51. *Id.* at 74.

52. *Id.*

53. *Id.* at 75-79.

54. *Id.* at 80-81.

55. *Id.* at 94-95 (White, J., concurring in part and dissenting in part); *Id.* at 102 (Stevens, J., concurring in part and dissenting in part).

56. *Id.* at 90-91 (Stewart, J., concurring).

57. 432 U.S. 464 (1977).

58. *Id.* at 479-80.

59. *Id.* at 470-471.

60. *Id.* at 471-75.

abortions is neither created nor in any way affected by the Connecticut regulation.⁶¹

The Court held that funding restrictions do not violate the right of privacy and that they are rationally related to legitimate state interests in preserving prenatal life.⁶²

In a companion case, *Beal v. Doe*,⁶³ the Court upheld a Pennsylvania regulation providing state funds only for therapeutic abortions.⁶⁴ The Court rejected the argument that the state law was inconsistent with Title XIX of the Social Security Act (“Medicaid”), interpreting Title XIX as neither requiring nor forbidding participating states to subsidize elective abortions.⁶⁵ In the third abortion-funding case decided that day, *Poelker v. Doe*,⁶⁶ the Court upheld the policy of a city-funded hospital restricting the performance of elective abortions.⁶⁷ It affirmed the restrictive policy on the grounds that the public entity could opt to use its scarce resources to encourage childbirth rather than perform abortions.⁶⁸

In 1979, the Supreme Court decided *Colautti v. Franklin*,⁶⁹ which held that a Pennsylvania standard-of-care requirement designed to ensure adequate medical attention for babies whose mothers had undergone abortion after the point of fetal viability was unconstitutional as interpreted.⁷⁰ An extremely exacting standard of thoroughness and precision in statutory drafting was emphasized, and the Court refused to give any benefit to the states’ interpretation of the meaning and purpose of the statute.⁷¹ The Court concluded that the relevant statute had an impermissible purpose of discouraging abortion.⁷²

That same year in *Bellotti v. Baird (II)*,⁷³ the Supreme Court invalidated a Massachusetts statute that provided that a minor seeking an abortion had to obtain parental consent before receiving an abortion; if the minor was unable to obtain parental consent, she could get an abortion by obtaining approval of a state court judge upon showing that the abortion

61. *Id.* at 474.

62. *Id.* at 478.

63. 432 U.S. 438 (1977).

64. *Id.* at 447.

65. *Id.*

66. 432 U.S. 519 (1977).

67. *Id.* at 521.

68. *Id.*

69. 439 U.S. 379 (1979).

70. *Id.* at 400-01.

71. *Id.* at 392-94.

72. *Id.* at 401.

73. 443 U.S. 622 (1979).

would be in her best interests.⁷⁴ Justice Powell announced the decision of the Court and rendered a plurality opinion for four justices emphasizing that the defect of the Massachusetts law was the requirement that minors notify their parents in all cases; provision for secret, ex-parte proceedings in which minors might be able to convince the Court of their maturity or need for a secret abortion was emphasized by this faction of the Court.⁷⁵ Four other concurring justices, however, took the position that the defect in the Massachusetts scheme was the requirement of third party *consent* (either parental or judicial) in *all* cases.⁷⁶ Justice White, alone, dissented asserting: “[u]ntil now, I would have thought inconceivable a holding that the United States Constitution forbids even notice to parents when their minor child who seeks surgery objects to such notice and is able to convince a judge that the parents should be denied participation in the decision.”⁷⁷

In 1980, the Supreme Court decided two cases that reconfirmed that public funding of abortion is not required by the Constitution. In *Harris v. McRae*,⁷⁸ and *Williams v. Zbaraz*,⁷⁹ the Court upheld the congressional Hyde Amendments⁸⁰ and state counterparts, which prohibited the expenditure of funds to pay for abortions.⁸¹ The arguments that these funding restrictions violated the Establishment Clause, the Due Process Clause, and the Equal Protection Clause were rejected, and the prior analyses in *Maher*, *Poelker*, and *Beal*, were reaffirmed.⁸² Also, the argument that Title XIX requires participating states to subsidize “medically necessary” abortions, even though the Hyde Amendment prohibits federal reimbursement, was rejected.⁸³

The next year, in *H. L. v. Matheson*,⁸⁴ the Supreme Court upheld a Utah law that required doctors performing an abortion upon an unmarried minor to notify her parents “if possible” prior to the performance of an abortion.⁸⁵ Chief Justice Burger, writing for the Court, rejected the challenge of an unmarried fifteen year-old minor living at home with, and dependent upon, her parents who challenged the statute as violative of her

74. *Id.* at 651.

75. *See id.* at 642-47.

76. *Id.* at 653-55 (Stevens, J., concurring).

77. *Id.* at 657 (White, J., dissenting)

78. 448 U.S. 297 (1980).

79. 448 U.S. 358 (1980).

80. Pub. L. 96-123, § 109, 93 Stat. 926 (1979).

81. *Harris*, 448 U.S. at 326; *Williams*, 448 U.S. at 368. Abortions performed to preserve the life of the mother or in response to incest were exempt from this funding prohibition.

82. *See Williams*, 448 U.S. at 369.

83. *Id.*

84. 450 U.S. 398 (1981).

85. *Id.* at 413.

constitutional right of privacy.⁸⁶ The Court emphasized that the Utah statute did not authorize parental veto, merely parental notification of the minor's desire for abortion.⁸⁷ The Court further noted that the statute was reasonably flexible (the "if possible" language) and did not preclude the possibility that "mature minors" might obtain abortions without parental notification upon a showing of their emancipation.⁸⁸

In 1983, the Court decided *City of Akron v. Akron Center for Reproductive Health, Incorporated*,⁸⁹ which invalidated substantial proportions of a city ordinance requiring that abortions could only be performed in a hospital after the first trimester.⁹⁰ In its holding, the Court emphasized that, as developments in medicines make abortion safer in later periods of pregnancy, the constitutional standard enunciated in *Roe* must be adjusted to permit access to those post-first-trimester abortions in low cost abortion clinics rather than higher-cost hospitals.⁹¹ Another provision, which required all minors under the age of fifteen to obtain parental or judicial consent for abortion, was invalidated, and the Court emphasized that the city could not presume that all minors under the age of fifteen are too immature to make an abortion decision or that abortion may never be in their best interests without parental approval.⁹² A detailed "informed consent" requirement obligating the attending physician to inform his patient of, *inter alia*, the development of her fetus, possible physical and emotional complications that might result from abortion, the availability of agencies to provide her with assistance and information regarding birth control, adoption and childbirth, and to inform her of the particular risks associated with her pregnancy and of the abortion technique to be employed, were declared unconstitutional.⁹³ The majority read the statute as being an "*in terrorem*"⁹⁴ statute intended to discourage abortion rather than inform the woman sufficiently to make an intelligent choice about it.⁹⁵ A provision requiring a twenty-four hour delay between the obtaining of informed consent in the performance of an abortion was invalidated as inconsistent with the need for speedy abortions and unnecessary to protect

86. *Id.* at 400.

87. *Id.* at 408-09.

88. *See id.* at 408-11.

89. 462 U.S. 416 (1983).

90. *Id.* at 452.

91. *Id.* at 434-37.

92. *Id.* at 440.

93. *Id.* at 442.

94. "*In terrorem*" is derived from Latin which means "in fear." *See* BLACK'S LAW DICTIONARY 896 (9th ed. 2009).

95. *See id.* at 450-51.

informed consent.⁹⁶ A requirement that fetal remains following an abortion are disposed of “in a humane and sanitary manner” was likewise invalidated because it was deemed to be unnecessary vague.⁹⁷ Writing for a six justice-majority, Justice Powell reaffirmed the fundamental principles of *Roe v. Wade*, and emphasized that the Court would not reconsider the core policy decisions made in *Roe*.⁹⁸ Justice Sandra Day O’Connor, however, authored a powerful dissenting opinion, joined by Justices White and Rehnquist, criticizing *Roe*’s trimester doctrine as being “on a collision course with itself”⁹⁹ and embodying “a completely unworkable method of accommodating the conflicting personal rights and compelling state interests that are involved in the abortion context.”¹⁰⁰

The Court announced its decision in *Planned Parenthood Association of Kansas City, Missouri, Incorporated. v. Ashcroft*¹⁰¹ the same day. In that case, the Court reiterated its holding in *City of Akron* that statutes requiring all abortions performed in the second and third trimester to be done in hospitals were unconstitutional.¹⁰² But Missouri’s requirement that a second physician be present during the performance of post-viability abortions was upheld as a constitutionally reasonable method of furthering the states compelling interest in protecting the lives of viable fetuses.¹⁰³ Likewise, a requirement that pathology reports be submitted in all abortion cases was upheld as being reasonable on its face and sufficiently related to accepted medical standards.¹⁰⁴ Similarly, the requirement that minors secure parental consent or judicial consent (based on a finding of maturity or best interests) before obtaining abortions was upheld in as much as it provided an alternative procedure whereby a pregnant minor could demonstrate that she was sufficiently mature to make the decision to have an abortion on her own or that the abortion would be in her best interests.¹⁰⁵

Also announced the same day was the decision of the Supreme Court in *Simopoulos v. Virginia*,¹⁰⁶ which upheld the conviction of a Virginia doctor for violating a Virginia statute making it unlawful to perform an abortion

96. *Id.*

97. *Id.* at 451-52.

98. *See id.* at 420.

99. *Id.* at 458 (O’Connor, J., dissenting).

100. *Id.* at 454.

101. 462 U.S. 476 (1983).

102. *Id.* at 494.

103. *Id.* at 485-86.

104. *Id.* at 490.

105. *Id.* at 490-91.

106. 462 U.S. 506 (1983).

during the second trimester of pregnancy outside of a hospital.¹⁰⁷ Evidence indicated that he had performed an illegal abortion on an unmarried minor by an injection of saline solution at his unlicensed clinic, that the minor had been directed to deliver the fetus in a motel, was not advised to go to a hospital when labor began, and aborted the child alone in the motel.¹⁰⁸ Licensed abortion clinics were deemed “hospitals” for purpose of the statute, and the Court upheld the requirement that second trimester abortions be performed in such licensed facilities.¹⁰⁹

In 1986, the Supreme Court decided *Thornburgh v. American College of Obstetricians and Gynecologists*.¹¹⁰ This case involved a Pennsylvania statute enacted post-*Colautti* found invalid — which required that a woman be informed of the name of the physician who had performed the abortion, the “particular medical risks” of the abortion procedure to be used, the risks of childbirth, the possibility of detrimental physical and psychological effects of medical assistance, benefits available for childbirth and prenatal care, the fact that the father would be liable for assistance in supporting the child, and of agencies offering alternatives to abortion.¹¹¹ Justice Blackmun, for the Court, sharply condemned the provisions as designed to deter the exercise of freedom of choice.¹¹² A requirement of disclosure of facts of fetal development was also invalidated after Justice Blackmun characterized them as nothing less than an attempt to discourage abortion and intrude into the privacy of the woman and her physician.¹¹³ Other provisions were impermissibly designed to protect the life and interests of the viable fetus subject to abortion.¹¹⁴ The majority also invalidated requirements that the physician performing post viability abortions exercise the degree of care required to preserve the life and health of an unborn child intended to be born alive, that a physician must use the abortion technique that would provide the best opportunity for the unborn child to be born alive unless it would present a significantly greater medical risk to the woman’s life or health, and that a second physician be present during the performance of an abortion when the fetus was possibly viable.¹¹⁵ Having condemned what it considered the wrongful intent of the Pennsylvania legislature, the majority refused to accept the state’s good faith construction

107. *Id.* at 519.

108. *Id.* at 508-09.

109. *Id.* at 518-19.

110. 476 U.S. 747 (1986).

111. *Id.* at 772.

112. *Id.* at 759.

113. *Id.* at 759-63.

114. *Id.* at 769-71.

115. *Id.*

of the statute, and found that it required pregnant women to bear increased medical risks in order to save viable fetuses, failed to explicitly contain a medical-emergency exception, and curtailed the performance of post viability abortions — all in contravention of the fundamental right of abortion privacy.¹¹⁶ Four justices dissented, including Chief Justice Burger — who had joined the majority in *Roe* that rejected claims that *Roe* would lead to extreme and extensive judicial doctrines protecting abortion. Chief Justice Burger expressed his regret that he had been wrong about such a predication, and for the first time, called for reconsideration of *Roe v. Wade*.¹¹⁷

After Justice Powell's resignation in 1987, with only eight Justices sitting, the Court decided *Hartigan v. Zbaraz*¹¹⁸ by an equally divided four-to-four decision. The Court affirmed a court of appeals split judgment invalidating an Illinois statute requiring physicians to wait twenty-four hours after notifying the parents of minors seeking an abortion before performing the abortion on the minor.¹¹⁹ The Illinois law incorporated exceptions including judicial bypass provisions conforming to the *Bellotti (II)* standards.¹²⁰

Akron, Thornburgh and *Zbaraz* represent the zenith of the intellectually turgid, doctrinally rigid pro-abortion jurisprudence as the Supreme Court struck down some common-sense regulations of a medical procedure that is not only fraught with medical risk, but is extremely perilous to individuals — especially vulnerable, desperate young women who discover that they have an unplanned, unexpected, or unwanted pregnancy — and to families. For a decade and a half, Justice Blackmun, who considered himself to be the medical expert on the Court, had successfully pressed the Court to view abortion only from the technical-medical perspective of a comparatively simple medical procedure and to exclude consideration of the profound moral, ethical, pacifist, child-protective, familial, social, cultural, and other normative dimensions. The record of the Court adopting that narrow perspective peaked by 1986, and while it re-emerged occasionally in some opinions, and while in some areas the abortion doctrine continued to expand, the relentless force of the abortion doctrine began to wane fifteen years after the Court decided *Roe*.

116. *Id.* at 772.

117. *Id.* at 785 (Burger, C.J., dissenting).

118. 484 U.S. 171 (1987) (per curiam).

119. *See Zbaraz v. Hartigan*, 584 F. Supp. 1452, 1455 (N.D. Ill. 1984), *aff'd* 763 F.2d 1532 (7th Cir. 1985).

120. *Id.*

A significant shift in the abortion doctrine occurred in 1989 when the Court decided *Webster v. Reproductive Health Services*.¹²¹ Here, the Supreme Court upheld four provisions of a Missouri abortion law that had been invalidated by a federal court of appeals and district court.¹²² The Missouri statute included a preamble declaring legislative policy that “the life of each human being begins at conception.”¹²³ The lower courts found that this official declaration was inconsistent with dicta in *Roe*, *City of Akron*, and *Thornburgh* in that a state may not adopt a theory regarding when life begins.¹²⁴ The Court in *Webster*, however, explained that *Roe*’s dicta only meant that the adoption by a state of such a theory did not justify abortion restrictions.¹²⁵ Moreover, other cases had held that the state is free to favor childbirth over abortion.¹²⁶ Missouri’s provisions prohibiting the expenditure of public funds, the use of public facilities, or the work of public employees to perform or encourage abortions not necessary to save the life of the mother also were upheld under the precedents established in *Maher*, *Poelker*, and *McRae*.¹²⁷ The Court emphasized that a state is not required to get or stay in the abortion business, and may restrict the use of public resources.¹²⁸ The majority also accepted Missouri’s interpretation of provisions requiring certain medical tests to determine if a fetus of twenty weeks gestation or more is viable as not being required if they would be medically useless.¹²⁹ As construed, four justices found that these provisions conflicted with the *Roe* trimester scheme, and proposed to eliminate the trimester scheme.¹³⁰ Four other justices said that the Missouri abortion provisions violated the *Roe* trimester scheme, and should be invalidated.¹³¹ One justice, Justice O’Connor, found that the provisions did not conflict with any precedents, and upheld them without deciding whether to revise the *Roe* trimester doctrine.¹³²

Webster was the most intensely watched Supreme Court case in many years. More *amicus curiae* briefs were filed in that case (seventy-

121. 492 U.S. 490 (1989).

122. *Id.* at 522.

123. *Id.* at 504 (quoting MO. REV. STAT. §§ 1.205.1(1)-(2) (1986)).

124. *Id.* at 504-05.

125. *Id.* at 506-07.

126. *Id.* at 506.

127. *Id.* at 508-10.

128. *Id.* at 509-10.

129. *Id.* at 514-21.

130. *Id.* at 494.

131. *Id.* at 537-38 (Blackmun, J. concurring in part and dissenting in part); *Id.* at 561 (Stevens, J. concurring in part and dissenting in part).

132. *Id.* at 525-26 (O’Connor J. concurring in part and concurring in judgment).

eight) than in any previous case heard by the Supreme Court,¹³³ and the Court received cartful's of mail expressing opinions on the involved abortion issues.¹³⁴ While the decision in *Webster* "turned the corner" and unequivocally moved away from the *Roe* doctrine, the movement was small, the judgment of the Court was quite narrow, and the Court did not overturn *Roe*. But the very fact that the *Webster* decision was so modest and narrow signaled that the era of constitutional adjudication characterized by abrupt and profound changes in constitutional doctrine (of which *Roe* is the prime example) was over. Moreover, the Court clearly signaled that more deference would be accorded to state legislatures regarding abortion regulations than had previously been permitted by the federal courts under *Roe*.

In 1990, the Supreme Court extended the trend toward deference to the reasonable regulations and restrictions of abortion adopted by state legislatures when it decided two parental participation cases: *Hodgson v. Minnesota*¹³⁵ and *Ohio v. Akron Center for Reproductive Health* ("Akron II").¹³⁶ In *Akron II*, the Court upheld, by a six to three vote, an Ohio law generally requiring that a parent be notified twenty-four hours before an abortion is performed on a minor child, unless judicial bypass was obtained.¹³⁷ In *Hodgson*, the Court struck down a two-parent notification requirement without a judicial bypass provision,¹³⁸ but upheld the same requirement with a judicial bypass provision.¹³⁹ Four justices in *Hodgson* indicated that a two-parent notification requirement would be upheld with or without judicial bypass on the ground that parental notification is distinguishable from, and less burdensome than, a parental consent requirement.¹⁴⁰ Four justices characterized the two-parent notification as irrational because of the prevalence of divorced, separated, and other single-parent families.¹⁴¹ These justices asserted that it would be unconstitutional even with judicial bypass.¹⁴² Justice O'Connor held that a two-parent requirement with judicial bypass is constitutional; without judicial bypass,

133. See Susan Behuniak-Long, *Friendly-Fire: Amici Curiae and Webster v. Reproductive Health Services*, 74 JUDICATURE 261, 261 (1991).

134. *Id.* at 535 (Scalia, J., concurring in part and concurring in judgment).

135. 497 U.S. 417 (1990).

136. 497 U.S. 502 (1990).

137. *Id.* at 506-07.

138. *Hodgson*, 497 U.S. at 422.

139. *Id.* at 481 (Kennedy, J., concurring in part and dissenting in part).

140. *Id.* at 479-80 (Scalia, J., dissenting).

141. *Id.* at 452 (plurality opinion).

142. *Id.*

it is unconstitutional.¹⁴³ The Court had no occasion to decide whether a one-parent notification requirement without judicial bypass is constitutional.

In the 1991 decision of *Rust v. Sullivan*,¹⁴⁴ the Court upheld the Title X regulations enacted by the Secretary of Health and Human Services (the “Secretary”) in 1988, which prohibited recipients of federal family planning funds from counseling, referring for, encouraging, or promoting abortion, and required family planning fund recipients to be financially and physically separate from abortion providers.¹⁴⁵ In *Rust*, recipients of the federal funds challenged these so-called “gag rules,” but the district court in New York and Second Circuit upheld the regulations,¹⁴⁶ as did the Supreme Court. Writing for a majority of five justices, Chief Justice Rehnquist first held the regulations were not inconsistent with the intent of Congress.¹⁴⁷ Section 1008 of the Family Planning Act (Title X) provides: “[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.”¹⁴⁸ The interpretation of the statute by the agency was entitled to judicial deference, even if it was not the only permissible reading of the statute and even though it was not identical with the Secretary’s original regulations.¹⁴⁹ The General Accounting Office and Office of the Inspector General reports of abuses (family planning clinics operating in the same facilities as and acting as feeders for abortion clinics) provided ample justification for the 1988 revised regulations.¹⁵⁰ Next, the Court concluded that the regulations did not raise the sort of grave and doubtful constitutional questions that would warrant invalidation of the regulations merely to avoid the possibility that the interpretation of the statute under which they could be upheld might be unconstitutional.¹⁵¹ Citing *Maher* and five other abortion funding cases, the Court also rejected Petitioners’ argument that the regulations violated the First Amendment by discriminating on the basis of viewpoint in prohibiting all discussion about abortion.¹⁵² The counseling and advocacy restrictions

143. *Id.* at 461 (O’Connor, J., concurring in part and concurring in judgment in part).

144. 500 U.S. 173 (1991).

145. *Id.* at 177-78.

146. *Id.* at 181 (citing *New York v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988), *aff’d*, 889 F.2d 401 (1989)).

147. *Id.* at 203.

148. *Id.* at 195, n.4. (citing *Grants for Family Planning Serv.*, 42 CFR §§ 59.8(a)(2), 59.5(b)(1) (1989)).

149. *Id.* at 184.

150. *Id.* at 187.

151. *Id.* at 191.

152. *Id.* at 192-94.

were merely designed to ensure that the limits of the Title X program were properly observed.¹⁵³ Selectively funding a program to encourage certain activities in the public interest, without funding alternative activities or programs, is not impermissible viewpoint discrimination.¹⁵⁴ For instance, “[w]hen Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles . . . it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.”¹⁵⁵ Moreover, the regulations did not prohibit pro-abortion counseling and advocacy by Title X grantees and off-the-job employees, only such speech for on-the-job employees.¹⁵⁶ Finally, the Court summarily rejected the petitioners’ assertion that the Fifth Amendment protects a woman’s right to choose whether to terminate her pregnancy.¹⁵⁷ The Due Process Clause only restricts governmental deprivation; it does not compel affirmative governmental assistance to secure protected liberties.¹⁵⁸ “The government has no affirmative duty to ‘commit any resources to facilitating abortions’”¹⁵⁹ There were three dissenting opinions in *Rust*. Justice Blackmun, joined by Justice Marshall, with Justice Stevens separately agreeing, would have invalidated the regulations on both statutory and constitutional grounds.¹⁶⁰ Justice O’Connor would have invalidated solely on statutory grounds.¹⁶¹

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁶² the Court reached another milestone in its saga of confusing abortion jurisprudence. The *Casey* decision was closely watched because the parties had urged the Court to either entirely overturn or endorse *Roe v. Wade*.¹⁶³ It did neither, but rendered a very long decision (the slip opinion was over 165 pages) with five separate opinions, none of them supported by a majority of the Court on all of the issues.¹⁶⁴ Three justices—O’Connor,

153. *Id.*

154. *Id.* at 193.

155. *Id.* at 194.

156. *Id.* at 198-99.

157. *Id.* at 201-02.

158. *Id.* at 201.

159. *Id.* (quoting *Webster v. Reprod. Health Serv.*, 492 U.S. 490, 510 (1989)).

160. *Id.* at 204 (Blackmun, J., dissenting).

161. *Id.* at 223-24 (O’Connor, J., dissenting).

162. 505 U.S. 833 (1992).

163. See Brief for Respondents at 117, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (No. 91-744); Brief for Petitioners and Cross-Respondents at 62, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (No. 91-744).

164. See *Casey*, 505 U.S. at 843-44.

Kennedy, and Souter—jointly authored the Court’s opinion.¹⁶⁵ Some parts of the joint opinion were also signed by two justices— Blackmun and Stevens—who agreed with the joint opinion on some points and disagreed (each in his own separate opinion) on other points.¹⁶⁶ Four others justices—Rehnquist, White, Scalia, and Thomas—agreed with most results of the joint opinion, but not with the rationale; all four justices signed two dissenting opinions—one written by Chief Justice Rehnquist and the other by Justice Scalia.¹⁶⁷

In *Casey*, the Court upheld four of five challenged Pennsylvania abortion regulations. First, the Court held that Pennsylvania’s informed consent requirement was constitutional, but the Court subdivided the informed consent provision three ways, and upheld each part with different alliances and different analyses. First, by a vote of eight to one (only Justice Blackmun dissenting), the Court upheld the requirement that the physician doing the abortion inform a woman of the nature of the procedure, health risks involved in abortion and childbirth, and gestational age of the unborn child. Four justices—Rehnquist, White, Scalia and Thomas—found that it was valid because it was rationally related to the legitimate state interest in assuring that a woman’s consent to abortion be a fully informed decision.¹⁶⁸ Justices O’Connor, Kennedy and Souter concluded that this provision was constitutional because it did not unduly burden a woman’s abortion decision.¹⁶⁹ Justice Stevens wrote that it was valid under the *Roe* strict scrutiny trimester standard (the highest possible standard of review) because it was a “neutral requirement.”¹⁷⁰ Justice Blackmun, alone, would have held it unconstitutional under strict scrutiny.¹⁷¹ That Justice Blackmun, the author of *Roe* and the most aggressive, insistent, passionate defender and expander of the *Roe* doctrine of abortion-on-demand, was alone in his dissent clearly signaled the end of an era—the era of automatic Supreme Court protection of, and cheer-leading for, abortion-on-demand.

By a vote of seven to two, the Court upheld the requirement that either the doctor or an assistant inform the woman of the availability of printed materials describing the fetus, giving information about medical assistance

165. *Id.*

166. *Id.* at 844.

167. *Id.* at 944, 979. (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (Scalia, J., dissenting).

168. *Id.* at 967 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

169. *Id.* at 881-87 (majority opinion).

170. *Id.* at 917-18 (Stevens, J., concurring and dissenting in part).

171. *Id.* at 925-26 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

for childbirth and child support, and a list of agencies that provide alternatives to abortion, including adoption. The Rehnquist-four again held that this was rationally related to the legitimate state interest in assuring that a woman's consent to abortion be a fully informed decision.¹⁷² The O'Connor-three again concluded that it did not unduly burden a woman's abortion decision because it would not have a "severely adverse" effect on a woman's abortion choice.¹⁷³ In separate opinions, Blackmun and Stevens dissented because the requirement violated precedents decided under the strict scrutiny standard of review.¹⁷⁴ The mandatory twenty-four hour waiting period was upheld by the same fragmented four¹⁷⁵ plus three¹⁷⁶ minus one¹⁷⁷ minus one¹⁷⁸ vote. The fact that no one would join Justice Blackmun's dissent was evidence that the Blackmun-led era of knee-jerk judicial invalidation of abortion restrictions by the Supreme Court was over.

Second, in *Casey*, the Court *unanimously* held that Pennsylvania's medical emergency provision—which provided an exception to certain regulations in cases of medical emergencies—was constitutional. Five justices signed the joint opinion agreeing that it did not impose an undue burden on access to abortion.¹⁷⁹ Four justices wrote that it was valid under rational relation analysis as reasonably interpreted by the court of appeals.¹⁸⁰ Third, Pennsylvania's parental consent provision was upheld by eight votes, and each of the three supporting opinions garnering such votes cited the numerous past decisions holding that parental participation furthers the important governmental interest in the welfare of minors.¹⁸¹ Justice Blackmun—again alone—dissented by arguing that the statute was unconstitutional under strict scrutiny because it could delay abortions for minors.¹⁸² Finally, with an eight to one vote, the Court upheld most of the

172. *Id.* at 966-67 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

173. *Id.* at 883-84 (majority opinion).

174. *Id.* at 934-935 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 917 (Stevens, J., concurring in part and dissenting in part).

175. *Id.* at 969-70 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

176. *Id.* at 886-87 (majority opinion).

177. *Id.* at 918 (Stevens, J., concurring and dissenting in part).

178. *Id.* at 926 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

179. *Id.* at 878-880 (majority opinion).

180. *Id.* at 977-979 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

181. *Id.* at 895 (majority opinion); *id.* at 971 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *id.* at 922 (Stevens, J., concurring and dissenting in part).

182. *Id.* at 938 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

public and confidential reporting and record-keeping requirements by simply relying on past precedents.¹⁸³ Justice Blackmun, alone, dissented.¹⁸⁴

The only abortion regulation the Supreme Court struck down in *Casey*, by the close vote of 5-4, was Pennsylvania's spousal notification requirement. The law, which required married women to notify their husbands, contained exceptions covering pregnancy by a non-husband, sexual assault, inability to locate the husband, fear of physical abuse, or medical emergency.¹⁸⁵ Nonetheless, the joint opinion, signed this time by five justices (the triumvirate¹⁸⁶ plus Blackmun¹⁸⁷ and Stevens¹⁸⁸) concluded that it unduly burdened the right of married women to obtain abortions because spousal abuse is a serious problem and because mandatory notification to a husband of his wife's desire to have an abortion is "repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution"—which protects the rights of individuals against families.¹⁸⁹ Chief Justice Rehnquist, and Justices White, Scalia, and Thomas in dissent, would have upheld the requirement by distinguishing mere notification from spousal consent, and because spousal notification rationally furthers state interests in protecting a husband's interest in the potential life of his unborn child, in protecting the potential life of the fetus, and in promoting the integrity of the marriage relationship.¹⁹⁰

The joint opinion for the Court in *Casey* explicitly reaffirmed key parts of the *Roe* doctrine, including the principle that the Constitution protects the decision of pregnant women in having abortion (now described as a "liberty interest" rather than a "privacy" interest, perhaps because of the incoherence of describing as "private" a decision to authorize a medical procedure performed by one person, upon another person, that ends the life of a third human being), and that direct prohibitions of abortion before the fetus is viable are unconstitutional.¹⁹¹ However, the joint opinion also explicitly repudiated the trimester scheme and the "overreaching" of some

183. *Id.* at 900-01 (majority opinion); *id.* at 976-77 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *id.* at 922 (Stevens, J., concurring and dissenting in part).

184. *Id.* at 939-40 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

185. *Id.* at 887-88 (majority opinion).

186. *Id.* at 895.

187. *Id.* at 922 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

188. *Id.* (Stevens, J., concurring in part and dissenting in part).

189. *Id.* at 898 (majority opinion).

190. *Id.* at 974-76 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

191. *See Casey*, 505 U.S. at 877.

abortion decisions (including *Akron I*, and *Thornburgh*),¹⁹² and announced a new test—the “undue burden” test—to replace the former “strict scrutiny” test in abortion cases.¹⁹³ Two justices, Blackmun¹⁹⁴ and Stevens,¹⁹⁵ joined the joint opinion in reaffirming part of *Roe*, but declined to repudiate any of the prior cases and insisted that the old strict scrutiny test continue to be applied.¹⁹⁶ Four other justices, Rehnquist, White, Scalia and Thomas, explicitly opined that *Roe* should be entirely overturned and that abortion restrictions should be analyzed under ordinary “rational relation” analysis.¹⁹⁷

In 1993 and 1994, abortion protests were the subject of the major Supreme Court abortion decisions. In *Bray v. Alexandria Women’s Health Clinic*,¹⁹⁸ abortion clinics and pro-abortion organizations filed suit in federal court against anti-abortion demonstrators and a group that organized demonstrations against abortion clinics seeking to enjoin them from protesting outside clinics in the metropolitan Washington, D.C. area. The plaintiff asserted three claims, including an alleged violation of a federal civil rights law that prohibits conspiracy to deprive “any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the law”¹⁹⁹ as well as two pendant state law claims—trespass and public nuisance.²⁰⁰ The district agreed, and enjoined defendants from trespassing or obstructing access to the clinics and ordered them to pay plaintiffs’ costs and attorneys’ fees.²⁰¹ The Fourth Circuit affirmed.²⁰² The Supreme Court reversed in part and vacated in part.²⁰³ Writing for the majority, Justice Scalia held that women seeking abortions do not constitute a “class” protected by the federal statute and that opposition to abortion does not constitute animus against women in general.²⁰⁴ Justice Scalia wrote, “[w]hatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for

192. *Id.* at 872.

193. *Id.* at 874-77.

194. *Id.* at 923 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

195. *Id.* at 912 (Stevens, J., concurring and dissenting in part).

196. *See id.* at 926 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

197. *Id.* at 966 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

198. 506 U.S. 263 (1993).

199. 42 U.S.C. § 1985(3) (1988).

200. *Bray*, 506 U.S. at 267.

201. *Nat’l Org. for Women v. Operation Rescue*, 726 F. Supp. 1483 (E.D. Va. 1989).

202. *Nat’l Org. for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990).

203. *Bray*, 506 U.S. at 287.

204. *Id.* at 274.

opposing it, other than hatred of, or condescension toward . . . women as a class — as is evident from the fact that men and women are on both sides of the issue . . .”²⁰⁵ Moreover, Justice Scalia emphasized that disfavoring abortion was not considered to be ipso facto sex discrimination, and that the defendants lacked the required “intent” to discriminate against women because their demonstrations were intended to protect the victims of abortion, stop abortion, and reverse its legalization.²⁰⁶ The “hindrance” prong of section 1985 would fail for similar reasons.²⁰⁷

Because plaintiffs could not prevail under section 1985, the *Bray* court held that they were not entitled to attorneys’ fees.²⁰⁸ The plaintiff’s federal claims, however, were not so insubstantial as to deprive the federal court of jurisdiction over the pendant state law claims, so the case was remanded.²⁰⁹ Concurring, Justice Kennedy noted that another federal statute, 42 U.S.C. section 10501 requesting assistance from the U.S. Attorney General, might apply.²¹⁰ Dissenting, Justices Souter (alone),²¹¹ Stevens (with Blackmun joining),²¹² and O’Connor (with Blackmun joining),²¹³ filed separate opinions asserting disparate interpretations of section 1985 under which the defendant’s might have been liable.

In 1994, the Court decided *National Organization for Women, Incorporated v. Scheidler*,²¹⁴ which involved another abortion protester issue. Abortion clinics and organizations that support abortion rights filed suit in federal court against anti-abortion organizations and individuals alleging that they were engaged in a conspiracy in violation of federal antitrust laws and the Racketeer Influenced and Corrupt Organizations Act (“RICO”).²¹⁵ The district court dismissed the antitrust claims on the ground that the activities involved political action, not commercial competition, and dismissed the RICO claims on the ground that, even though the plaintiffs alleged predicate illegal acts (such as violation of the Hobbs Act), RICO requires an “economic motive” of profit, and the abortion demonstrators

205. *Id.* at 270.

206. *Id.* at 274. In addition, Justice Scalia pointed out that the demonstrations were not “aimed at” interfering with the right of interstate travel, and the right to abortion is not among the few rights protected against purely private conspiracies. *Id.* at 276-78.

207. *Id.* at 279-85.

208. *Id.* at 285.

209. *Id.*

210. *Id.* at 287-88 (Kennedy, J., concurring).

211. *Id.* at 288 (Souter, J., concurring in the judgment in part and dissenting in part).

212. *Id.* at 307 (Stevens, J., dissenting).

213. *Id.* at 345 (O’Connor, J., dissenting).

214. 510 U.S. 249 (1994).

215. *Id.* at 252-53.

lacked such a motive.²¹⁶ The Seventh Circuit Court of Appeals affirmed the dismissal of both counts.²¹⁷ Reviewing the RICO dismissal only, a unanimous Supreme Court reversed, ruling that an “economic motive” for profit is not required to allege a violation of RICO.²¹⁸ The Court ruled that the clinics had standing to bring RICO claims because they alleged facts—i.e., illegal violence was used to shut down the clinic—which, if proved, could justify the relief they sought.²¹⁹ Chief Justice Rehnquist’s opinion then held that “[n]owhere in either [section] 1962(c), or in the RICO definitions in [section] 1961, is there any indication that an economic motive is required.”²²⁰ The phrase “affect commerce” was broad enough to include acts done without an economic motive.²²¹ In addition, the Court did not believe that the term “enterprise” implied that an economic motive was required.²²² Although the congressional statement of findings prefacing RICO refers draining billions of dollars from the economy, that “thin reed” of general legislative concern did not suggest that personal benefit to the actor was a predicate.²²³ Congress could have clearly included an economic motive requirement, but did not.²²⁴ Department of Justice guidelines in 1981 referring to economic motive were not persuasive because they were amended only three years later.²²⁵ Finding the statutory language “unambiguous” and that the legislative history contained no “clearly expressed legislative intent to the contrary” the court rejected the protesters’ and lower courts’ construction of the RICO law.²²⁶ Justice Souter (joined by Justice Kennedy) wrote an additional opinion to emphasize that “RICO actions could deter protected advocacy and to caution courts applying RICO to bear in mind the First Amendment interests that could be at stake.”²²⁷

The same year, in *Madsen v. Women’s Health Center, Incorporated*,²²⁸ the Court significantly curtailed a broad injunction that had been issued against abortion clinic protesters.²²⁹ Chief Justice Rehnquist wrote the

216. *Nat’l Org. for Women, Inc. v. Scheidler*, 765 F. Supp. 937, 941 (N.D. Ill. 1991).

217. *Nat’l Org. for Women, Inc. v. Scheidler*, 968 F.2d 612, 630-31 (7th Cir. 1992).

218. *Nat’l Org. for Women, Inc.*, 510 U.S. at 262.

219. *Id.* at 256.

220. *Id.* at 257.

221. *Id.* at 258.

222. *Id.*

223. *Id.* at 260.

224. *Id.* at 259-61.

225. *Id.* at 261.

226. *Id.* at 261 (citations omitted).

227. *Id.* at 265 (Souter, J., concurring).

228. 512 U.S. 753 (1994).

229. *Id.* at 757.

opinion for the Court (part for five justices and part for six justices).²³⁰ A Florida state court entered an injunction against abortion protestors blocking access to an abortion clinic entrances and against physically abusing people entering or leaving the clinic.²³¹ Six months later, finding that the first injunction had been violated, causing physical harm to some persons and discouraging potential patients, the court issued a broader injunction including nine restraints.²³² The demonstrators objected to four of the restrictions on their public expression of opposition to abortion and to the abortion clinic.²³³ The Florida Supreme Court upheld the injunction,²³⁴ but in a separate case, the Eleventh Circuit Court of Appeals invalidated it.²³⁵

The U.S. Supreme Court upheld a few narrow provisions, but held that most of the injunction unconstitutionally infringed upon the First Amendment rights of abortion protestors.²³⁶ The Court first rejected the argument that the injunction was content or viewpoint based.²³⁷ Next, the court stated that, because every injunction singles out a group on the basis of its past actions, the failure to similarly enjoin pro-abortion demonstrators was not improper because they had not engaged in those disruptive actions; the restraint of the demonstrators was “incidental to their antiabortion message because they repeatedly violated the court’s original order.”²³⁸ Because the restriction of speech was an injunction rather than a statute, a “somewhat more stringent” standard applied (“whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest”) than would have applied to a statute.²³⁹ But strict scrutiny was not necessary.²⁴⁰ The public sidewalk was a “public forum.”²⁴¹ The Court also agreed that numerous significant governmental interests justified an appropriately tailored injunction, including protecting property rights, free flow of traffic, public safety and order, protecting women’s freedom to seek lawful medical and counseling services for pregnancy, and the well-being of the patients.²⁴²

230. *Id.*

231. *Id.* at 758.

232. *Id.* at 758-61.

233. *Id.* at 768-76.

234. *Id.* at 761.

235. *Id.* at 761-62.

236. *Id.* at 776.

237. *Id.* at 763-64.

238. *Id.* at 763.

239. *Id.* at 765.

240. *Id.*

241. *Id.* at 764.

242. *Id.* at 767-68.

The Court, however, concluded that most of the challenged provisions of the injunction were overbroad. First, the injunction prohibited protestors from “congregating [or] picketing” within 36-feet of most of the clinic property.²⁴³ The thirty-six foot buffer zone was reasonable as applied to clinic driveways and entrances because the court found (and respondents did not contest) that demonstrators had repeatedly blocked both.²⁴⁴ Second, the court held that as applied to bar demonstrators from picketing on adjacent private property, absent any evidence any traffic was blocked, the thirty-six foot buffer zone “fail[ed] to serve the significant governmental interests” and was stricken.²⁴⁵ Third, the court upheld the injunction barring “singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds . . . within earshot of the patients inside the clinic” during clinic hours because noise can create stress and health risks in a medical setting.²⁴⁶ The injunction also prohibited protesters displaying “images observable . . . [by] patients inside” the clinic, but the Court found that the proper remedy if patients found visual images displayed by protesters disturbing was for the clinic to “pull its curtains,” and the Court held that this provision “violate[d] the First Amendment.”²⁴⁷ The injunction also prohibited protesters from approaching any person within a three hundred foot bubble zone around the clinic unless invited by the person to do so.²⁴⁸ The Supreme Court, however, struck this because the prior consent requirement was impermissible and this provision “burden[ed] more speech than is necessary to prevent intimidation and ensure access to the clinic.”²⁴⁹ Finally, the injunction prohibited picketing or using sound amplification equipment within a three hundred foot bubble zone of the residences of clinic staff.²⁵⁰ The Court upheld the sound equipment restriction, but struck down the picketing ban because the three hundred foot zone was much greater than necessary to protect the neighborhood.²⁵¹ Moreover, the court rejected the challenge to the “in concert” language in the injunction for lack of standing, noting that freedom of association to express a viewpoint was permitted, but collaboration to deprive others of lawful rights was not.²⁵² Justice

243. *Id.* at 768.

244. *Id.* at 769-70.

245. *Id.* at 772.

246. *Id.* at 772-73.

247. *Id.* at 773.

248. *Id.* at 774.

249. *Id.* at 774.

250. *Id.*

251. *Id.* at 774-75.

252. *Id.* at 775-76.

Souter joined the Court's opinion, but added that claims against those acting "in concert" would be decided on a case-by-case basis without regard to viewpoint.²⁵³ According to Justice Stevens, he would: apply a lower standard of review to injunctions than to statutes;²⁵⁴ uphold the three hundred foot bubble zone against unbidden approaching because "approaching" is conduct as well as speech;²⁵⁵ and refrain from deciding the other issues (though Justice Stevens was "inclined to agree with the Court's resolution respecting the noise and images restrictions.")²⁵⁶

Justice Scalia, joined by Justices Kennedy and Thomas, agreed with the Court's invalidation of portions of the injunction, but would have gone further and invalidated the entire injunction.²⁵⁷ They first argued that the injunction "departs so far from the established course of our jurisprudence that in any other context it would have been regarded as a candidate for summary reversal."²⁵⁸ These three justices would hold the application of the thirty-six foot zone and noise restriction "to [anti-abortion protestors] alone" is impermissible.²⁵⁹ After describing a video of the demonstrations, Justice Scalia emphasized that the Florida judge that issued the injunction himself acknowledged that the injunction was limited on the basis of viewpoint.²⁶⁰ The Court's "intermediate-intermediate" standard of review was a departure from accepted prior restraint standards.²⁶¹

Justice Scalia also disputed the assertion that the first injunction had been violated, noting that the evidence only showed that the flow of traffic had been slowed a little, not a finding of any intentional blocking of traffic, and just one incident in which the protestors "took their time to get out of the way."²⁶² Moreover, the pro-abortion protestors made more noise than the anti-abortion protestors, and the injunction was not the narrowest possible restraint.²⁶³ As a result, all nine justices agreed that at least some parts of the injunction were unconstitutionally overbroad infringements of free speech. Six justices agreed that at least some parts of the injunction were constitutionally permissible.²⁶⁴ Three justices would have overturned

253. *Id.* at 776-77 (Souter, J., concurring).

254. *Id.* at 778 (Stevens, J., concurring in part and dissenting in part).

255. *Id.* at 777.

256. *Id.* at 784.

257. *Id.* at 784-85 (Scalia, J., concurring in judgment and dissenting in part).

258. *Id.* at 785.

259. *Id.*

260. *Id.* at 794-97.

261. *See id.* at 790-91.

262. *Id.* at 807.

263. *Id.* at 809-10, 813.

264. *Id.* at 776 (majority opinion); *id.* at 776-77 (Souter, J., concurring); *id.* at 784.(Stevens, J., concurring in part and dissenting in part).

the entire injunction as violating the First Amendment.²⁶⁵ Only one justice, Stevens, would have upheld more of the injunction than the Court upheld.²⁶⁶ Thus, *Madsen* was a major turning point in the abortion jurisprudence of the Court, finally signaling that the Court was clearly willing to extend ordinary First Amendment protections to the rights of expression of anti-abortion protesters.

In *Leavitt v. Jane L.*,²⁶⁷ the Court reversed a Tenth Circuit decision that had ruled that a Utah abortion law was not severable under Utah law and was unconstitutional in its entirety.²⁶⁸ A federal district court invalidated part of the Utah law restricting abortions before twenty weeks gestation, but upheld the part of the law that restricted abortions after twenty weeks gestation, finding that the latter portion was severable under state law.²⁶⁹ While the Supreme Court normally does not review interpretations of state law, this decision amounted to such a blatant federal court nullification of clear state law allowing severability that a five to four majority of the Court ruled, per curiam, that the law was severable, and the Court remanded the case for further proceedings.²⁷⁰

In *Lambert v. Wicklund*,²⁷¹ the Court, per curiam, reversed the Ninth Circuit Court of Appeals and a United States district court that invalidated a Montana parental notice law.²⁷² The law at issue required that one parent be notified forty-eight hours before performance of an abortion unless a court waived the requirement on showing that: (1) the minor was “sufficiently mature,” or; (2) she had been the victim of a pattern of parental physical, sexual, or emotional abuse, or; (3) parental notification was “not in the best interests of the minor.”²⁷³ When doctors challenged the law, the district court struck it down, finding that the third possible waiver was too narrow because it did not specify that the waiver could be judicially granted when abortion was not in the minor’s best interest—not just when notification was not in the minor’s best interest.²⁷⁴ The court of appeals placed heavy reliance on its earlier decision in *Glick v. McKay*,²⁷⁵ in which the court had invalidated Nevada’s parental notification rule on similar

265. *Id.* at 815 (Scalia, J., concurring in the judgment in part and dissenting in part).

266. *Id.* at 782 (Stevens, J., concurring in part and dissenting in part).

267. 518 U.S. 137 (1996) (per curiam).

268. *Id.* at 137-38 (citing *Jane L. v. Bangerter*, 61 F.3d 1493, 1499 (1995)).

269. *Id.* at 138-39 (citing *Jane L. v. Bangerter*, 809 F. Supp. 865, 870 (1992)).

270. *Id.* at 146.

271. 520 U.S. 292 (1997) (per curiam).

272. *Id.* at 293.

273. *Id.* at 293-94 (citing MONT. CODE ANN. § 50-20-204 (1995)).

274. *Id.* at 294.

275. 937 F.2d 434 (9th Cir. 1991).

grounds.²⁷⁶ The Supreme Court noted that its prior decisions had never determined whether judicial bypass is necessary when the statute merely requires parental notification (instead of parental consent), criticized the *Glick* decision, and found that the “best interests” exception encompassed both the benefits from abortion and harm from notification.²⁷⁷ The Court observed that *Akron II* was based upon an assumption that a judicial bypass when notification is not in the minor’s best interest “is equivalent to” judicial bypass based on showing “that abortion is not in her best interests”²⁷⁸ Justice Stevens, joined by Ginsburg and Breyer, concurred because the Montana statute was “essentially identical” to the statute upheld in *Akron II*, but noted that either “best interest” showing would justify judicial bypass, a showing of both was not necessary.²⁷⁹

In *Mazurek v. Armstrong*,²⁸⁰ the Court, per curiam, also upheld a Montana law restricting the performance of abortion to licensed physicians, which was similar to laws in forty other states.²⁸¹ The district court denied a motion for preliminary injunction when a physician-assistant and several doctors challenged the law.²⁸² The Ninth Circuit Court of Appeals vacated that judgment, finding the plaintiffs had a fair chance of success on the merits.²⁸³ Here, the Supreme Court reiterated its determination in *Casey* that there was no evidence that requiring a doctor to perform the abortion amounted to a substantial obstacle to a woman seeking an abortion.²⁸⁴ It also rejected the Court of Appeals conclusion that the law was invalid because the legislature had impermissibly intended to create such an obstacle, noting the absence of proof of that alleged motive; the fact that an anti-abortion group drafted the law did not mean the legislature had illegal motive.²⁸⁵ The Court’s precedents dating back to *Roe v. Wade* had upheld similar requirements.²⁸⁶ While reversal of an interlocutory judgment is unusual, because the error was clear and the effect in Montana immediate, the Court reversed.²⁸⁷ Justice Stevens, joined by Justices Ginsburg and Breyer, dissented, arguing that the error was not sufficiently important to

276. *Lambert*, 520 U.S. at 294-95.

277. *Id.* at 296-97.

278. *Id.* at 297.

279. *Id.* at 301-02 (Stevens, J., concurring in the judgment).

280. 520 U.S. 968 (1997) (per curiam).

281. *Id.* at 976.

282. *Id.* at 970.

283. *Id.*

284. *Id.* at 971.

285. *Id.* at 972.

286. *Id.* at 974.

287. *Id.* at 976.

justify interlocutory review and finding that the law was aimed specifically at one person—the physician-assistant—and designed to make abortion more difficult.²⁸⁸

From 1973 until the late 1990s, the Court declined to review restraints on anti-abortion free speech in cases that seemed to be contrary to prior rulings of the Court. In *Lawson v. Murray*, the Court denied a petition for certiorari from a New Jersey prior restraint order against anti-abortion protestors picketing within three hundred feet of the residence of an abortion provider, even though the court found that the picketing was peaceful and all tort claims against the protestors had been denied.²⁸⁹ Just the year before in *Madsen*, the Court had explicitly struck down an injunction against picketing within three hundred feet of the residence of abortion clinic staff under the justification that the injunction was overbroad.²⁹⁰ Scalia's concurrence warned that the suppression of the First Amendment rights of pro-life activists was developing "more quickly and more severely than . . . feared,"²⁹¹ and he cautioned that "[t]he danger that speech-restricting injunctions may serve as a powerful means to suppress disfavored views" especially when "the defendant's prior speech (and proposed future speech) has been expressly found not to constitute a crime or common law tort."²⁹² Nonetheless, he concurred in denying certiorari because of a technical problem and because he was convinced that anti-abortion protesters are "the currently disfavored class" of litigants in the Supreme Court.²⁹³

Three years later, in *Lawson v. Murray*,²⁹⁴ the Court again denied certiorari in a reincarnation of the same case. In this case, a New Jersey court enjoined peaceful pro-life picketers "from carrying signs with generalized anti-abortion messages, and signs identifying the respondent as an abortionist" alongside a public street in front of the large, well-set-back home of an abortion doctor, except for picketing by small groups "*no more than one hour every two weeks, and only if the police department is given [twenty-four] hours' notice.*"²⁹⁵ No "violence, disruption of traffic, or other tortious or unlawful activity" had been threatened or had occurred.²⁹⁶ Concurring in the denial of certiorari, Justice Scalia commented that the

288. *Id.* at 977 (Stevens, J., dissenting).

289. 515 U.S. 1110 (1995).

290. *See supra*, notes 228 through 266 and accompanying text.

291. *Lawson*, 515 U.S. at 1110 (Scalia, J. concurring).

292. *Id.* at 1114.

293. *Id.* at 1116.

294. 525 U.S. 955 (1998).

295. *Id.* at 955 (Scalia, J., concurring) (emphasis added).

296. *Id.*

injunction “makes a mockery of First Amendment law” and imposed “a degree of restriction upon free speech that [wa]s unparalleled in the opinions of this Court.”²⁹⁷ However, the “captive audience” doctrine again made it difficult to reach the prior restraint issue, and he warned that pro-life protestors could not expect to receive protection for their First Amendment rights from the current Court: “experience suggests that seeking to bring the First Amendment to the assistance of abortion protesters is more likely to harm the former than help the latter.”²⁹⁸

In 2000, the Court decided another major freedom of expression case, *Hill v. Colorado*.²⁹⁹ In this case, pro-life abortion protestors sought a declaratory judgment and injunction against a Colorado statute that forbade anyone from knowingly approaching within eight feet of another person without that person’s consent for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person within one hundred feet of an abortion clinic.³⁰⁰ The state courts denied relief on motion for summary judgment,³⁰¹ but, in 1997, the Supreme Court vacated the judgment and remanded for reconsideration in light of *Schenck*.³⁰² The state courts again upheld the statute,³⁰³ and the Supreme Court affirmed, six to three. Justice Stevens wrote the majority opinion. He distinguishing *Schenck*, and found the statute to be “content-neutral,” a valid “time, place and manner” regulation, not overbroad, not unreasonably vague, and not a prior restraint.³⁰⁴ However, four of the justices in the majority—Souter, O’Connor, Ginsberg, and Breyer—signed a separate concurring opinion, which emphasized somewhat different perspectives, including the importance of the state interest in protecting people in the one hundred foot zone.³⁰⁵ Justice Scalia, joined by Justice Thomas, dissented, and characterized the majority decision as an attack on fundamental individual expression rights, noting that, “[h]aving deprived abortion opponents of the political right to persuade the electorate that abortion should be restricted by law, the Court today continues and expands its assault upon their individual right to persuade women contemplating

297. *Id.*

298. *Id.*

299. 530 U.S. 703 (2000).

300. *Id.* at 707-08 (citing COLO. REV. STAT. § 18-9-122(3) (1999)).

301. *See Hill v. City of Lakewood*, 911 P.2d 670, 672 (Colo. App. 1995); *see also Hill v. Thomas*, 973 P.2d 1246, 1259 (Colo. 1999).

302. *Hill v. Colorado*, 519 U. S. 1145, 1145 (1997).

303. *Hill v. City of Lakewood*, 949 P.2d 107, 109 (Colo. App. 1998).

304. *See generally Hill*, 530 U.S. at 719-35.

305. *See id.* at 735-40 (Souter, J., concurring).

abortion that what they are doing is wrong.”³⁰⁶ Justice Kennedy separately dissented, complaining that the holding “contradicts more than a half century of well-established First Amendment principles. For the first time the Court approves a law which bars a private citizen from passing a message, in a peaceful manner and on a profound moral issue, to a fellow citizen on a public sidewalk.”³⁰⁷

The same day that *Hill* was announced, the Court also decided the controversial case of *Stenberg v. Carhart*.³⁰⁸ Here, by a vote of five to four, the Court affirmed the ruling of the lower federal courts—which had ruled that a Nebraska statute banning “partial birth abortion”³⁰⁹ was unconstitutional.³¹⁰ Justice Breyer delivered the opinion for the Court, and found the statute unconstitutional because it did not contain an exception for the life of the mother³¹¹ and because it unduly burdened the right to abortion because it might be interpreted to apply to ordinary abortion procedures.³¹² Three of the justices in the majority also signed concurring opinions. Justice Stevens and Justice Ginsburg each filed a concurring opinion and joined in each other’s opinion.³¹³ Justice O’Connor filed a separate concurring opinion.³¹⁴ All four dissenters filed separate opinions. Chief Justice Rehnquist noted that he considered *Casey* wrongly decided and wrongly applied in this case.³¹⁵ Justice Scalia argued that the “undue burden” test was unworkable, and called for overruling *Casey*.³¹⁶ Justice Kennedy, joined by Rehnquist, argued that the statute put no undue burden on abortion.³¹⁷ Justice Thomas, joined by the Chief Justice and Justice Scalia, asserted that the majority failed to interpret the statute according to its plain meaning, and the statute was capable of a narrowing construction.³¹⁸

In 2006, the Supreme Court decided two other significant abortion cases. *Ayotte v. Planned Parenthood of Northern New England*,³¹⁹ concerned the New Hampshire Parental Notification Prior to Abortion Act,

306. *Id.* at 741-42 (Scalia, J., dissenting).

307. *Id.* at 765 (Kennedy, J., dissenting).

308. 530 U.S. 914 (2000).

309. *Id.* at 921-22 (citing NEB. REV. STAT. § 28-328 (1999)).

310. *Id.* at 922.

311. *Id.* at 938.

312. *Id.*

313. *Id.* at 946 (Stevens, J., concurring); *id.* at 951 (Ginsburg, J., concurring).

314. *Id.* at 947 (O’Connor, J., concurring).

315. *Id.* at 952 (Rehnquist, C.J., dissenting).

316. *Id.* at 953-55 (Scalia, J., dissenting).

317. *Id.* at 957 (Kennedy, J., dissenting).

318. *Id.* at 983 (Thomas, J., dissenting).

319. 546 U.S. 320 (2006).

which required forty-eight-hour prior notification by a doctor to parents of a minor before performing an abortion on the minor unless the doctor found that the abortion was necessary to save her life, but it also allowed a minor to petition a court for judicial bypass (approval of abortion without parental notification if the minor is mature or the abortion is in her best interests).³²⁰ The federal district court agreed with Planned Parenthood's claim that the Act was unconstitutional because it did not allow a doctor to perform an abortion without parental notification if necessary to protect the health of the minor, and the court enjoined its enforcement.³²¹ The Supreme Court *unanimously* vacated and remanded, noting that the record showed that the number of cases in which the law might be unconstitutional as applied was so small that it was not clear that the law would be facially unconstitutional.³²²

In *Scheidler v. National Organization for Women, Incorporated*,³²³ the Court reversed and remanded lower federal courts judgments finding that Scheidler and other anti-abortion protesters had violated RICO and ordering them to pay damages and enjoining them from engaging in anti-abortion protests anywhere in the country.³²⁴ The Supreme Court ruled that physical violence unrelated to robbery or extortion falls outside RICO's (Hobbs Act) scope because Congress did not intend to create a freestanding physical violence offense.³²⁵ It did intend to forbid acts or threats of physical violence in furtherance of a plan or purpose to engage in what the Act refers to as robbery or extortion (and related attempts or conspiracies), which were not proven in this case.³²⁶

In 2007, the Supreme Court issued two major decisions related to abortion. In *Gonzales v. Carhart*,³²⁷ the Court upheld a federal law prohibiting "partial birth abortion."³²⁸ The five to four majority opinion of Justice Kennedy emphasized that *Casey* had vindicated the government's strong interest in protecting prenatal human life and the brutal and

320. *Id.* at 323-24 (citing N.H. REV. STAT. ANN. §§ 132:24-132:28 (2004)).

321. *Id.* at 325 (citing *Planned Parenthood of N. New Eng. v. Heed*, 296 F. Supp. 2d 59, 65 (D.N.H. 2003)).

322. *Id.* at 332. The New Hampshire legislature repealed the law after the Supreme Court decision. See *Planned Parenthood of N. New Eng. v. Ayotte*, 571 F. Supp. 2d 265 (D.N.H. 2008).

323. 547 U.S. 9 (2006).

324. *Id.* at 14-15 (detailing the procedural history and factual background of the case).

325. *Id.* at 17-23.

326. *Id.* at 23 (explaining, "Congress did not intend to create a freestanding physical violence offense in the Hobbs Act. It did intend to forbid acts or threats of physical violence in furtherance of a plan or purpose to engage in what the statute refers to as robbery or extortion (and related attempts or conspiracies).").

327. 550 U.S. 124 (2007).

328. *Id.* at 133.

gruesome method of partial birth abortion clearly implicated that important state interest.³²⁹ The Court distinguished *Stenberg v. Carhart*, holding that the federal law was neither void for vagueness nor an undue burden on the right to abortion because the federal law was drafted more narrowly than the Nebraska, applying only to “intact D&E abortions” and not D&E abortions generally, specific anatomical marks were included rather than vague “substantial” language, an additional “overt act” to kill was required, and the law contained a scienter requirement, and accidental D&E was not covered.³³⁰ The federal law did not impose a “substantial obstacle” to late-term pre-viable abortions, and women’s regrets coupled with doctor reluctance to disclose details of this abortion method justified the state regulation.³³¹ The lack of a health exception was acceptable because both Congressional findings and the differing lower court opinions indicated that there is uncertainty in the medical community about whether such method of abortion was ever necessary to protect maternal health.³³² A facial attack should not have been entertained in the first instance, but an as-applied challenge may be brought.³³³

Justice Thomas, joined by Justice Scalia, joined the Court’s opinion “to reiterate . . . that the Court’s abortion jurisprudence, including *Casey* and *Roe* . . . has no basis in the Constitution.”³³⁴ Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, caustically dissented, finding the case indistinguishable from *Stenberg*.³³⁵ The dissenters wrote:

Today’s decision is alarming. It refuses to take *Casey* and *Stenberg* seriously. It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists (ACOG). It blurs the line, firmly drawn in *Casey*, between previability and postviability abortions. And, for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman’s health.³³⁶

While the majority opinion in *Gonzales* was very cautious, focused, and narrow, and upheld a very popular regulation, it involved a matter of extreme controversy (late-term abortions).

329. *Id.* at 157-58.

330. *Id.* at 147-49, 151-55.

331. *Id.* at 159-60.

332. *Id.* at 162-67.

333. *Id.* at 167.

334. *Id.* at 168-69 (Thomas, J., concurring).

335. *Id.* at 169-70, 187 (Ginsburg, J., dissenting).

336. *Id.* at 170-71.

In a collateral decision, *Federal Election Commission v. Wisconsin Right to Life, Inc.*,³³⁷ the Supreme Court upheld an “as applied” challenge to section 203 of the Bipartisan Campaign Reform Act (“McCain-Feingold”), which barred electioneering advertisements within thirty days of a federal primary or sixty days of a federal election as applied to three ads that Wisconsin Right to Life (“WRTL”) intended to run less than sixty days before an election in which Senator Feingold was running.³³⁸ The advertisements asked citizens to call his office to ask him not to filibuster President Bush’s judicial nominees, which the Court agreed were constitutionally protected political speech issue advertisements, not electioneering or the “functional equivalent.”³³⁹ The Court found no compelling state interest justified burdening WRTL’s speech.³⁴⁰ While this case did not concern the abortion doctrine per se, the context concerned abortion speech, an area of law in which the Court had, in some past cases, clearly distorted First Amendment doctrine with the effect, if not purpose, of suppressing pro-life speech. This decision was an overdue re-balancing of the Court’s earlier reluctance to protect anti-abortion speech and a counter-balancing of its earlier broad endorsement of the McCain-Feingold political speech restrictions.

There has been no major Supreme Court abortion decision since 2007. However, the free-speech rights of abortion protestors are still in controversy. For example, in *Snyder v. Phelps*,³⁴¹ the Court ruled that protests at funerals of military personnel killed in action by members of the Westboro Baptist Church, led by Pastor Fred Phelps, who demonstrate to express their belief that God punishes the United States and its military personnel because the United States tolerates homosexuality, could not give rise to a tort judgment for damages for offending members of the fallen soldier’s family.³⁴² Here, the Court approved but distinguished its rulings allowing government-imposed buffer zones at abortion clinics, noting that although it had approved a similar injunction that required a buffer zone

337. 551 U.S. 449 (2007).

338. *Id.* at 455-57. The Court explained:

Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA) makes it a federal crime for a corporation to use its general treasury funds to pay for any “electioneering communication,” 2 U.S.C. § 441b(b)(2), which BCRA defines as any broadcast that refers to a candidate for federal office and is aired within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction where that candidate is running, § 434(f)(3)(A).

Id.

339. *Id.* at 456-57.

340. *Id.* at 477.

341. 131 S. Ct. 1207 (2011).

342. *Id.* at 1219-20.

between protestors and an abortion clinic entrance in *Madsen v. Women's Health Center, Inc.*,³⁴³ the facts of *Snyder* were “obviously quite different” in respect to both “the activity being regulated and the means of restricting those activities.”³⁴⁴ At this point, it was clear that the Court was unable to break the prejudiced habit of considering abortion protests at clinics to be *sui generis* with limited First Amendment protection.³⁴⁵

In the fall of 2012, the Court issued a per curiam opinion in *Lefemine v. Wideman*,³⁴⁶ providing that a pro-life protester was entitled to collect attorney's fees as a prevailing party.³⁴⁷ Lefemine and other pro-life protestors held a demonstration at a busy intersection in a town in South Carolina in which they held up signs of aborted fetuses.³⁴⁸ When some citizens complained about the graphic pictures, county police ordered Lefemine to discard the signs or be ticketed for breach of the peace, which eventually led him to disband the protest.³⁴⁹ A year later when the protestors' attorney notified the police that they intended to engage in a similar demonstration and asserting their right to use the signs picturing aborted fetuses without interference, the Chief of Police defended the prior police action and promised it would be repeated if the signs were used.³⁵⁰ Lefemine filed a section 1983 civil rights action seeking declaratory and injunctive relief and nominal damages.³⁵¹ The federal court granted the injunction, declared that defendants had violated Lefemine's rights, but denied monetary damages (under qualified immunity as the rule of law had been uncertain), and denied his request for attorney's fees.³⁵² The Fourth Circuit Court of Appeals affirmed, holding that winning the injunction and declaratory judgment did not make Lefemine a “prevailing party.”³⁵³ The Supreme Court disagreed, and vacated and remanded the judgment.³⁵⁴ Because Lefemine had succeeded in removing the threat to his right to demonstrate with the signs, he had achieved a “material alteration in the parties' relationship” and thus satisfied the test for being a “prevailing

343. 512 U.S. 753 (1994).

344. *Snyder*, 131 S. Ct. at 1218.

345. After all, since the abortion doctrine is entirely a judicial creation, why should opponents think that they have the right to express opposition to or disagreement with such a divinely-created doctrine, especially at the temples of that doctrine?

346. 133 S. Ct. 9 (2012) (per curiam).

347. *Id.* at 11-12.

348. *Id.* at 10.

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.* at 10-11 (citing *Lefemine v. Davis*, 732 F. Supp. 2d 614, 620-25 (D.S.C. 2010)).

353. *Id.* at 11 (citing *Lefemine v. Wideman*, 672 F.3d 292, 302-03 (4th Cir. 2012)).

354. *Id.* at 12.

party” entitled to recover his attorneys’ fees, absent “unjust” exceptional circumstances that had not been shown.³⁵⁵ While this did not involve abortion rights or doctrine, it continues the line of cases suggesting that the Court no longer is always hostile to protecting the First Amendment rights of pro-life protestors, apart from clinic protests.

The Court has been dealing with certiorari petitions regarding restrictions on pro-life speech for at least twenty years.³⁵⁶ In 2012, the Court granted certiorari and summarily reversed *Lefemine v. Wideman*, which involved a fee dispute arising from a challenge to such a restriction.³⁵⁷ Lower courts have been dealing with such restrictions for nearly forty years; accordingly, the Supreme Court’s affirmation that free speech rights extend to pro-life protesters comes none too soon.³⁵⁸

Consequentially, the great bulk of the Supreme Court’s abortion jurisprudence has been to strike down any pre-natal protection or other legislation that might restrict, impede, or discourage a pregnant woman’s decision to get or have access to an abortion. The few minor, collateral exceptions (mostly in the past fifteen years) mostly related to *finally* (after more than two decades of ignoring and upholding repression of pro-life free speech) extending nearly normal protections to free expression by pro-life advocates. Apart from those few peripheral and collateral issues (primarily regarding funding and parental notice), the Court for four decades has steadfastly protected, preserved, expanded, and reinforced the core principles of the abortion doctrine by invalidating any laws that significantly burden, encumber, inhibit, hamper, or delay access to abortion on demand.

III. PRO-LIFE SPRING OF 2011-2013

Since 2010, there has been a notable eruption in pro-life legislation, which reflects public repugnance about excesses, abuses and scandals

355. *Id.* at 11-12.

356. *See Hill v. Colorado*, 530 U.S. 703 (2000); *Cloer v. Gynecology Clinic, Inc.*, 528 U.S. 1099 (2000); *Lawson v. Murray*, 525 U.S. 955 (1998); *Williams v. Planned Parenthood Shasta-Diablo, Inc.*, 520 U.S. 1133 (1997); *Lawson v. Murray*, 515 U.S. 1110 (1995); *Winfield v. Kaplan*, 512 U.S. 1253 (1994). The Court has also reviewed a few such laws. *See Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997); *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753 (1994).

357. *Lafemine*, 133 S. Ct. at 10.

358. *See, e.g., Commonwealth v. Jarboe*, 12 Pa. D. & C.3d 554, 561 (C.P. Cumberland. 1979); *O.B.G.Y.N. Ass’n v. Birthright of Brooklyn & Queens, Inc.*, 407 N.Y.S.2d 903, 906 (N.Y. App. Div. 1978); *Bolles v. People*, 541 P.2d 80, 84 (Colo. 1975) (en banc). In cases in which the restrictions have been found to be content-neutral, they were thus subject only to intermediate scrutiny. *See, e.g., Hill*, 530 U.S. at 719-25; *Madsen*, 512 U.S. at 763-68. Other cases have arisen in nonpublic fora, where the government power to restrict speech is broader. *See, e.g., Ctr. for Bio-Ethical Reform, Inc. v. City & Cnty. of Honolulu*, 455 F.3d 910, 920 (9th Cir. 2006).

involving unregulated abortion-on-demand. The research arm or ally of Planned Parenthood, the Alan Guttmacher Institute, reports that in 2012-2013 many abortion regulations were introduced, and some enacted. These include:

- (1) Abortion bans to replace *Roe*, have been introduced in nineteen states, enacted in North Dakota and Arkansas, passed one chamber in Montana.
- (2) Abortion clinic regulation, requiring all or some abortion providers to have hospital privileges or a transfer agreement with a hospital, have been introduced in nine states, enacted in Alabama, North Dakota, Ohio, Texas, and Wyoming.
- (3) Specific regulation of abortion providers in particular have been introduced in ten states, enacted in Alabama, Indiana, North Carolina, and Texas, passed one chamber in Minnesota.
- (4) “Choose Life” license plate laws have been introduced in four states, vetoed in Rhode Island.
- (5) State funding of alternatives to abortion services have been introduced in seven states, enacted in Kansas, Michigan, Missouri, North Carolina, Ohio, Pennsylvania, and Texas.
- (6) Insurance coverage of abortion laws concerning abortion coverage in health plans offered through health exchanges. Introduced in seventeen states and enacted in Arkansas, North Carolina, Pennsylvania, and Virginia. Passed one chamber in Minnesota.
- (7) Private insurance coverage of abortion bills have been introduced in eleven states and enacted in Kansas, North Carolina, and South Carolina. Passed at least one chamber in Georgia and Wisconsin and adopted by the state board in Georgia.
- (8) Public funding of abortion for low-income women has been introduced in nine states. Enacted in Arkansas, Iowa, and Maryland.
- (9) Required abortion coverage has been introduced in two states. Passed one chamber in Washington.
- (10) Late-term abortion legislation including “partial birth” abortions laws, post-viability abortions regulations or specified gestational period abortions regulations have been introduced in one form or another in seventeen states. Specific

gestational period abortions enacted by Arkansas, North Dakota, and Texas.

- (11) Bills to mandate counseling and waiting periods before abortion including self-directed counseling that includes information that the fetus can feel pain (two states) and information that the fetus is a person (two states), have been introduced in seven states. Enacted in Ohio and Kansas. Passed one chamber in Indiana. Also, state-directed counseling followed by a waiting period, including requiring a woman to make two trips to the clinic (two states). These have been introduced in fourteen states. Enacted in South Dakota. Passed one chamber in Kentucky.
- (12) Medication abortion regulations have been introduced in ten states and enacted in Alabama, Indiana, Louisiana, Mississippi, Missouri, North Carolina, and Texas. Adopted by the state board in Iowa.
- (13) Parental involvement in minor's abortion regulations have been popular. Parental consent requirements have been introduced in eight states. Enacted in Arkansas, Montana, and Oklahoma. Parental notification requirements have been introduced in seven states. The Illinois Supreme Court upheld a 1995 law requiring parental notice.
- (14) Physicians liability for abortions regulations have been introduced in five states, and Enacted in Kansas and Montana.
- (15) Physicians-only requirement for surgical and medical abortions have been introduced in eleven states and enacted in Indiana, Alabama, Louisiana, Missouri, and North Dakota, and adopted by a state board in Iowa.
- (16) Laws prohibiting coercing a woman into having an abortion have been introduced in five states and enacted in Louisiana and Montana.
- (17) Laws forbidding sex and race selection abortions have been introduced in seventeen states and enacted in Kansas, North Carolina, and North Dakota. Such bills have passed one chamber in Florida and Wisconsin.³⁵⁹

359. *Monthly State Update: Major Developments in 2013*, GUTTMACHER INST. (Oct. 1, 2013), <http://www.guttmacher.org/statecenter/updates/>.

Clearly there has been a lot of legislative activity in the states concerning abortion. Some of these laws are designed to facilitate abortion, but most are designed to prevent abortion abuses, exploitation, and dangerous, potentially harmful practices.

A. NORTH DAKOTA ABORTION-REGULATION LEGISLATION ENACTED IN 2013

In 2012-2013, the North Dakota legislature led the nation in enacting laws regulating abortion. Among those new abortion laws are Senate Bill 2305,³⁶⁰ requiring physicians performing abortion procedures to have hospital admitting privileges; House Bill 1456,³⁶¹ prohibiting the performance of abortions of unborn children when a heartbeat is detected; Senate Bill 2368,³⁶² establishing the state's compelling interest in the unborn human life from the time that unborn child is capable of feeling pain; House Bill 1305,³⁶³ prohibiting abortions for the purpose of sex selection or because of genetic abnormalities detected in the fetus; and Senate Concurrent Resolution 4009,³⁶⁴ a concurrent resolution to create and enact a new section of the Constitution of North Dakota relating to the inalienable right to life of every human being at every stage of development. Two other bills relating to abortion were introduced in the North Dakota legislature in 2013 but did not pass. Senate Bill 2303 proposed to amend the definition of "human being"³⁶⁵ and Senate Bill 2302³⁶⁶ proposed to prohibit abortions except when necessary to save the life of the pregnant woman.

Senate Bill 2305 amended subsection one of North Dakota Century Code section 14-02.1-04 to read:

An abortion may not be performed by any person other than a physician who *is* using applicable medical standards and who is

360. S.B. 2305, 63rd Leg. Assemb., Reg. Sess. (N.D. 2013) (codified at N.D. CENT. CODE § 14-02.1-04(1) (2013)).

361. H.B. 1456, 63d Leg. Assemb., Reg. Sess. (N.D. 2013) (codified at N.D. CENT. CODE § 14-02.1-05.2(1) (2013)).

362. S.B. 2368, 63d Leg. Assemb., Reg. Sess. (N.D. 2013) (codified at N.D. CENT. CODE § 14-02.1-05.3(1) (2013)).

363. H.B. 1305, 63d Leg. Assemb., Reg. Sess. (N.D. 2013) (codified at N.D. CENT. CODE § 14-02.1-04.1(1) (2013)).

364. S. Con. Res. 4009, 63d Leg. Assemb., Reg. Sess. (N.D. 2013).

365. S.B. 2303, 63d Leg. Assemb., Reg. Sess. (N.D. 2013). This bill passed the second reading in the Senate, but failed the second reading in the House. *See* Resp. in Opp'n to Mot. for Prelim. Inj. at 2, MKB Mgmt. Corp., v. Stenehjem, No. 1:13-CV-071 (D.N.D. July 19, 2013).

366. S.B. 2302, 63d Leg. Assemb., Reg. Sess. (N.D. 2013). This bill failed the second reading in the Senate. *See* Resp. in Opp'n to Mot. for Prelim. Inj. at 2, MKB Mgmt. Corp., v. Stenehjem, No. 1:13-CV-071 (D.N.D. July 19, 2013).

licensed to practice in this state. All physicians performing abortion procedures must have admitting privileges at a hospital located within thirty miles [42.28 kilometers] of the abortion facility and staff privileges to replace hospital on-staff physicians at that hospital. These privileges must include the abortion procedures the physician will be performing at abortion facilities. An abortion facility must have a staff member trained in cardiopulmonary resuscitation present at all times when the abortion facility is open and abortions are scheduled to be performed.³⁶⁷

The statute is largely unremarkable except for the fact that the need for such basic regulations of the provision of medical services of any kind is noteworthy. That fact may reveal something disturbing about the lack of self-regulation within the abortion industry. The validity of the principle that doctors performing abortion must be licensed to practice in the state in which he or she is performing abortions and should have admitting and staff privileges at a hospital within reasonable proximity of the place of abortion seem reasonable in light of the record of abortion complications, injuries, and even deaths that have occurred with tragic frequency.³⁶⁸ The state interest in protecting the medical safety of the provision of abortion services in its jurisdiction is indisputable.³⁶⁹ However, the group of doctors most likely to perform abortions, the American Congress of Obstetricians and Gynecologists (“ACOG”), has issued a statement in which they have voiced their disapproval of a law requiring admitting privileges, thinking the law is singling out abortion providers, asserting:

ACOG opposes legislation or other requirements that single out abortion services from other outpatient procedures. For example, ACOG opposes laws or other regulations that require abortion providers to have hospital admitting privileges. ACOG also

367. N.D. CENT. CODE § 14-02.1-04(1) (2013) (emphasis added).

368. See John Hurdle & Trip Gabriel, *Philadelphia Abortion Doctor Guilty of Murder in Late-Term Procedures*, N.Y. TIMES, May 13, 2013, available at http://www.nytimes.com/2013/05/14/us/kermit-gosnell-abortion-doctor-found-guilty-of-murder.html?_r=0 (describing abortionist convicted of numerous violations of law, causing death of adult woman patient and of killing several born-alive fetuses).

369. See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 161 (2007) (upholding abortion regulations of intact D & E abortions to protect medical safety of abortion); *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 327-39 (2006) (parental involvement statutes are permissible to protect the health and other interests of minors and parents); *Mazurek v. Armstrong*, 520 U.S. 968, 974-75 (1997) (“[W]e emphasized that our prior cases ‘left no doubt that, to ensure the safety of the abortion procedure, the States may mandate that only physicians perform abortions.’”) (quoting *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 447 (1983)).

opposes facility regulations that are more stringent for abortion than for other surgical procedures of similar low risk.³⁷⁰

The last part of the ACOG statement seems to reveal the motive and purpose—ACOG wants to insure that abortion procedures are not treated differently than any other procedures of similar risk to the patient. Moreover, ACOG also “believes physicians who provide medical and surgical procedures, including abortion services, in their offices, clinics, or freestanding ambulatory care facilities, should have a plan to ensure prompt emergency services if a complication occurs and should establish a mechanism for transferring patients who require emergency treatment.”³⁷¹ So ACOG provides no principled medical or professional basis for opposition to laws like the North Dakota law from a medical perspective, only a political concern that abortion not be “single[d] out”³⁷² for more regulation than other procedures of similar medical risk. Of course, abortion involves such serious moral, religious, and ethical concerns that are really not comparable with most therapeutic medical procedures or even most other elective, non-therapeutic procedures. At the end of July 2013, a state court judge granted a temporary restraining order barring enforcement of House Bill 2305’s hospital admission privileges for doctors performing abortions in North Dakota.³⁷³

House Bill 1456 requires that a physician “may not perform an abortion on a pregnant woman before determining, in accordance with standard medical practice, if the unborn child the pregnant woman is carrying has a detectable heartbeat,”³⁷⁴ and bars abortion of a child with a heartbeat unless necessary to save the life or “to prevent a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman, or to save the life of an unborn child.”³⁷⁵ Texas,³⁷⁶ Ohio,³⁷⁷ and Arkansas³⁷⁸ have introduced or enacted bills that are

370. *Statement on State Legislation Requiring Hospital Admitting Privileges for Physicians Providing Abortion Services* AM. CONG. OF OBSTETRICIANS AND GYNECOLOGISTS (Apr. 23, 2013), <http://www.acog.org/About%20ACOG/News%20Room/News%20Releases/2013/Hospital%20Admitting%20Privileges%20for%20Physicians%20Providing%20Abortion%20Services.aspx>.

371. *Id.*

372. *Id.*

373. *Woman’s Safety Law Enjoined by Fargo Judge*, N.D. CATHOLIC CONFERENCE (July 31, 2013), <http://ndcatholic.org/latestnews/?cat=4>.

374. H.B. 1456, 63d Leg. Assemb., Reg. Sess. (N.D. 2013) (codified at N.D. CENT. CODE § 14-02.1-05.2(1) (2013)).

375. H.B. 1456, 63d Leg. Assemb., Reg. Sess. (N.D. 2013) (codified at N.D. CENT. CODE § 14-02.1-05(2)(a) (2013)). This section also makes it a class C felony for a physician to violate this provision. *See* N.D. CENT. CODE § 14-02.1-05(4) (2013).

376. H.B. 59, 83d Leg., 2d Spec. Sess. (Tex. 2013).

377. H.B. 125, 129th Gen. Assemb., Reg. Sess. (Ohio 2011).

substantially similar to the North Dakota bill, while Oklahoma requires doctors to inform women that they can hear the heartbeat of their unborn child (at eight weeks or later gestation) if they so choose.³⁷⁹ At least two other state legislatures also have considered fetal heartbeat bills.³⁸⁰ A federal district court granted a preliminary injunction against enforcement of North Dakota House Bill 1456 and Senate Bill 2305.³⁸¹

House Bill 2368 enacted four new provisions of the North Dakota Century Code governing performance of abortions by: 1) requiring the doctor performing the abortion to attempt to ascertain “the post-fertilization age of the unborn child”;³⁸² 2) prohibiting the abortion of an unborn child of twenty or more weeks post-fertilization age;³⁸³ 3) requiring the facility to record the probable post-fertilization age of the aborted unborn child, the method of abortion used, whether intra-fetal injunction was used,³⁸⁴ and; 4) protecting the anonymity of the woman upon who abortion is performed.³⁸⁵ This new law took effect August 1, 2013 and no efforts to judicially enjoin enforcement of it were filed.³⁸⁶ House Bill 1305, amending section 14-02.1-02 of the North Dakota Century Code, bans sex-selection abortions and abortions done because the unborn child has an actual or potential genetic abnormality (such as Trisomy 23).³⁸⁷ The abortion clinic in North

378. S.B. 134, 89th. Gen. Assemb., Reg. Sess. (Ark. 2013) (codified at ARK. CODE ANN. § 20-16-1304 (2013)). This restriction has since been held unconstitutional. *See Edwards v. Beck*, No. 4:13CV00224 SWW, 2014 WL 1245267 (E.D. Ark. March 14, 2014).

379. S.B. 1274, 53rd Leg., Reg. Sess. (Okla. 2012) (codified at OKLA. STAT. tit. 63, § 1-745.14 (2012)).

380. H.B. 2324, 2013 Leg. Sess. (Kan. 2013); H.B. 97, 62d Leg., Gen. Sess. (Wyo. 2013). *See also* Laura Hancock, *Wyoming House Panel Votes Down Abortion Bill*, WYO. STAR TRIB., Jan. 29, 2013, available at http://trib.com/news/state-and-regional/govt-and-politics/wyoming-house-panel-votes-down-abortion-bill/article_bb56bab3-9ce9-5b40-a968-559b0e155e07.html.

381. *See generally* Latest News, *Updated Status on Abortion Legislation – September 13, 2013*, N.D. CATHOLIC CONF. (Sept. 13, 2013), <http://ndcatholic.org/latestnews/?p=1714> (hereinafter “*Updated Status*”).

382. S.B. 2368, 63d Leg. Assemb., Reg. Sess., § 3 (N.D. 2013) (codified at N.D. CENT. CODE § 14-02.1-05.3(2) (2013)).

383. *Id.* § 4 (codified at N.D. CENT. CODE § 14-02.1-05.3(3) (2013)).

384. *Id.* § 5 (codified at N.D. CENT. CODE § 14-02.1-07 (2013)). Abortions that are performed in violation of these section are punishable as a class C felony and actionable civilly by the mother or father of the unborn child aborted. *See* N.D. CENT. CODE § 14-02.1-05(4) (2013).

385. *Id.* § 7 (codified at N.D. CENT. CODE § 14-02.1-03.3 (2013)).

386. *See generally Updated Status*, *supra* note 381.

387. H. B. 1305, 63d Leg. Assemb., Reg. Sess., § 2 (N.D. 2013) (codified at N.D. CENT. CODE § 14-02.1-04.1 (2013))

1. Notwithstanding any other provision of law, a physician may not intentionally perform or attempt to perform an abortion with knowledge that the pregnant woman is seeking the abortion solely: a. On account of the sex of the unborn child; or b. Because the unborn child has been diagnosed with either a genetic abnormality or a potential for a genetic abnormality.

Id.

Dakota originally filed suit to enjoin enforcement of this new law, but it later withdrew its legal challenge.³⁸⁸

Senate Concurrent Resolution 4009 proposed to amend the North Dakota Constitution by adding a new section to Article 1. It would read as follows: “The inalienable right to life of every human being at any stage of development must be recognized and protected.”³⁸⁹ The legislature passed the proposed amendment; now it must be voted upon by the people of North Dakota during the general election to be held on November 4, 2014.³⁹⁰

The North Dakota abortion legislation is not unique. At least six other states have passed or introduced bills with similar regulations. Wisconsin passed a bill that has as its first section wording almost verbatim to that of the North Dakota laws; that is that the physician must have admitting rights to a hospital within thirty miles of the abortion location.³⁹¹ Similar to the North Dakota law, a federal judge has enjoined enforcement of the law for four months.³⁹² A trial is set for November 25, 2013 in the case in which Planned Parenthood is the party challenging the law.³⁹³

Texas passed House Bill 2, which was scheduled to come into effect at the end of October, 2013.³⁹⁴ The admitting privileges and the hospital proximity are the same as in North Dakota.³⁹⁵ It is reported that this new law has already caused seven abortion clinics to announce that they will probably have to shut down because of the restrictions.³⁹⁶

388. See *Updated Status*, *supra* note 381.

389. S. Con. Res. 4009, 63d Leg. Assemb., Reg. Sess.(N.D. 2013).

390. See *Updated Status*, *supra* note 381.

391. See S.B. 206 § 1(2), 2013 Leg. Assemb., Reg. Sess. (Wisc. 2013) (codified at WIS. STAT § 253.095 (2013)).

392. See Todd Richmond, *Federal Judge Blocks Admitting Privileges Mandate in New Abortion Law* WISCONSIN ST. J., Aug. 2, 2013, available at http://host.madison.com/news/local/govt-and-politics/federal-judge-blocks-admitting-privileges-mandate-in-new-abortion-law/article_e776a184-b748-54f0-90dc-d635ad11eb8a.html.

393. *Id.*

394. H.B. 2, 83d Leg., 2d Spec. Sess. (Tex. 2013) (codified at TEX. FAM. CODE ANN. § 171 (2013)).

395. *Id.* (codified at TEX. FAM. CODE ANN. § 171.0031(2013)). The admitting privileges provision has since been upheld. See *Planned Parenthood of Greater Tex. Surgical Health Serv. v. Abbot*, No. 13–51008, 2014 WL 1257965 (5th Cir. March 27, 2014). The Texas bill also states that abortions are no longer allowed after twenty weeks unless a threat to the life of the mother is present or serious abnormalities to the child. *Id.* (codified at TEX. FAM. CODE ANN. § 171.044 (2013)).

396. See Brittney Martin, *Some Texas Abortion Clinics Prepare to Shut Down After New Law*, DALLAS NEWS, Sept. 4, 2013, available at <http://www.dallasnews.com/news/politics/headlines/20130904-some-texas-abortion-clinics-prepare-to-shut-down-after-new-state-law.ece>.

The North Carolina legislature has created a bill similar to this North Dakota law.³⁹⁷ In addition, it also requires that the physician must remain with the patient throughout the entire procedure and during the recovery period.³⁹⁸ The North Carolina Legislature has codified this proposal.³⁹⁹

Alabama House Bill 57 was passed by the legislature and sent to the governor in April,⁴⁰⁰ and the governor signed the bill into law on or about April 18, 2013.⁴⁰¹ This bill does not specify a proximity requirement, but indicates that the person performing the abortion must have admitting privileges at a hospital within the same metropolitan statistical area as the facility where the abortion occurs.⁴⁰² Additionally, the bill declares: “[a]bortion not only involves a surgical procedure with the usual risks attending surgery, but also involves the taking of human life.”⁴⁰³

Mississippi enacted a law similar to Senate Bill 2305⁴⁰⁴ that took effect in 2012.⁴⁰⁵ While the Mississippi law does not have a proximity requirement, it provides that the physician performing the abortion must have admitting privileges to a hospital.⁴⁰⁶ This could be very significant because Mississippi only has one abortion clinic. It has been speculated—perhaps overly-optimistically/pessimistically—that the law could make Mississippi the first elective-abortion-free state in the nation.⁴⁰⁷ Kansas enacted a law in 2011 as part of their state budget, similar to the North Dakota law.⁴⁰⁸ It requires that a physician performing an abortion must have admitting privileges to a hospital that is within a thirty-mile radius of their facility.⁴⁰⁹

397. Amend Women’s Right to Know Act, S.B. 308, 2013 Leg., Gen. Assemb., Reg. Sess. (N.C. 2013),

398. *Id.*

399. See N.C. GEN. STAT. § 90-21.82 (2013).

400. See H.B. 57, 2013 Leg., Gen. Assemb., Reg. Sess. (Ala 2013).

401. John Shyrock, *Gov. Bentley to sign HB 57 Abortion Bill Tuesday*, WSFA COM., Apr. 8, 2013, <http://www.wsfa.com/story/21913097/gov-bentley-to-sign-hb-57-abortion-bill-tuesday>.

402. H.B. 57 § 4(c), 2013 Leg., Reg. Sess. (Ala. 2013) (codified at ALA. CODE § 26-23E-4(c) (2013)).

403. *Id.* at § 2(4) (codified at ALA. CODE § 26-23E-2(4) (2013)).

404. H.B. 1390, 2012 Leg., Reg. Sess. (Miss. 2012) (codified at MISS. CODE ANN. § 47-75-1(f) (2012)).

405. See, *Governor Phil Bryant Signs House Bill 1390*, GOV. PHIL BRYANT (Apr. 16, 2012), <http://www.governorbryant.com/governor-phil-bryant-signs-house-bill-1390/>.

406. *Id.*

407. See generally Sarah Kliff, *In Mississippi, a new push to end abortion*, WASH. POST, Mar. 13, 2012, http://www.washingtonpost.com/blogs/wonkblog/post/in-mississippi-a-new-push-to-end-abortion/2012/03/13/gIQAz5PAAS_blog.html (“Abortion-rights advocates say it’s unclear whether they would be able to find a doctor with the credentials required by this new law. If they can’t, and this bill becomes law, Mississippi’s one abortion clinic would close.”).

408. KAN. STAT. ANN. § 65-4a09(d)(3) (2011).

409. *Id.*

B. REASONS FOR THE PRO-LIFE SPRINGTIME OF 2011-2013

Many causal influences might be identified as contributing to the pro-life spring at the beginning of the twenty-first century, particularly in the first three years of the second decade of this century. Nonetheless, three factors in particular may have been the most influential in providing the catalyst for pro-life legislation: (1) some shocking abortion scandals; (2) the adoption and implementation of President Obama's unpopular, broad healthcare law (dubbed "Obamacare") including its contraceptive (*qua* abortifacient) mandate; and (3) growing sense that there are many ways to avoid and prevent the tragedy of unwanted pregnancy and better alternatives than abortion.

There have been several shocking scandals (including deaths of patients) involving abortion, abortion clinics, and abortion doctors in recent years. The most recent, and extremely deplorable, was the conviction of Philadelphia's Dr. Kermit Gosnell for the deaths of born-alive aborted fetuses and injuries to their women submitting to abortions at his hands. As one report summarized:

Late-term abortionist Kermit Gosnell was convicted Monday of first-degree murder in the deaths of three infants who were born alive after botched abortions performed in his run-down West Philadelphia clinic. He was also found guilty of involuntary manslaughter in the death of Karnamaya Mongar, a 41-year-old woman who died from an overdose of anesthetic drugs during an abortion procedure.

The jury's deliberations came after six weeks of harrowing testimony detailing the brutal deaths of newborns and unthinkable mistreatment of women. These murders followed failed abortions performed after Pennsylvania's 24-week limit.

In addition to the four murder charges, Gosnell was also convicted of more than 200 other criminal counts including violating Pennsylvania's informed consent law and performing illegal late-term abortions.⁴¹⁰

One of the babies Dr. Gosnell killed in his clinic he said was so big it could "walk to the bus."⁴¹¹

410. Sarah Torre, *Morning Bell: Serving Justice to Gosnell*, HERITAGE FOUND., May 14, 2013, <http://blog.heritage.org/2013/05/14/morning-bell-serving-justice-to-gosnell/>.

411. Steven Ertelt, *Kermit Gosnell Receives Third Consecutive Life Term for Killing Baby*, LIFENEWS.COM, May 15, 2013, <http://www.lifenews.com/2013/05/15/kermit-gosnell-receives-third-consecutive-life-term-for-killing-baby/>.

Gosnell was convicted . . . of first-degree murder in the deaths of three babies born alive after an abortion process that involved jabbing them in the neck with scissors Gosnell gave up his right to appeal the verdict that found him guilty on three of the four first-degree murder charges he faced. As a result, prosecutors agreed to two life terms in prison and Gosnell would not face the death penalty.⁴¹²

While the Gosnell trial was underreported by mainstream media, what little got into the press was galvanizing. As the *New York Times* reported:

In the witness box, clinic employees said live births occurred regularly, and they believed Dr. Gosnell's explanation for snipping necks with surgical scissors — to “ensure fetal demise” — was accepted practice in late-term abortions. An abortion doctor who testified for the prosecution said such practice was unheard of.

One witness, Steven Massof, testifying under a plea agreement to avoid first-degree murder charges, instructed jurors to feel the backs of their own necks and said, “It's like a beheading.”

Another former employee, Adrienne Moton, sobbed as she described the death of Baby A, aborted when his teenage mother was about 29 weeks pregnant. Ms. Moton was so upset she took a cellphone photograph of him, which was shown in court. She said Dr. Gosnell had joked that the baby was big enough to walk to a bus stop.

Ms. Moton, who also testified under a plea agreement, said she cut the neck of Baby D, who was delivered into a toilet while its mother, given a large dose of a drug to dilate the cervix, waited for Dr. Gosnell to arrive.

Another clinic worker said she followed Dr. Gosnell's instructions and cut the neck of Baby C after it moved an arm. The doctor told her was an “involuntary movement.”⁴¹³

Such negative publicity (and the Gosnell case is just the most recent notorious example of many) reveals the ghastly practices and callous ethics of the abortion business and probably has contributed to the pro-life legislative boom in the past few years.

412. *Id.*

413. John Hurdle & Trip Gabriel, *Philadelphia Abortion Doctor Guilty of Murder in Late-Term Procedures*, N.Y. TIMES, May 13, 2013, available at <http://www.nytimes.com/2013/05/14/us/kermit-gosnell-abortion-doctor-found-guilty-of-murder.html>.

Second, the attempt (so-far successful) by President Obama to expand medical insurance by forcing insurers, employers, and covered employees to implement insurance coverage for elective abortions has provoked a lot of controversy.⁴¹⁴ “The mandate forces employers, regardless of their religious or moral convictions, to facilitate insurance coverage for abortion-inducing drugs, sterilization and contraception under threat of heavy penalties.”⁴¹⁵ The government coercion coupled with the controversy has breathed new life into pro-life efforts.

Third, awareness of alternatives that can prevent the need for abortion also seems to have grown. Pregnant women today generally are not so naive and easily exploitable as to be misled into thinking that their dilemma is an abortion-or-bear-and-raise-an-unwanted-child scenario. Attitudes of Americans about abortion have stabilized in the past fifteen years. As responses to the question “[w]ith respect to the abortion issue, would you consider yourself to be pro-choice or pro-life?” indicate, Gallup reports that from 1998 to 2013 the percentage of Americans self-identifying as pro-life has ranged from 45% to 51%, while the percentage of Americans self-identifying as pro-choice has ranged from 41% to 51%.⁴¹⁶ For the past five years, (since 2009) pro-life advocates have tied or exceeded pro-choice proponents nearly all the time and in nearly every year.⁴¹⁷

Likewise, more Americans believe that abortion is morally wrong than believe that it is morally acceptable. The Gallup data reveals that 49% of Americans think that abortion is morally wrong as opposed to 42% that think it is morally acceptable.⁴¹⁸ The Gallup Poll reports as of May, 2013 show that 52% of the Americans surveyed believe that abortion should be “legal only under certain circumstances,” while only 26% believe that abortion should be “legal under any circumstances” and 20% believe that it

414. See, e.g., Jeffrey Young, *Obamacare Provokes 21 States Into Banning Abortion Coverage By Private Health Insurers*, HUFFPOST POLITICS, Sept. 3, 2013, http://www.huffingtonpost.com/2013/09/03/obamacare-abortion-coverage_n_3839720.html; *Defend Religious Liberty – Stop Forced Abortion Pill Coverage*, AM. CENTER L. & JUST., <http://aclj.org/obamacare/defend-religious-liberty-stop-forced-abortion-pill-coverage>; Terrence P. Jeffrey, *Obama Orders Catholics to Act Against Their Faith; Bishops Call it ‘Unconscionable’*, CNSNEWS.COM, Jan. 22, 2012, <http://cnsnews.com/news/article/obama-orders-catholics-act-against-their-faith-bishops-call-it-unconscionable>.

415. Abby Carr, *26 Religious Colleges Take Stand Against Abortion-Pill Mandate*, CHARISMANEWS, Apr. 15, 2013, <http://www.charismanews.com/us/39081-26-religious-colleges-take-stand-against-abortion-pill-mandate>.

416. *Abortion*, GALLUP, available at <http://www.gallup.com/poll/1576/abortion.aspx> (last visited May 2, 2014).

417. *Id.*

418. *Id.*

should be “illegal in all circumstances.”⁴¹⁹ Likewise, a July 2013 report by the PewResearch Religion & Public Life Project confirms that public opinion has been remarkably stable for the past twenty years, with minor vacillations holding steady (when given two choices only – “legal in all/most cases or illegal in all/most cases”) at about 55% pro-choice and about 45% pro-life.⁴²⁰

Even general public media occasionally have acknowledged that most Americans are pro-choice regarding early abortions and hard-case abortions only, but that most Americans are pro-life regarding elective abortions, especially after the first trimester of pregnancy. As an article in the Washington Post in 2011 reported:

Except in the first few years after *Roe v. Wade* made abortion legal, when public acceptance grew, sentiment around the issue has not moved much. Nor is there a large generational divide.

That distinguishes abortion from other contentious social issues, such as same-sex marriage and marijuana legalization, where overall public opinion — led by the young — has shifted dramatically in favor of a more liberal position.

For decades, polls have shown that most people want abortion to be available to women, at least in the early stages of pregnancy, when the vast majority occur.

But Americans get increasingly uncomfortable with the procedure as a fetus gets closer to viability. In December, a Gallup poll found roughly six in 10 saying abortion should be legal in the first three months of pregnancy, but support dropped to 27 percent in the second trimester and to 14 percent in the third.

Data just released by the National Opinion Research Center show that most Americans think the woman’s decision to have an abortion is justified in some instances — rape (where 78 percent support abortion as an option), fetal deformity (77 percent) and serious danger to her health (87 percent), for example. But they do not support it when an abortion is sought because the woman believes she is too poor to have more children (a situation in which

419. *Id.* The other two percent had “no opinion.” *Id.* The minor differences in the pro-life and pro-choice percentages in answer to these questions reveals both the difference to some respondents that the phrasing of the question may make in the results. But they also reveal general, strong consistency in the pro-life and pro-choice designations.

420. *Public Opinion on Abortion Slideshow*, PEWRESEARCH (Jan. 16, 2013), <http://features.pewforum.org/abortion-slideshow/>.

45 percent say they approve of an abortion) or doesn't want to marry the father (42 percent).⁴²¹

IV. THE COMING OF ANOTHER WINTER OF REPRESSION FOR PRO-LIFE PUBLIC LEGISLATION AND ACTIVITY

Political seasons like the climatic seasons of the year change. It would be unrealistic to believe that any one season will last forever. The recent enactment of many pro-life laws by various state legislatures signals the end of a social winter season of casual acceptance and tolerance of horrific killing of pre-natal human life and human lives. That season may be passing, or at least waning. For example, in *MKB Management Corporation v. Burdick*,⁴²² the United States District Court of North Dakota granted a preliminary injunction against enforcement of the fetal heartbeat bill, North Dakota House Bill No. 1446.⁴²³ A similar Texas abortion law also was enjoined by a trial court,⁴²⁴ but the U.S. Court of Appeals suspended that judicial restraint.⁴²⁵

However, the new springtime of pro-life values and legislation will also be temporary. That should motivate persons with serious, strong pro-life values to accomplish as much as they can in this short season. It should sober them to act carefully and enact laws that are likely to survive challenge and to endure even when the favorable season ends and pro-abortion values and actors again are dominant.

V. CONCLUSION: ROSES IN WINTER

The darkness of Winter may become our habitual and natural environment. As Emily Dickinson wrote: “[w]e grow accustomed to the Dark –/ When Light is put away.”⁴²⁶ It is in human nature to adjust to and accommodate to living in current circumstances. So, if we are not wary, abortion-on-demand may be normalized, routinized, accepted even by

421. Karen Tumulty, *Four decades after Roe v. Wade, views of most Americans still complex, conditional*, WASH. POST, July 10, 2013, available at http://www.washingtonpost.com/politics/abortion-fights-test-public-ambivalence/2013/07/10/eb75aa92-e8ad-11e2-8f22-de4bd2a2bd39_print.html.

422. 954 F. Supp. 2d 900 (D.N.D. 2013).

423. *Id.* at 914.

424. *Planned Parenthood of Greater Texas Surgical Health Serv. v. Abbott*, 951 F.Supp.2d 891 (W.D. Tex. 2013), *stay granted in part*, 734 F.3d 406 (5th Cir. 2013), *judgment reversed in part*, No. 13–51008, 2014 WL 1257965 (5th Cir. 2014).

425. *See generally* *Planned Parenthood of Greater Tex. Surgical Health Serv. v. Abbot*, No. 13–51008, 2014 WL 1257965 (5th Cir. 2014).

426. Emily Dickinson, *We grow accustomed to the Dark –(428)*, POETRY FOUND., <http://www.poetryfoundation.org/poem/246776>. Dickinson also wrote “Either the Darkness alters –/ Or something in the sight / Adjusts itself to Midnight –/ And Life steps almost straight.” *Id.*

Americans with basically pro-life values as they live is a pervasively pro-abortion society that habituates all of its members, all men, women and children, to the ethic of abortion-on-demand (if the term can correctly be applied to abortion-on-demand). Some believe that it already has become generally accepted in American society.

North Dakota's bouquet of pro-life laws enacted in 2013 is a reminder of the Spring of pro-life values and activities. May North Dakota's actions set an example that will be followed by lawmakers and officials in other states and in the branches, agencies and officials of the United States. Perhaps this Pro-life Spring can last a little longer.