

# STATE COURT PROTECTION OF REPRODUCTIVE RIGHTS: THE PAST, THE PERILS, AND THE PROMISE

DAWN JOHNSEN\*

## I. Introduction

In the United States constitutional system, the protection of individual rights depends upon the federal and state judiciaries. The role of the federal courts in protecting reproductive rights provides a particularly well known, if controversial, example. *Roe v. Wade* is among the most widely recognized of all judicial decisions.<sup>1</sup> The U.S. Senate, for example, routinely questions Supreme Court nominees about their views on *Roe*, as well as *Roe*'s principal precedent, *Griswold v. Connecticut*.<sup>2</sup> Although the Supreme Court's invalidation in *Roe* of Texas's criminal abortion ban continues to be debated, *Griswold*'s invalidation of a Connecticut law that made it illegal for even married couples to use contraception stands as a pillar of modern constitutionalism.<sup>3</sup>

The courts of the fifty states also possess broad authority to safeguard or diminish

---

\* I would like to thank my research assistants Kathleen Cullum, Samantha von Ende, Besma Fakhri, and Alyson Schwartz for their outstanding assistance in all aspects of the preparation of this Essay. I also am deeply grateful to the following individuals for taking the time to provide extensive information and valuable guidance: Bebe Anderson, Jennifer Dalven, Debra Erenberg, Roger Evans, Susan Frietsche, Linda Greenhouse, David Lyle, Louise Melling, Lynn Paltrow, and Melissa Spatz. I also appreciate the financial support of the Proteus Fund for the hiring of research assistants. All views expressed and any errors that may appear are solely my own:

1 410 U.S. 113 (1973), *holding modified by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

2 381 U.S. 479 (1965). Compare, e.g., *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 142–49, 158–60, 206 (2005) (statement of John G. Roberts) (discussing *Roe v. Wade*), with *id.* at 207–08 (statement of John G. Roberts) (discussing *Griswold v. Connecticut*); compare, e.g., *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 321–23, 380–83, 407–08 (2006) (statement of Samuel A. Alito, Jr.) (discussing *Roe v. Wade*), with *id.* at 318–19 (statement of Samuel A. Alito, Jr.) (discussing *Griswold v. Connecticut*).

3 See *supra* note 2; Morton J. Horowitz, *The Meaning of the Bork Nomination in American Constitutional History*, 50 U. PITT. L. REV. 655 (1989) (explaining the significant role played by Robert Bork's opposition to *Griswold* in the Senate's failure to confirm him to the U.S. Supreme Court). But see *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014) (holding that certain for-profit employers have a right to deny health care coverage to employees based on the employer's religious opposition to contraception).

reproductive autonomy and, as a consequence, the status of health care, reproductive justice, and the well-being of women, children, and families in their jurisdictions. State courts interpret the meaning of state laws—constitutional provisions paramount among them—that may provide greater protection for individual rights than the federal Constitution. The movement for marriage equality provides a powerful and related example: the first states to allow couples of the same sex to marry did so only after a state court interpreted a state constitutional guarantee to require what increasingly is recognized as a matter of right.<sup>4</sup>

Americans regularly have battled governmental intrusions on their reproductive rights in state as well as federal courts, dating back to when not only abortion and contraception were illegal, but so, too, was the distribution of information about how to prevent unintended pregnancy.<sup>5</sup> Now, more than forty years after *Roe* and fifty years after *Griswold*, state courts are as important as at any time since those landmark decisions. Overlapping factors converge to create special urgency for attention to state courts. A brief review of five such factors helps situate this Essay's analysis of the contemporary relevance of state courts to the fight for reproductive justice.

First, this is a time of heightened threat to the availability of legal abortion services, which diminishes the effectiveness and availability of women's health care services more generally.<sup>6</sup> Several facts illustrate this trend:

- State legislatures enacted more abortion restrictions in the last three years (2011–2013) than in the previous decade.<sup>7</sup>

4 See *Kerrigan v. Comm'n of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

5 See, e.g., MARGARET SANGER, *AN AUTOBIOGRAPHY* (1938) (recounting prosecutions under and litigation against state laws prohibiting dissemination of information on pregnancy prevention).

6 The unintended pregnancy rate in the United States is extraordinarily high—half of all pregnancies—about forty percent of which end in abortion. GUTTMACHER INST., *FACTS ON INDUCED ABORTION IN THE UNITED STATES FACT SHEET* (2014), [http://www.guttmacher.org/pubs/fb\\_induced\\_abortion.pdf](http://www.guttmacher.org/pubs/fb_induced_abortion.pdf) [<http://perma.cc/7QXZ-HVAM>] [hereinafter GUTTMACHER INST., *INDUCED ABORTION*]. The same clinics that perform abortions typically provide a range of reproductive and sexual health care, including pregnancy prevention services; for more than six out of ten clients (and more than seven out of ten with incomes below the poverty line), the family planning clinic is their “usual” source of health care. RACHEL BENSON GOLD ET AL., GUTTMACHER INST., *NEXT STEPS FOR AMERICA'S FAMILY PLANNING PROGRAM: LEVERAGING THE POTENTIAL OF MEDICAID AND TITLE X IN AN EVOLVING HEALTH CARE SYSTEM* 14, 16 (2009), <http://www.guttmacher.org/pubs/NextSteps.pdf> [<http://perma.cc/BCE4-8MCD>].

7 ELIZABETH NASH ET AL., GUTTMACHER INST., *LAWS AFFECTING REPRODUCTIVE HEALTH AND RIGHTS: 2013 STATE POLICY REVIEW* (2014), available at <http://www.guttmacher.org/statecenter/updates/2013/statetrends42013.html> [<http://perma.cc/WBN6-PRBU>]. See generally NARAL PRO-CHOICE AM., *WHO DECIDES? THE STATUS OF*

- Between 2000 and 2013, the proportion of women living in states hostile to abortion rights nearly doubled, from 31% to 56% (as measured by the Guttmacher Institute).<sup>8</sup>
- The number of abortion providers in the United States has fallen over 40% since 1982<sup>9</sup> and has declined 4% between 2008 and 2011 alone; 89% of all United States counties lack an abortion clinic.<sup>10</sup>
- The number of providers will continue to fall from 2011 levels unless courts enjoin new restrictions, as illustrated by the situation in Texas where in 2014 the number of clinics shrunk from forty-one to nineteen and threatened to fall to seven.<sup>11</sup>
- In six states, only a single clinic remains open in the entire state,<sup>12</sup> placing them at special risk of soon becoming, as abortion opponents describe their aspiration, “abortion free.”<sup>13</sup>

Second, women increasingly depend upon state courts not only to protect their rights to terminate pregnancies but also to safeguard their liberty, equality, and dignity during pregnancy. The assault on reproductive rights seeks broadly to define fertilized eggs, embryos, and fetuses as persons possessing rights independent of pregnant women.<sup>14</sup>

---

ABORTION RIGHTS IN THE UNITED STATES (23d ed. 2014), <http://www.prochoiceamerica.org/assets/download-files/2014-who-decides.pdf> [<http://perma.cc/4NC-9VNS>] (providing data on state abortion restrictions).

8 NASH ET AL., *supra* note 7.

9 Rachel K. Jones & Kathryn Kooistra, *Abortion Incidence and Access to Services in the United States, 2008*, 43 PERSP. ON SEXUAL & REPRO. HEALTH 41, 41 (2011), <https://www.guttmacher.org/pubs/journals/4304111.pdf> [<http://perma.cc/8PM-SDQP>] (indicating that there were 2,900 facilities in 1982, compared with 1,800 facilities in 2005).

10 GUTTMACHER INST., INDUCED ABORTION, *supra* note 6.

11 Editorial Board, *Quackery & Abortion Rights*, N.Y. TIMES (Aug. 20, 2014), <http://www.nytimes.com/2014/08/21/opinion/quackery-and-abortion-rights.html> [<http://perma.cc/NER6-FNEQ>] [hereinafter Editorial Board, *Quackery & Abortion Rights*].

12 Austin Ruse, *Missouri Joins Five States With Only One Abortion Clinic*, BREITBART (Mar. 25, 2014), <http://www.breitbart.com/Big-Government/2014/03/23/Missouri-Joins-Five-States-with-Only-One-Abortion-Clinic> [<http://perma.cc/N22K-J5AU>].

13 *Frontline: The Last Abortion Clinic* (PBS television broadcast Nov. 8, 2005), available at <http://www.pbs.org/wgbh/pages/frontline/clinic/> [<http://perma.cc/L85W-NLJD>] (quoting the president of Pro-Life Mississippi, who described the organization's goal as “mak[ing] Mississippi the first abortion free state in the nation”).

14 See *infra* Part IV.

National Advocates for Pregnant Women has documented hundreds of instances since *Roe* in which states have used criminal and civil law in efforts to specially punish or control women because they had an abortion, experienced a miscarriage or stillbirth, or engaged in behavior a prosecutor or physician deemed harmful to embryonic or fetal development.<sup>15</sup> Women have been subjected to arrest, criminal prosecution, incarceration, civil commitment, and forced medical treatment. Broad definitions of personhood that encompass fertilized eggs also threaten women's access to the most effective and personally appropriate methods of contraception.<sup>16</sup> Because these misguided efforts are actually detrimental to healthy pregnancies, leading medical associations have joined in opposition to what the *New York Times* recently condemned as "criminalizing expectant mothers."<sup>17</sup>

Third, in the years since *Griswold* and *Roe*, the federal courts have become far less hospitable to the protection of reproductive rights. Ultimately, rights related to pregnancy should be protected at the federal level and not vary state-by-state. However, a long-term partisan effort to overrule *Roe* has rendered the federal courts more likely to uphold governmental restrictions and intrusions. Forty years ago abortion was not a partisan issue: *Roe*'s seven-Justice majority included five Republican-appointed Justices.<sup>18</sup> But beginning in 1980, the Republican Party platform has stated: "We will work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life."<sup>19</sup> As of 2014, Republican presidents have appointed twelve of

---

15 Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL., POL'Y & L. 299 (2013).

16 See *infra* notes 162–65 and accompanying text.

17 Editorial Board, *Criminalizing Expectant Mothers*, N.Y. TIMES (Apr. 16, 2014), <http://www.nytimes.com/2014/04/17/opinion/criminalizing-expectant-mothers.html> [<http://perma.cc/5269-FFQG>]; see NAT'L ADVOCATES FOR PREGNANT WOMEN, MEDICAL AND PUBLIC HEALTH STATEMENTS ADDRESSING PROSECUTION AND PUNISHMENT OF PREGNANT WOMEN (2014), [http://advocatesforpregnantwomen.org/medical\\_group\\_opinions\\_2011/Medical%20Group%20Positions%202011.pdf](http://advocatesforpregnantwomen.org/medical_group_opinions_2011/Medical%20Group%20Positions%202011.pdf) [<http://perma.cc/CVT3-AMB6>].

18 President Dwight Eisenhower appointed Justices William Brennan and Potter Stewart, and President Richard Nixon appointed Justice Lewis Powell, Chief Justice Warren Burger, and the author of *Roe*, Justice Harry Blackmun. President Nixon appointed dissenting Justice William Rehnquist, and President John F. Kennedy (a Democrat) appointed the other dissenting Justice, Byron White. For a concise description of the politicization of the abortion issue, see Linda Greenhouse, *Misconceptions*, N.Y. TIMES (Jan. 23, 2013), <http://opinionator.blogs.nytimes.com/2013/01/23/misconceptions/> [<http://perma.cc/H4ME-PLWH>].

19 *Political Party Platforms: Republican Party Platform of 1980*, AM. PRESIDENCY PROJECT (July 15, 1980), <http://www.presidency.ucsb.edu/ws/?pid=25844> [<http://perma.cc/JUE-26AX>]; see also Lauren Feeney, *Timeline: The Religious Right and the Republican Platform*, BILL MOYERS & CO. (Aug. 31, 2012), <http://>

the last sixteen Justices to the U.S. Supreme Court.<sup>20</sup> The present Roberts Court is sharply divided, with the five Republican appointees supportive of abortion restrictions that the Court previously held unconstitutional.<sup>21</sup>

Fourth, coinciding with the increased need for state court protection, opponents of *Roe* have ramped up efforts to populate state courts with like-minded judges. These efforts are supported by the launching of the Republican State Leadership Committee's state-focused "judicial fairness initiative"<sup>22</sup> and take two principal forms.<sup>23</sup> As at the federal level, some state Republican Party platforms expressly call for the selection of judges who oppose *Roe*, and state anti-abortion organizations regularly target particular judges and nominees. This tactic became well known in the related issue of marriage equality when self-described "pro-family" organizations targeted for electoral defeat state court judges who had held that prohibitions on the ability of same-sex couples to marry violated state constitutional protections.<sup>24</sup> An emerging, second form of activism opposes entire systems of judicial selection viewed as interfering with the ability to select judges based on prospective judges' opposition to reproductive rights. In the last few years, anti-abortion organizations in Ohio, Pennsylvania, Minnesota, and Tennessee have opposed judicial selection systems premised on consideration of judicial candidates' merit, in favor of systems of direct elections in which they can "hold accountable" "elitist" judges who protect reproductive rights. This move against merit selection has profound implications for the full range of issues that come before state courts: the rights of criminal defendants, the indigent, persons of color, and corporations, to name a few of the most affected. Making judges stand for election exposes them to mounting general threats to elections and democracy—encouraged by recent decisions of a U.S. Supreme Court closely divided on the same partisan lines as

---

billmoyers.com/content/timeline-the-religious-right-and-the-republican-platform/ [http://perma.cc/AHM9-CR27].

20 *Members of the Supreme Court of the United States*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/members.aspx> [http://perma.cc/UC5S-E7K2] (last visited Oct. 11, 2014).

21 *See Gonzales v. Carhart*, 550 U.S. 124 (2007) (Roberts, C.J., Scalia, Kennedy, Thomas, & Alito, JJ., in the majority, and Stevens, Souter, Ginsburg, & Breyer, JJ., dissenting).

22 Reid Wilson, *Republican Group Will Focus on Judicial Races*, WASH. POST. (Apr. 29, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/04/29/republican-group-will-focus-on-judicial-races/> [http://perma.cc/SW59-RGH3].

23 *See infra* Part V.

24 *See* Editorial Board, *Get Politics Out of Judicial Selections*, WASH. POST. (Aug. 10, 2014), [http://www.washingtonpost.com/opinions/get-politics-out-of-judicial-selections/2014/08/10/6cca3860-1f3a-11e4-ab7b-696c295ddfd1\\_story.html](http://www.washingtonpost.com/opinions/get-politics-out-of-judicial-selections/2014/08/10/6cca3860-1f3a-11e4-ab7b-696c295ddfd1_story.html) [http://perma.cc/4NPX-3XV5]; *see also infra* Part V.

in the abortion decisions.<sup>25</sup> Unprecedented levels of money in politics and new barriers to voting will disproportionately disadvantage and disenfranchise those who lack the resources and practical ability to take equal, effective part in American politics. These are the same individuals who tend to be especially harmed by abortion and pregnancy-related restrictions and most in need of judicial protection.

A fifth factor contributing to the urgent need for state court independence is public opinion. Although a majority of Americans support *Roe* and oppose criminal abortion bans,<sup>26</sup> many current forms of abortion restrictions were specially designed to attract majority support by disguising their true nature and purporting to protect women's health.<sup>27</sup> Moreover, the harms and indignities of abortion restrictions, today and pre-*Roe*, fall disproportionately on women who lack the resources to overcome them: poor women, young women, women of color, immigrant women, and women who reside in rural areas or in the middle of the country or the South, in "red" or "purple" states with ideologically conservative politics.<sup>28</sup> To protect and realize reproductive justice, all persons—regardless of personal identity, race, economic status, or geography—must be able to access and freely choose reproductive healthcare, which in turn depends, in part, upon the judiciary.<sup>29</sup> Judges, of course, are obligated to protect rights regardless of local political sentiment. At the same time, judges—especially elected judges, dependent on votes, endorsements, and

---

25 See *infra* note 203.

26 A recent Gallup poll found that, "[f]orty years after the Supreme Court issued its opinion in *Roe v. Wade*, significantly more Americans want the landmark abortion decision kept in place rather than overturned." Lydia Saad, *Majority of Americans Still Support Roe v. Wade Decision*, GALLUP (Jan. 22, 2013), <http://www.gallup.com/poll/160058/majority-americans-support-roe-wade-decision.aspx> [<http://perma.cc/3VJL-9JJJ>].

27 See *infra* Part III(C).

28 See *infra* notes 60–62, 87–92.

29 Public interest lawyers at the American Civil Liberties Union, the Center for Reproductive Rights, and Planned Parenthood Federation of America assess the prospects of state and federal challenges to scores of new state restrictions enacted each year and handle most of this litigation. Many other organizations join them in advancing reproductive justice in courts, legislatures, and all aspects of society. Vital among them are state-based organizations—such as the Women's Law Project of Pennsylvania and the state affiliates of NARAL Pro-Choice America—and many that work to keep the focus on the full range of issues and perspectives of reproductive justice, including National Advocates for Pregnant Women and those that comprise SisterSong Women of Color Reproductive Justice Collective. For an overview of a reproductive justice movement led by women of color, see generally Jael Silliman, Marlene Gerber Fried, Loretta Ross & Elena Gutierrez, *UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE* (2004); Asian Cmtys. for Reprod. Justice, *A NEW VISION FOR ADVANCING OUR MOVEMENT FOR REPRODUCTIVE HEALTH, REPRODUCTIVE RIGHTS, AND REPRODUCTIVE JUSTICE* (2005), <http://forwardtogether.org/assets/docs/ACRJ-A-New-Vision.pdf> [<http://perma.cc/8N8Y-RFXG>].

campaign contributions—typically do not stray far from public opinion.

Two examples help show how these five factors converge. The connections between money in politics and reproductive rights can be seen in the enterprise of Indiana lawyer James Bopp.<sup>30</sup> Bopp is a principal architect of current efforts to use the First Amendment of the U.S. Constitution to invalidate regulations imposed on campaign contributions and increase the amount of money in politics—including in the selection of state judges.<sup>31</sup> Not entirely coincidentally, “the man behind *Citizens United*”<sup>32</sup> has also, for thirty-six years, served as general counsel to the National Right to Life Committee and has helped craft a strategy to gut *Roe*. Bopp believes *Roe* should be overruled but recognizes that an express overruling is unrealistic at this time. He instead endorses making abortion unavailable, state-by-state, through cumulative restrictions that shut down clinics and otherwise make abortion services more stigmatized, expensive, and scarce.<sup>33</sup> He also is active in Republican Party politics, including the drafting of national and Indiana Republican Party platforms.<sup>34</sup>

The current situation in Tennessee further illustrates the vital and complex nature of

---

30 James Bopp, Jr., U.S. DEP’T OF STATE, <http://www.state.gov/p/io/unesco/members/49204.htm> [<http://perma.cc/PD9G-6FVH>] (last visited Oct. 11, 2014); *Attorney Profiles: James Bopp, Jr.*, BOPP LAW FIRM, <http://www.bopp-law.com/attorney-profiles> [<http://perma.cc/NQL8-B8VR>] (last visited Oct. 11, 2014).

31 See James Bennet, *The New Price of American Politics*, THE ATLANTIC (Sept. 19, 2012), available at <http://www.theatlantic.com/magazine/archive/2012/10/the/309086/> [<http://perma.cc/9U97-F6MC>]; David D. Kirkpatrick, *A Quest to End Spending Rules for Campaigns*, N.Y. TIMES (Jan. 24, 2010), <http://www.nytimes.com/2010/01/25/us/politics/25bopp.html> [<http://perma.cc/MVA5-GE29>]; Stephanie Mencimer, *The Man Behind Citizens United Is Just Getting Started*, MOTHER JONES (May/June 2011), available at <http://www.motherjones.com/politics/2011/03/james-bopp-citizens-united?page=3> [<http://perma.cc/6EF5-NV7Y>]; Viveca Novak, *Citizen Bopp*, AM. PROSPECT (Jan. 2, 2012), <http://prospect.org/article/citizen-bopp> [<http://perma.cc/4FFP-URK8>].

32 Mencimer, *supra* note 31.

33 Memorandum from James Bopp, Jr., Member, Bopp, Coleson & Bostrom, & Richard E. Coleson, Senior Assoc., Bopp, Coleson & Bostrom, on Pro-Life Strategy Issues 3 (Aug. 7, 2007), <http://www.personhood.net/docs/BoppMemorandum1.pdf> [<http://perma.cc/ER2R-MU3E>]; see also Dawn Johnsen, “Trap”ing *Roe* in Indiana and a Common-Ground Alternative, 118 YALE L.J. 1356, 1360 (2009) (noting that the anti-*Roe* strategy “favors an incremental approach: the cumulative effect of legal restrictions short of bans . . . [to] create ‘abortion free’ states without criminalization”); Irin Carmon, *The Right’s Plan to Reverse Roe: Ban Abortions to ‘Protect’ Women*, MSNBC (Sept. 13, 2013, 8:47 AM), <http://www.msnbc.com/msnbc/the-rights-plan-reverse-roe-ban> [<http://perma.cc/DWM9-SNED>].

34 REPUBLICAN NAT’L COMM., PROPOSED RNC RESOLUTION ON REAGAN’S UNITY PRINCIPLE FOR SUPPORT OF CANDIDATES (2010), available at [http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/A\\_Politics/Reagan\\_First\\_Read.pdf](http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/A_Politics/Reagan_First_Read.pdf) [<http://perma.cc/5HZZ-7TPE>].

state court involvement in the law and politics of reproductive rights. In 2000, the Tennessee Supreme Court interpreted the Tennessee Constitution as protecting reproductive autonomy more fully than the federal Constitution.<sup>35</sup> The court relied upon “the right to procreate and the right to avoid procreation,” a right it first recognized in resolving a dispute about the disposition of a pre-embryo created in the process of in vitro fertilization—a seminal ruling in the field of assisted reproductive technology.<sup>36</sup> Anti-abortion forces retaliated on multiple fronts. Most directly, in November 2014, Tennessee voters approved a ballot measure that restricts Tennessee courts’ ability to protect reproductive rights by amending the Tennessee Constitution to provide that “[n]othing in this Constitution secures or protects a right to abortion.”<sup>37</sup> Further, in an August 2014 retention election, Tennessee Right to Life, the state’s largest anti-abortion organization, joined forces with the Koch brothers-backed Americans for Prosperity to target three Tennessee Supreme Court justices.<sup>38</sup> Although the justices prevailed, the margin of victory was sufficiently narrow that a *New York Times* headline reported, “Despite Failure, Campaign to Oust Tennessee Justices Keeps Conservatives Hopeful.”<sup>39</sup> In addition, the state has been engaged for years in complicated debates about the state’s system of judicial selection, leading in 2013 to a failure to extend the life of the Judicial Nominating Commission<sup>40</sup> and in November 2014 to the approval,

---

35 *Planned Parenthood of Middle Tenn., Inc. v. Sundquist*, 38 S.W.3d 1, 4 (Tenn. 2000) (holding that the Tennessee Constitution provides a guaranteed right of privacy and that “a woman’s right to terminate her pregnancy is a vital part of the right to privacy . . . inherent in the concept of ordered liberty embodied in the Tennessee Constitution . . .”).

36 *Davis v. Davis*, 842 S.W.2d 588, 601 (Tenn. 1992) (reasoning that courts should respect the wishes of persons who donate eggs or sperm).

37 S.J. Res. 127, 107th Gen. Assemb., Reg. Sess. (Tenn. 2014), available at <http://www.capitol.tn.gov/Bills/107/Bill/SJR0127.pdf> [<http://perma.cc/ZAL8-8QK6>]; Anita Wadhvani, *Tennessee Amendment 1 Abortion Measure Passes*, TENNESSEAN (Nov. 6, 2014), <http://www.tennessean.com/story/news/politics/2014/11/04/amendment-takes-early-lead/18493787/> [<http://perma.cc/9Q3H-RGJU>].

38 *AFP-Tennessee Launches New Campaign on Justices, A.G.*, AM. FOR PROSPERITY (July 22, 2014), <http://americansforprosperity.org/tennessee/article/afp-tennessee-launches-new-campaign-on-justices-a-g/> [<http://perma.cc/6JWS-LZ6H>]; Brian Harris, *TN Right to Life Calls for Rejection of Supremes*, HUMPHREY ON THE HILL (Aug. 1, 2014), <http://knoxblogs.com/humphreyhill/2014/08/01/tn-right-life-calls-rejection-supremes/> [<http://perma.cc/87QP-TQVD>]; see also *Tennessee Judges Facing Voter Review*, WND (July 28, 2006, 1:00 AM), <http://www.wnd.com/2006/07/37229/> [<http://perma.cc/D34K-8J2T>] (similar targeting of Tennessee judges in 2006).

39 Alan Blinder, *Despite Failure, Campaign to Oust Tennessee Justices Keeps Conservatives Hopeful*, N.Y. TIMES (Aug. 9, 2014), <http://www.nytimes.com/2014/08/10/us/despite-failure-campaign-to-oust-tennessee-justices-keeps-conservatives-hopeful.html> [<http://perma.cc/UZ34-BN4H>].

40 *Legislature Leaves Open Question About Judges*, ASSOC. PRESS (May 1, 2013), <http://nashvillecitypaper.com>.



in addition to “the Abortion Amendment,” of a ballot measure regarding the selection of appellate judges.<sup>41</sup> Finally, in July 2014, Tennessee became the first state to pass a statute applying the crime of fetal assault to pregnant women regarding their own pregnancies, and a week after the law went into effect, a woman was arrested for allegedly violating it.<sup>42</sup>

This Essay analyzes the role of state courts in light of the increased challenges at the outset of 2015 to both judicial independence and women’s reproductive rights. Following this Introduction, Part II provides background on the state and federal judiciaries in our constitutional system. Part III examines the role of state courts relative to federal courts over the last half century in protecting against restrictions on contraception and abortion. Part IV considers a range of other pregnancy-related restrictions and intrusions handled in state courts. Part V concludes with recommendations for encouraging state courts to fulfill their responsibility to protect reproductive rights for all within their jurisdictions, in the face of efforts to politicize state judicial selection to promote outcomes to the contrary.

## II. Role of State Courts in “Our Federalism”

The U.S. Constitution establishes a system of government in which the national and fifty state governments share authority. Although the precise nature of “our federalism” can be complicated and controversial in some contexts, the essential structure as it relates to the protection of reproductive rights is straightforward. Actions of state legislatures, executive officers, and other state actors are subject to judicial constraint, review, and interpretation by courts at the state and federal levels, applying state as well as federal law. Federal law is supreme, so states may not, for example, restrict the provision of abortion services in ways that conflict with rights guaranteed by the U.S. Constitution. Subject to this “federal floor of protection,”<sup>43</sup> states may define and protect rights differently than federal guarantees, as

---

com/content/city-news/legislature-leaves-open-question-about-judges [http://perma.cc/8J29-MKNY].

41 *Tennessee Judicial Selection, Amendment 2 (2014)*, BALLOTEDIA, [http://ballotpedia.org/Tennessee\\_Judicial\\_Selection\\_Amendment\\_2\\_\(2014\)](http://ballotpedia.org/Tennessee_Judicial_Selection_Amendment_2_(2014)) [http://perma.cc/HN57-KXKD] (last visited Oct. 11, 2014); Dave Boucher, *Amendment 2 to Change Judicial Selection Passes*, TENNESSEAN (Nov. 4, 2014), <http://www.tennessean.com/story/news/politics/2014/11/05/amendment-change-judicial-selection-leads/18499123/> [http://perma.cc/98UL-F4JU].

42 Katie McDonough, *First Woman Arrested Under State Law that Criminalizes Pregnancy Outcomes*, SALON (July 11, 2014, 8:28 PM), [http://www.salon.com/2014/07/11/first\\_woman\\_arrested\\_under\\_tennessee\\_law\\_that\\_criminalizes\\_pregnancy\\_outcomes/](http://www.salon.com/2014/07/11/first_woman_arrested_under_tennessee_law_that_criminalizes_pregnancy_outcomes/) [http://perma.cc/QT4G-C5UP].

43 Justice William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550 (1986) [hereinafter Brennan, *Bill of Rights*].

state courts have in numerous cases affecting reproductive rights.

Most fundamentally, each state is governed by its own constitution, which controls and constrains state action. Thus, individual rights and liberties are potentially doubly protected by state and federal constitutions, the provisions of which sometimes differ in significant respects, either textually or by interpretation. Indeed, prior to the Civil War and the fundamental changes effected by the Reconstruction Amendments, Americans often had only the state courts to turn to for even the most basic rights. State courts continue to decide the vast majority of cases: about 30,000 state court judges handle roughly thirty million cases, compared to 1,600 federal judges with just over one million cases.<sup>44</sup> In addition to protecting their own citizens, state court decisions may serve as a model for other states or for the federal courts. Justice William Brennan put it well in a 1977 seminal essay on state court independence: “[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law.”<sup>45</sup>

In practice, state courts often simply follow the federal courts’ lead and interpret their constitutional protections to be coextensive with identical or analogous federal protections. U.S. history, however, is replete with examples of state courts interpreting their own constitutions differently, including to afford greater protection even in the absence of textual differences. One example that Justice Brennan likely had in mind when he urged state courts to act independently was a 1973 case in which he dissented from a five-Justice majority opinion that rejected a constitutional challenge to Texas’s grossly unequal system for funding public education.<sup>46</sup> Years later, on this issue of tremendous importance, the Texas Supreme Court unanimously rejected the U.S. Supreme Court’s approach and held that the system violated the Texas Constitution.<sup>47</sup>

---

44 FED. JUDICIAL CTR., *FEDERAL COURTS AND WHAT THEY DO* 4 (1996), [http://www.fjc.gov/public/pdf.nsf/lookup/FCtsWhat.pdf/\\$file/FCtsWhat.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/FCtsWhat.pdf/$file/FCtsWhat.pdf) [<http://perma.cc/6N3L-FV3P>].

45 Justice William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) [hereinafter Brennan, *State Constitutions*]; see *id.* at 502 (“[S]tate court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees.”).

46 *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

47 *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989).

The cause of marriage equality provides an especially instructive and inspiring example. As in the case of women's reproductive rights, advances in securing the right of gays and lesbians to marry has depended on both state and federal court rulings, premised on the same textual and conceptual bases: liberty, privacy, and equality.<sup>48</sup> Moreover, the precise content of fundamental rights under the U.S. Constitution in both contexts may depend in part on our nation's "history and tradition" measured by state treatment of the issue. *Lawrence v. Texas*, for example, discussed the evolving nature of state criminalization of same-sex sodomy.<sup>49</sup> Marriage equality advocates have prioritized efforts in state courts. In the words of Freedom to Marry's President Evan Wolfson, they have tried to "win more states" and ultimately persuade the Supreme Court to end marriage discrimination: "Using the struggle against race discrimination in marriage as a measure, [we are] still far short of the 34 states that had ended race-based marriage discrimination when the Supreme Court ruled in *Loving v. Virginia* (1967)."<sup>50</sup>

The differences, as much as the similarities, between marriage equality and reproductive rights help explain the potential of state courts. Although state courts always remain free to interpret their constitutions to provide independent and stronger protections, timing matters. State courts may rule in advance of the U.S. Supreme Court, as in the case of marriage equality (state and lower federal courts considered the issue contemporaneously), or afterwards, as when the Texas Supreme Court rejected the U.S. Supreme Court's approach to the inequality in public education funding.<sup>51</sup> An absence of federal precedent requires state courts to exercise greater independence and affords them greater potential to inform federal courts interpreting the U.S. Constitution, as well as other states considering their own constitutions. As the next Part discusses, state rulings on restrictive abortion laws usually have followed U.S. Supreme Court rulings. A close examination reveals a relatively complex history of interaction—and the story continues.

---

48 See, e.g., *Kerrigan v. Comm'n of Pub. Health*, 957 A.2d 407 (Conn. 2008) (denying same-sex couples the ability to marry violates state constitutional guarantee of equal protection); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (same); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (denying same-sex couples the ability to marry violates state constitutional guarantees of individual liberty and equality).

49 *Lawrence v. Texas*, 539 U.S. 558, 568–75 (2003).

50 FREEDOM TO MARRY, ANNUAL REPORT 2010, at 3 (2010), [http://freemarry.3cdn.net/f953d3c4f6119cb42b\\_qnm62v1jd.pdf](http://freemarry.3cdn.net/f953d3c4f6119cb42b_qnm62v1jd.pdf) [<http://perma.cc/M56B-4JFQ>].

51 Compare *Edgewood Indep. Sch. Dist.*, 777 S.W.2d 391 (holding the Texas school financing system violated the state constitution), with *San Antonio*, 411 U.S. 1 (upholding the Texas school financing system against a federal constitutional challenge).

### III. State and Federal Constitutional Rulings on Contraception and Abortion Restrictions

The U.S. Constitution, properly interpreted, affords strong protection against governmental efforts to interfere with highly personal and consequential decisions about childbearing. The U.S. Supreme Court primarily relies upon the constitutional protections of “liberty” in the Fifth and Fourteenth Amendments, sometimes (though with decreasing frequency) describing the right as one of privacy.<sup>52</sup> State constitutions provide protections under provisions that sometimes mirror the federal Constitution, but in some cases provide stronger textual support. Some state constitutions contain express guarantees of privacy,<sup>53</sup> and others protect liberty in stronger language than the federal Constitution.<sup>54</sup> The Court also has relied upon the federal guarantee of “equal protection” to protect reproductive rights,<sup>55</sup> and many commentators have advocated that this guarantee more generally should protect against abortion restrictions under a theory of gender discrimination.<sup>56</sup> In holding restrictions on abortion funding unconstitutional, some state courts have relied upon textually similar guarantees of equal protection, while others have relied upon textually different provisions, including a right to common benefit,<sup>57</sup> a guarantee of privileges and immunities,<sup>58</sup> and an equal rights amendment similar to the one ultimately not ratified at the federal level.<sup>59</sup>

Although the ability to decide when and whether to bear children should not depend

---

52 See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

53 See ALA. CONST. art. I, § 22; CAL. CONST. art. I, § 1; HAW. CONST. art. I, § 6; MONT. CONST. art. II, § 10.

54 See, e.g., *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982); *MKB Mgmt. Corp. v. Burdick*, No. 09-2011-CV-02205 (N.D. Dist. Ct. July 15, 2013), available at [http://jurist.org/paperchase/2013-07-15\\_MKBvBurdick\\_Perm\\_Injunction.pdf](http://jurist.org/paperchase/2013-07-15_MKBvBurdick_Perm_Injunction.pdf) [<http://perma.cc/KZS4-MULR>]; *MKB Mgmt. Corp. v. Burdick*, No. 09-2011-CV-02205 (N.D. Dist. Ct. Feb. 16, 2012) (granting preliminary injunction), available at <http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/MKB%20v%20Burdick%20Order%2021612%20%282%29.pdf> [<http://perma.cc/N7UR-L4EH>].

55 *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972). But see *Harris v. McRae*, 448 U.S. 297 (1980).

56 See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985).

57 *Women's Health Ctr. of W. Va., Inc. v. Panepinto*, 446 S.E.2d 658 (W. Va. 1993).

58 *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247, 259 (Ind. 2003).

59 *Doe v. Maher*, 515 A.2d 134, 147 (Conn. Super. Ct. 1986); *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 855–56 (N.M. 1988).

upon one's state of residence, the reality is that state law and politics have created dramatic differences that are likely to persist for the foreseeable future. Since before *Roe* and continuing today, women who live in the Northeast and on the West Coast suffer fewer government intrusions and enjoy greater reproductive autonomy and support than women who live in the South or in the middle of the country (though shortcomings in reproductive justice, particularly for the least powerful, exist in all parts of the country).<sup>60</sup> The degree of state-based disparities has varied over time, depending largely on the extent of gaps in federal protection and the local availability of abortion services (which, in part, reflects the prevalence of clinic harassment and violence). The inequalities were most severe before *Roe*, substantially improved between 1973 and 1986, and worsened again after the Court's 1992 decision in *Planned Parenthood v. Casey*.<sup>61</sup> Always, the resulting harms of those inequalities fall most intensely on those women who are unable to travel, due to financial or other obstacles, to a state where they can obtain abortion services.<sup>62</sup>

Disparities among states also have depended upon their willingness to fill gaps in federal protection, either by judicial interpretation or legislation. One of the most comprehensive of the many analyses of state constitutional protection of reproductive rights, Paul Benjamin Linton's book, *Abortion Under State Constitutions: A State-by-State Analysis*, devotes a separate chapter to each state to assess all potentially relevant constitutional provisions and judicial decisions.<sup>63</sup> Linton personally opposes *Roe*, and he concludes each chapter with two assessments of that state's law: (1) whether, "[i]f *Roe*, as modified by *Casey*, is ultimately overruled," the state "could enact and enforce a statute *prohibiting* abortion"<sup>64</sup> (or enforce a pre-*Roe* statute—still on the books—that prohibits

60 See NASH ET AL., *supra* note 7; Rachel Benson Gold, *Lessons From Before Roe: Will Past Be Prologue?*, 6 GUTTMACHER REP. ON PUB. POL'Y 8 (2003), <http://www.guttmacher.org/pubs/tgr/06/1/gr060108.pdf> [<http://perma.cc/FCW8-5RMF>]; Linda Feldmann, *As Abortion Limits Sweep US, Even 'Purple' States Join the Crackdown*, CHRISTIAN SCI. MONITOR (July 30, 2013), <http://www.csmonitor.com/USA/DC-Decoder/2013/0730/As-abortion-limits-sweep-US-even-purple-states-join-the-crackdown> [<http://perma.cc/B7CB-L9SJ>].

61 505 U.S. 833 (1992).

62 See, e.g., LINDA GREENHOUSE & REVA SIEGEL, *BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING* (2010); Willard Cates, Jr. et al., *The Public Health Impact of Legal Abortion: 30 Years Later*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 25 (2003), <https://www.guttmacher.org/pubs/journals/3502503.pdf> [<http://perma.cc/9MZQ-PWRW>].

63 PAUL BENJAMIN LINTON, *ABORTION UNDER STATE CONSTITUTIONS: A STATE-BY-STATE ANALYSIS* (2008); see also CTR. FOR REPROD. RIGHTS, *WHAT IF ROE FELL* (2004), [http://reproductiverights.org/sites/default/files/documents/bo\\_whatifroefell.pdf](http://reproductiverights.org/sites/default/files/documents/bo_whatifroefell.pdf) [<http://perma.cc/GAX8-NSPJ>]; Scott A. Moss & Douglas M. Raines, *The Intriguing Federalist Future of Reproductive Rights*, 88 B.U. L. REV. 175 (2008).

64 LINTON, *supra* note 63, at 68.

abortion);<sup>65</sup> and (2) whether anything in the state's constitution precludes that state from "regulating abortion within federal constitutional limits in the meantime."<sup>66</sup> At the time of his 2008 book, Linton found that twelve states' supreme courts "have recognized a state constitutional right to abortion" that would independently constrain the state,<sup>67</sup> and that the highest courts of thirty-eight states "have not yet decided whether there is a state constitutional right to abortion."<sup>68</sup> However, the presence of a state constitutional guarantee that would remain in effect were the Supreme Court to overrule *Roe* does not necessarily render that guarantee more extensive than the current federal guarantee; Linton found that ten state supreme courts have interpreted state constitutions to be coextensive with federal guarantees.<sup>69</sup> In a January 2014 analysis examining a related question, NARAL Pro-Choice America found that sixteen states have interpreted their constitutions as providing more expansive protection for abortion rights than the U.S. Supreme Court has held is afforded by the federal Constitution.<sup>70</sup>

#### A. The Road to *Roe v. Wade* (1973)

It was only beginning in the 1960s and 1970s—with advances in prevailing societal attitudes about sexuality, reproduction, and gender equality—that any realistic possibility existed that judges would equally and fairly apply to women's reproductive rights the federal and state constitutional protections of liberty, privacy, equal protection, and privileges and immunities. An earlier foundational case, the U.S. Supreme Court's 1942 decision in *Skinner v. Oklahoma*, protected against governmental intrusion into individuals' childbearing decisions.<sup>71</sup> In what can be viewed as an early version of today's "three strikes and you're out" laws that impose life sentences on three-time offenders,<sup>72</sup> an Oklahoma statute imposed forcible sterilization as a penalty after the third conviction for some, but

---

65 *Id.* at 44.

66 *Id.*

67 *Id.* at 605.

68 *Id.* at 609.

69 *Id.*

70 NARAL PRO-CHOICE AM., *supra* note 7, at 28. Since then, however, a ballot measure amended the Tennessee Constitution to limit its protection of reproductive rights. *See supra* note 37 and accompanying text.

71 316 U.S. 535 (1942).

72 *See, e.g.,* CAL. PENAL CODE § 667 (West 2012).

not all, felonies (differences that, not surprisingly, tracked class and political power).<sup>73</sup> In holding the law unconstitutional, the Court said: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."<sup>74</sup>

The Supreme Court's 1965 decision in *Griswold v. Connecticut* invalidated a Connecticut law that made it illegal for even a married couple to use contraception.<sup>75</sup> In keeping with the times, the Justices, in oral argument and in their opinions, emphasized that the case involved the "private," "fundamental," and "intimate to the degree of being sacred" marital relationship, while avoiding the fact that it also involved women's ability to engage in sexual intercourse while avoiding pregnancy.<sup>76</sup> In 1972, the Court held unconstitutional a Massachusetts law that banned the sale of contraceptives for unmarried individuals, explaining, "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>77</sup> In 1973, the Court in *Roe v. Wade* cited *Skinner*, *Griswold*, *Eisenstadt v. Baird*,<sup>78</sup> and a right to privacy grounded in the Fourteenth Amendment's due process protection of liberty, in striking down a Texas law that deemed the performance of an abortion at any stage of pregnancy a felony, with an exception only to save the life of the woman.<sup>79</sup>

*Roe* dramatically diminished the extent to which a woman's ability to prevent and control the timing of childbearing varied by state of residence or ability to pay for interstate or even international travel.<sup>80</sup> For women without the resources to travel, it also largely ended the need to resort to dangerous illegal abortions, notwithstanding later limiting opinions that exacerbated inequality, particularly by denying public funding for abortions

---

73 *Skinner*, 316 U.S. at 536-37.

74 *Id.* at 541.

75 381 U.S. 479 (1965).

76 *Id.* at 485-86.

77 *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

78 *Roe v. Wade*, 410 U.S. 113, 169-70 (1973).

79 *Id.*

80 *Id.*

under Medicaid.<sup>81</sup>

The fact that *Griswold* and *Roe* came early in shifts in popular understandings about what had been viewed as women's "natural" and "destined" role as mothers meant that state court litigation was relatively sparse in these early years and did not play the same foundational role, for example, as in the movement for marriage equality.<sup>82</sup> By one count, in the years before *Roe*, state courts in fifteen states considered state and/or federal constitutional challenges to state abortion restrictions, mainly in the eight years between *Griswold* and *Roe*.<sup>83</sup> Most rejected the challenges, but the highest courts in California (1969) and Florida (1972) held their pre-*Roe* criminal abortion bans inconsistent with state constitutional protections.<sup>84</sup>

### B. *Roe v. Wade* (1973) to *Planned Parenthood v. Casey* (1992): Strict Scrutiny

For most of the two decades after *Roe* and before *Planned Parenthood v. Casey* in 1992, reproductive rights litigation was concentrated in the federal courts, under federal constitutional standards. Courts applied *Roe*'s appropriately demanding "strict scrutiny" standard of review<sup>85</sup> to invalidate most harmful state abortion restrictions, such as husband notification and waiting period requirements.<sup>86</sup> Two important exceptions illustrate the potential and limitations of state courts.

In the 1970s and 1980s, the U.S. Supreme Court upheld two types of abortion restrictions, both of which disproportionately harmed vulnerable women without political clout, resulting in extensive state court litigation aimed at filling those gaps in vital abortion access. In one series of decisions, the Court upheld federal and state legislation that excluded

---

81 Cates, Jr. et al., *supra* note 62, at 25.

82 See, e.g., *Bradwell v. Illinois*, 83 U.S. 130, 141–42 (1873) (Bradley, J., concurring).

83 LINTON, *supra* note 63, at 4 n.9.

84 *People v. Belous*, 458 P.2d 194 (Cal. 1969) (finding California's ban on abortion inconsistent with the California Constitution's protections of liberty and privacy); *State v. Barquet*, 262 So. 2d 431, 436 (Fla. 1972) (finding Florida's ban on abortion inconsistent with both the state's constitutional guarantee of due process and the federal Constitution's Fourteenth Amendment).

85 *Roe v. Wade*, 410 U.S. 113, 155 (1973).

86 E.g., *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983) (holding Ohio's mandatory twenty-four-hour delay law unconstitutional); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (holding Missouri's spousal consent law unconstitutional).



abortion services from the health care provided to poor women under Medicaid<sup>87</sup> and, later, that prohibited public facilities and public employees from providing abortion services.<sup>88</sup> At the heart of these decisions was the federal Hyde Amendment, named for Congressman Henry Hyde, which has prevented federal funding for abortions since 1977, in only slightly varying forms. Four Justices would have found the exclusion of funding unconstitutional, including Justice Marshall who wrote in dissent that the express purpose and function of the amendment was to “deprive poor and minority women of the constitutional right to choose abortion.”<sup>89</sup>

The Supreme Court’s decisions left states free to pay for abortions in circumstances identical to those in which the Hyde Amendment barred the use of federal funds.<sup>90</sup> Reproductive rights advocates therefore challenged funding restrictions under state constitutions where they believed the state courts might reach a more favorable result. Currently, seventeen states fund all or most medically necessary abortions through state programs, thirteen of which are pursuant to a judicial determination that the state constitution provides stronger protection than the federal Constitution.<sup>91</sup> Thirty-three states and the District of Columbia exclude abortion services from the health care coverage provided to poor women.<sup>92</sup>

---

87 *Harris v. McRae*, 448 U.S. 297 (1980); *Williams v. Zbaraz*, 448 U.S. 358 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

88 *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

89 *Zbaraz*, 448 U.S. at 344 (Marshall, J., dissenting).

90 *See, e.g., id.* at 358.

91 GUTTMACHER INST., STATE POLICIES IN BRIEF: STATE FUNDING OF ABORTION UNDER MEDICAID (2014), [http://www.guttmacher.org/statecenter/spibs/spib\\_SFAM.pdf](http://www.guttmacher.org/statecenter/spibs/spib_SFAM.pdf) [<http://perma.cc/AFU4-ERW9>] [hereinafter GUTTMACHER INST., STATE FUNDING OF ABORTION]. In addition, the Indiana Supreme Court ordered funding only when the pregnancy creates a “serious risk of substantial and irreversible impairment of a major bodily function.” *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247, 259 (Ind. 2003).

92 GUTTMACHER INST., STATE FUNDING OF ABORTION, *supra* note 91; *see also* AMY ALLINA ET AL., PRE-EXISTING CONDITIONS: HOW RESTRICTIONS ON ABORTION COVERAGE AND MARGINALIZATION OF CARE PAVED THE WAY FOR DISCRIMINATORY TREATMENT OF ABORTION IN HEALTH REFORM AND BEYOND 1 (2012), [http://centerwomenpolicy.org/programs/health/statepolicy/documents/REPRO\\_PreExistingConditions\\_Allina-Arons-Barajas-RomanFINAL.pdf](http://centerwomenpolicy.org/programs/health/statepolicy/documents/REPRO_PreExistingConditions_Allina-Arons-Barajas-RomanFINAL.pdf) [<http://perma.cc/8KPG-J5TB>]; JESSICA ARONS & MADINA AGÉNOR, SEPARATE AND UNEQUAL: THE HYDE AMENDMENT AND WOMEN OF COLOR 19 (2010), [http://cdn.americanprogress.org/wp-content/uploads/issues/2010/12/pdf/hyde\\_amendment.pdf](http://cdn.americanprogress.org/wp-content/uploads/issues/2010/12/pdf/hyde_amendment.pdf) [<http://perma.cc/R5ZM-LBTE>]; STANLEY K. HENSHAW ET AL., GUTTMACHER INST., RESTRICTIONS ON MEDICAID FUNDING FOR ABORTIONS: A LITERATURE REVIEW (2009), <http://www.guttmacher.org/pubs/MedicaidLitReview.pdf> [<http://perma.cc/3TUE-ZPK2>].

In a second series of decisions, the U.S. Supreme Court held that states may require minors to notify or obtain the consent of their parents before having an abortion, as long as the state provides a "bypass" alternative by which a minor may seek a judicial determination that she is sufficiently mature to make her own decision or that an abortion without compelled parental involvement is otherwise in her interests.<sup>93</sup> State supreme courts in Alaska, California, Florida, New Jersey, and Washington each have found that their state constitutions confer greater protection for minors' reproductive rights than that provided under federal doctrine.<sup>94</sup> In Florida, however, after the Florida Supreme Court invoked a strict scrutiny analysis to find a requirement of parental consent unconstitutional, that decision was overturned by constitutional amendment.<sup>95</sup> The composition of state courts also affects whether they actually give minors, as the U.S. Constitution requires, the opportunity to "bypass" parental involvement when it is not in their interests. Some judges routinely deny such requests, to the point that in some jurisdictions minors simply no longer seek them and in effect are denied a bypass option.<sup>96</sup>

In some states, courts found greater protection against funding or minors' restrictions even though the state constitution was textually indistinguishable from the federal Constitution, while other state courts emphasized textual differences. For example, the Supreme Court of California cited the California Constitution's express guarantee of a right to privacy in invalidating both a public funding restriction and a parental consent requirement.<sup>97</sup> Interestingly, that privacy provision was added after the California Supreme

---

93 Bellotti v. Baird, 443 U.S. 622, 643 (1979).

94 See State v. Planned Parenthood, 171 P.3d 577 (Ala. 2007); Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797 (Cal. 1997); *In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989); Planned Parenthood of Cent. N.J. v. Farmer, 762 A.2d 620 (N.J. 2000); State v. Koome, 530 P.2d 260, 263 (Wash. 1975).

95 FLA. CONST. art. X, § 22.

96 See, e.g., Caroline A. Placey, Note, *Of Judicial Bypass Procedures, Moral Recusal, and Protected Political Speech, Throwing Pregnant Minors Under the Campaign Bus*, 56 EMORY L.J. 693, 706-11 (2006) (citing Mark Rollenhagen, *Clinics Fight Notification Rule by Filing Suit*, PLAIN DEALER (Cleveland, Ohio), June 18, 1992, at 1C (reporting that denial of waiver applications varied by county in Ohio, ranging from two percent to one hundred percent)).

97 Comm. to Defend Reprod. Rights v. Myers, 625 P.2d 779 (Cal. 1981) (citing CAL. CONST. art. I, § 1). In rejecting the California Attorney General's argument that the U.S. Supreme Court's decision in *Harris v. McRae* should be decisive in assessing the constitutionality of the state law, the California Supreme Court declared, "[S]tate courts are 'independently responsible for safeguarding the rights of their citizens.'" *Id.* at 783. Later, the California Supreme Court held that the state's mandatory parental involvement law violated a minor's state constitutional right of privacy and "even when the terms of the California Constitution are textually identical to those of the federal Constitution, the proper interpretation of the state constitutional provision is not

Court held, in 1969, that a pre-*Roe* state abortion ban violated an implied constitutional right to privacy protected by both the U.S. and California constitutions.<sup>98</sup> To take an example where the text differed, state courts in Connecticut and New Mexico relied in part on their state constitutions' equal rights amendments to invalidate a public funding restriction.<sup>99</sup> In another, the Alaska Supreme Court struck down a parental consent requirement, relying on the Alaska Constitution's privacy amendment and stating that the textual right to privacy is "more robust and 'broader in scope' than those of the implied federal right to privacy."<sup>100</sup> Other state courts, including those in Oregon and Indiana, cited textual differences in the state constitutions' privileges and immunities clauses to extend public funding for abortion beyond federal requirements;<sup>101</sup> in the case of the "red" state of Indiana, however, the court's holding only required funding where pregnancy threatened "serious risk of substantial and irreversible impairment of a major bodily function."<sup>102</sup>

This history reveals that a state court's willingness to invalidate harmful abortion restrictions may depend at least as much on the court's composition as on the text of the constitution. Unlike Connecticut and New Mexico, for example, Pennsylvania and Texas ruled against challenges to discriminatory funding laws even though the Pennsylvania Constitution contained an equal rights amendment protecting against sex discrimination, and the Texas Supreme Court had interpreted its constitution to protect women from sex discrimination under a higher standard than the federal Constitution affords.<sup>103</sup> The vast majority of state courts have not provided additional protection—and probably will not, absent changes in the courts' composition or popular understandings of constitutional meaning.

At the federal level, the Supreme Court's changing composition explains much. That

---

invariably identical to the federal courts' interpretation of the corresponding provision contained in the federal Constitution." *Lungren*, 940 P.2d at 808.

98 *People v. Belous*, 71 Cal. 2d 954, 963 (1969).

99 *Doe v. Maher*, 515 A.2d 134 (Conn. Super. Ct. 1986); *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998).

100 *State v. Planned Parenthood*, 171 P.3d 577, 581 (Ala. 2007).

101 *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247 (Ind. 2003); *Planned Parenthood Ass'n v. Dep't of Human Res.*, 687 P.2d 785 (Or. 1983).

102 *Humphreys*, 796 N.E.2d at 259.

103 *Compare Doe*, 515 A.2d 134, and *New Mexico Right to Choose*, 975 P.2d 841, with *Fischer v. Dep't of Pub. Welfare*, 502 A.2d 114 (Penn. 1985), and *Bell v. Low Income Women of Tex.*, 95 S.W.3d 253 (Tex. 2002).

change has not been coincidental. President Reagan's administration and the Republican Party prioritized remaking the federal courts to overrule *Roe*.<sup>104</sup> Notably, Justice Brennan wrote the words quoted above in support of independence in state constitutional interpretation in 1977, when changes in the Court's composition threatened to undermine a variety of constitutional rights.<sup>105</sup> Justice Brennan repeated this message in 1986,<sup>106</sup> a time when Republican presidents had appointed seven consecutive Supreme Court Justices.<sup>107</sup>

By the late 1980s, the changing Supreme Court seemed to virtually all observers to have achieved the Republican Party's official goal of a majority of Justices who believed *Roe* was wrongly decided. The Court's 1989 decision in *Webster v. Reproductive Health Services* is little known today,<sup>108</sup> but at the time attracted tremendous attention and raised public awareness that, with *Roe* and the federal courts in question, state courts and elected officials at all levels of government were newly important to protecting reproductive rights. Because no one had a clear sense of what returning the issue to the states actually would mean, NARAL undertook the first comprehensive state-by-state survey of the status of abortion rights.<sup>109</sup> The results were grim, with predictions of widespread criminal bans and other harsh restrictions if the Court were to overrule *Roe*.<sup>110</sup>

### **C. *Planned Parenthood v. Casey* (1992) to Present: The Undue Burden Standard**

The existential threat to *Roe* abated in 1992, with the Supreme Court's *Planned Parenthood v. Casey* decision rejecting the first Bush administration's request that it expressly overrule *Roe*.<sup>111</sup> Later that year, President Clinton's election offered additional reassurance. The public perception of the threat plummeted, indeed beyond what the *Casey* decision merited. Advocates and reproductive health care providers have remained

---

104 See, e.g., *supra* note 19.

105 See Brennan, *State Constitutions*, *supra* note 45.

106 Brennan, *Bill of Rights*, *supra* note 43, at 546.

107 SUPREME COURT OF THE UNITED STATES, *supra* note 20.

108 492 U.S. 490 (1989).

109 NAT'L ABORTION RIGHTS ACTION LEAGUE, WHO DECIDES? A STATE-BY-STATE REVIEW OF ABORTION RIGHTS IN AMERICA (1989).

110 See *id.*

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

cognizant of the vital role of state courts and state legislatures, but until recently, not so the general public. *Casey*'s declaration that it reaffirmed what it characterized as the core of *Roe* proved to be a placating game changer that restored public confidence in the federal courts as protectors of reproductive rights.<sup>112</sup>

Events of the last several years, however, have brought a growing manifestation and appreciation of the dangers of the flipside of *Casey*: its adoption of a newly created, less protective, and malleable "undue burden" standard.<sup>113</sup> Increasingly, this standard is encouraging harmful state restrictions on abortion. *Casey* itself held constitutional a mandatory waiting period, directly contrary to an earlier ruling, and overruled two earlier Supreme Court decisions from 1983 and 1986.<sup>114</sup>

One critical marker was the Supreme Court's own use of the "undue burden" standard in 2007 in *Gonzales v. Carhart* to uphold the so-called federal "partial birth abortion ban" in a five-four decision authored by Justice Kennedy, the clear deciding vote after Justice Samuel Alito replaced Justice Sandra Day O'Connor.<sup>115</sup> *Gonzales* all but overruled another five-four decision, *Stenberg v. Carhart*, in which Justice Kennedy had dissented and Justice O'Connor was a necessary vote to invalidate a similar state statute.<sup>116</sup> Notably, Justice Kennedy has never found an abortion restriction unconstitutional since his surprising decision in *Casey* to provide a critical vote to uphold *Roe*'s "core."<sup>117</sup>

Since *Gonzales*, states have enacted abortion restrictions in record numbers. Some take the form of clearly unconstitutional pre-viability abortion bans.<sup>118</sup> Just since 2013,

---

112 *Id.*

113 *Id.* at 873.

114 *Id.* at 870 (overruling *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) and *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983)).

115 550 U.S. 124 (2007); see Joan Biskupic, *The Alito/O'Connor Switch*, 35 PEPP. L. REV. 495, 498 (2008) (describing how Alito's nomination effectively made Justice Kennedy the deciding vote in the 2007 *Gonzales* decision).

116 530 U.S. 914 (2000).

117 *Casey*, 505 U.S. 833.

118 See *id.* at 871 ("The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce.").

states have enacted laws that ban abortion at six weeks, twelve weeks, and twenty weeks.<sup>119</sup> North Dakota, with only one clinic that provides abortions in the entire state, enacted laws separately banning abortion at six weeks and twenty weeks in an effort to cover its bases in the event a court strikes down the six-week ban.<sup>120</sup>

More often, restrictions take the form of what are commonly described as TRAP laws, or “targeted regulation of abortion providers.” Under the guise of helping women by regulating abortion providers, these laws actually force providers of abortion services to close down, for example through innocuous-sounding, but expensive and difficult-to-meet requirements that dictate the physical structure of clinics and effectively require the construction of small hospitals.<sup>121</sup> The restrictions are cumulative and reinforcing in their harm. One type of TRAP prominent in 2014 would prohibit clinics from operating unless the physician performing the abortion acquires “admitting privileges” at a nearby hospital.<sup>122</sup> A variation requires the clinic to convince a hospital to enter into a “transfer” agreement to treat their patient. Admitting privilege and transfer requirements are not medically indicated or in any way beneficial, as hospitals are already legally required to admit women in the extremely rare circumstance of an emergency following an abortion.<sup>123</sup> They also typically are difficult or impossible to obtain for a variety of reasons, including

119 See, e.g., Eric M. Johnson, *Mississippi Sets 20-Week Limit on Abortions*, REUTERS (Apr. 24, 2014), <http://www.reuters.com/article/2014/04/24/us-usa-abortion-mississippi-idUSBREA3N0LN20140424> [<http://perma.cc/4GMA-VXLT>]; *SB134: To Create the Arkansas Human Heartbeat Protection Act; To Protect Unborn Children*, ARK. STATE LEGIS., <http://www.arkleg.state.ar.us/assembly/2013/2013R/Pages/BillInformation.aspx?measureno=sb134> [<http://perma.cc/HK5C-T8K4>] (last visited Oct. 11, 2014).

120 James MacPherson, *North Dakota Gov. Jack Dalrymple Approves 6-Week Abortion Ban*, WASH. TIMES (Mar. 26, 2013), <http://www.washingtontimes.com/news/2013/mar/26/north-dakota-gov-jack-dalrymple-approves-6-week-ab/> [<http://perma.cc/4C3U-D59P>]. A federal district court has temporarily enjoined North Dakota’s six-week “heartbeat” ban. *MKB Management, Inc. v. Burdick*, 954 F. Supp. 2d 900 (D.N.D. 2013).

121 See generally Rachel Benson Gold & Elizabeth Nash, *TRAP Laws Gain Political Traction While Abortion Clinics—And the Women they Serve—Pay the Price*, 16 GUTTMACHER POL’Y REV. 7 (2013), <http://www.guttmacher.org/pubs/gpr/16/2/gpr160207.pdf> [<http://perma.cc/FY8K-8RAA>]; NARAL PRO-CHOICE AM., TARGETED REGULATION OF ABORTION PROVIDERS (TRAP) LAWS: DECREASING ACCESS, DRIVING PROVIDERS AWAY 5 (2014), <http://www.prochoiceamerica.org/media/fact-sheets/abortion-access-trap.pdf> [<http://perma.cc/GZ4Y-NVAV>].

122 See, e.g., GUTTMACHER INST., STATE POLICIES IN BRIEF: TARGETED REGULATION OF ABORTION PROVIDERS 1 (2014), [http://www.guttmacher.org/statecenter/spibs/spib\\_TRAP.pdf](http://www.guttmacher.org/statecenter/spibs/spib_TRAP.pdf) [<http://perma.cc/Q2VE-DGMR>].

123 See *Planned Parenthood Se., Inc. v. Strange*, No. 2:13cv405-MHT, 2014 WL 3809403, at \*32–45 (M.D. Ala. Aug. 4, 2014); Direct Testimony of Elizabeth Gray Raymond, MD, M.P.H., Whole Woman’s Health v. Lakey, No. 14-CV-284-LY (D. Tex. Aug. 4, 2014) (on file with Center for Reproductive Rights); Gold & Nash, *supra* note 121, at 10; NARAL PRO-CHOICE AM., *supra* note 121, at 5.

hospital rules that physicians work within a certain proximity or admit a minimum number of patients to the hospital.<sup>124</sup> Even if a physician meets the requirements, the hospital need not grant the privileges. Laws requiring admitting privileges leave abortion providers susceptible to denials based solely on religion or ideology, as many hospitals are affiliated with the Catholic Church or otherwise opposed to abortion—or simply want to avoid potential controversy.<sup>125</sup>

For each new restriction enacted, reproductive rights litigators assess the prospects of a challenge in state or federal court. In most states, the state courts as they exist at the close of 2014 do not promise any more protection than the federal courts. The several federal courts to consider admitting privileges restrictions have split in their conclusions, with a split even between panels of the U.S. Court of Appeals for the Fifth Circuit. One panel found a Texas admitting privileges requirement constitutional and allowed it to go into effect, resulting in more than half the clinics closing (forty-one clinics reduced to nineteen clinics).<sup>126</sup> A different, divided Fifth Circuit panel upheld a preliminary injunction blocking a Mississippi admitting privileges requirement from going into effect, which would have forced the only remaining clinic in the state to close.<sup>127</sup> The parties have petitioned the full Fifth Circuit to rehear both cases en banc. On August 29, 2014, a federal district court permanently enjoined another TRAP provision in Texas, which required that all abortion clinics meet the standards applied to ambulatory surgical centers, on the grounds that it imposes an undue burden on a woman's right to choose to have an abortion;<sup>128</sup> if not sustained on appeal, the law would force all but seven or eight of the remaining Texas clinics to close.<sup>129</sup>

---

124 *Strange*, 2014 WL 3809403, at \*10–15.

125 *See, e.g.,* NARAL PRO-CHOICE AM., *supra* note 121, at 5–6.

126 *Planned Parenthood of Greater Tex. Surgical Health Serv. v. Abbott*, 734 F.3d 406 (5th Cir. 2013); *see* Editorial Board, *Quackery & Abortion Rights*, *supra* note 11.

127 *Jackson Women's Health Org. v. Currier*, 760 F.3d 448 (5th Cir. 2014).

128 *Whole Woman's Health Ctr. v. Lakey*, No. 1:14-cv-00284-LY, 2014 WL 4346489 (D. Tex. Aug. 29, 2014); Mary Fernandez & Erik Eckholm, *Abortion Providers in Texas Press Judge to Block Portions of New Law*, N.Y. TIMES (Aug. 4, 2014), <http://www.nytimes.com/2014/08/05/us/texas-abortion-providers-press-judge-to-block-curbs-in-new-law.html> [<http://perma.cc/GBU5-8QE5>]. The U.S. Supreme Court vacated a Fifth Circuit stay order pending appeal, thereby ensuring that the clinics may remain open until the appeal is resolved. *Whole Woman's Health v. Lakey*, 135 S. Ct. 399 (2014).

129 Andrea Grimes, *Soon in Texas, One Abortion Provider for Every One Million Potentially Pregnant Texans*, RH REALITY CHECK (Aug. 26, 2014, 3:44 PM), <http://rhrealitycheck.org/article/2014/08/26/soon-texas-one-abortion-provider-every-one-million-potentially-pregnant-texans/> [<http://perma.cc/3VCA-XP33>].

In Ohio, reproductive health advocates went to state court to challenge an onerous transfer agreement requirement. Ohio law first required transfer agreements with local hospitals,<sup>130</sup> and clinics worked hard to secure them with public hospitals. The legislature then amended the law to prohibit public hospitals from entering into such agreements.<sup>131</sup> Due to these and other restrictions, of the fourteen clinics open at the outset of 2013, five have closed and others are expected to follow,<sup>132</sup> which would leave major cities and heavily populated areas with no clinics.<sup>133</sup>

Since the Court's *Casey* decision, reproductive rights advocates have achieved mixed results in state courts. Outside the earlier standard context of funding and parental notice restrictions, which continue on occasion, successes have been few and far between and can be briefly described. In a strong 1999 opinion, the Montana Supreme Court held that a state law requiring that abortions be performed solely by licensed physicians violated the state constitution's privacy protection, which, the court held, "affords significantly broader protection than does the federal Constitution."<sup>134</sup> The next year, the Tennessee Supreme Court issued a ruling strongly protective of reproductive rights, holding that the Tennessee Constitution provided an independent right to privacy and greater protections than the federal Constitution.<sup>135</sup> The court declined to adopt *Casey*'s undue burden standard and instead analyzed the challenged provisions under a strict scrutiny standard, resulting in the invalidation of requirements that abortions performed after the first trimester be performed in a hospital and that women delay their abortions at least two days after receiving state-mandated information.<sup>136</sup> However, a new amendment to the Tennessee Constitution passed by ballot measure in November 2014 may essentially overrule this decision by amending the Tennessee Constitution to state: "Nothing in this Constitution secures or protects a right

---

130 OHIO ADMIN. CODE § 3701-83-19(E).

131 Am. Subs. H.B. 59, 130th Gen. Assemb., Reg. Sess., § 3727.60(B) (Ohio 2013), available at [http://www.legislature.state.oh.us/bills.cfm?ID=130\\_HB\\_59](http://www.legislature.state.oh.us/bills.cfm?ID=130_HB_59) [<http://perma.cc/P7XC-CWC2>].

132 Amanda Seitz, *Abortion Clinic Stops Procedures, 9 Facilities Remain in Ohio*, DAYTON DAILY NEWS (Aug. 21, 2014, 9:34 AM), <http://www.daytondailynews.com/news/news/local/sharonville-clinic-to-stop-performing-abortion/ng56B/> [<http://perma.cc/FB3F-HSNR>].

133 Darrel Rowland & Alex Felser, *More Ohio Abortion Clinics Closing*, COLUMBUS DISPATCH (Oct. 16, 2013), <http://www.dispatch.com/content/stories/local/2013/10/16/1016-abortion-clinics-closing.html> [<http://perma.cc/YQL9-DAEB>].

134 *Armstrong v. State*, 989 P.2d 364, 375 (Mont. 1999).

135 *Planned Parenthood of Middle Tenn., Inc. v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000).

136 *Id.*



to abortion.”<sup>137</sup>

Currently, state court challenges to abortion restrictions are pending in eleven states. Although litigation within the fifty state systems changes quickly, this snapshot at the close of 2014 reveals creativity and practical limitations in both the restrictions and the challenges and suggests tenacity on the part of advocates on both sides. Two of the challenges do not claim a violation of individual reproductive rights protected under a state constitution. A challenge to the Ohio transfer agreement requirement (as well as other restrictions in the law) rests on a claim that it was enacted in violation of the Ohio Constitution’s requirement that legislation be limited to a single subject.<sup>138</sup> A Texas suit argues that regulations that disqualify abortion providers from receiving state Medicaid funds were improperly promulgated, without statutory authority.<sup>139</sup> Challenges in two states involve mandatory parental involvement. These challenges, pending in Montana and Alaska, are the current iterations of ongoing litigation surrounding parental involvement laws. A challenge to Montana’s parental notification law (enacted by a 2012 referendum) and parental consent law (enacted by a 2013 legislative act) is currently pending before the Montana Supreme Court, after a district court found a nearly identical law unconstitutional in 1999.<sup>140</sup> Plaintiffs in this case argue that the onerous parental consent and notification laws violate minors’ rights to privacy, equal protection, and due process guaranteed by the state constitution.<sup>141</sup> The challenge to Alaska’s parental notification law, which was enacted by referendum, also followed a state court ruling striking down a similar law.<sup>142</sup> Similarly,

---

137 S.J. Res. 127, 107th Gen. Assemb., Reg. Sess. (Tenn. 2014), available at <http://www.capitol.tn.gov/Bills/107/Bill/SJR0127.pdf> [<http://perma.cc/ZAL8-8QK6>]; Wadhwani, *supra* note 37.

138 *ACLU Announces Lawsuit Challenging Three Ohio Budget Amendments Restricting Reproductive Rights*, ACLU (Oct. 9, 2013), <https://www.aclu.org/reproductive-freedom/aclu-announces-lawsuit-challenging-three-ohio-budget-amendments-restricting> [<http://perma.cc/VWS8-K4ED>]. On August 20, 2014, a Cincinnati-area abortion clinic that provided surgical abortions conceded its court battle challenging the laws and was forced to close, leaving just one facility performing surgical abortions and none providing late-term abortions. *Ohio: Abortion Clinic Drops Fight Over License*, N.Y. TIMES (Aug. 20, 2014), <http://www.nytimes.com/2014/08/21/us/ohio-abortion-clinic-drops-fight-over-license.html> [<http://perma.cc/PCL3-LJK3>].

139 *Tex. Dep’t of State Health Servs. v. Balquinta*, 429 S.W.3d 726 (Tex. App. 2014).

140 *Complaint, Planned Parenthood of Mont. v. State*, No. DA 14-0110 (Mont. Dist. Ct. Jan. 31, 2014), available at <http://go.nationalpartnership.org/site/DocServer/RHW.Courts.PlannedParenthoodMontana.pdf?docID=13081> [<http://perma.cc/7KV9-P94Y>] (on appeal to state supreme court).

141 *Id.*

142 *Planned Parenthood of the Great Nw. v. Alaska*, No. 3AN-10-12279 CI, 2012 WL 4835506 (Alaska Super. Ct. Oct. 8, 2012); *Complaint for Declaratory and Injunctive Relief, Planned Parenthood of the Great*

Alaska's public funding regulation and statute would limit the availability of public funding for abortions in violation of a 2001 Alaska Supreme Court ruling that the state's Medicaid system may not discriminate in the type of care it provides.<sup>143</sup> The Superior Court of Alaska has issued a preliminary injunction against this funding regulation.<sup>144</sup>

Of the remaining challenges in seven states, four involve laws that restrict medication abortions. A North Dakota trial court judge issued a strong opinion in support of a permanent injunction blocking a law that essentially bans all medication abortions.<sup>145</sup> In Iowa and Wisconsin, the legislature prohibited physicians from prescribing medication to induce abortions after electronic (rather than in-person) consultation.<sup>146</sup> A state challenge to an Arizona medication abortion restriction has been stayed pending a parallel federal challenge.<sup>147</sup> State court challenges are pending against Kansas and Virginia TRAP laws that impose onerous and expensive licensing requirements for abortion clinics.<sup>148</sup> Finally, a Georgia trial court temporarily enjoined a law that banned doctors from performing

---

Nw. v. Alaska, No. 3AN-10-12279CI (Alaska Super. Ct. Oct. 8, 2012), *available at* [https://www.aclu.org/files/assets/11.19.10\\_Complaint\\_for\\_Declaratory\\_and\\_Injunctive\\_Relief.pdf](https://www.aclu.org/files/assets/11.19.10_Complaint_for_Declaratory_and_Injunctive_Relief.pdf) [<http://perma.cc/PU8Z-ZDWA>].

143 Complaint, *Planned Parenthood of the Great Nw. v. Streuer*, No. 3AN-14-04711 CI (Alaska Super. Ct. filed Jan. 29, 2014), *available at* [https://www.aclu.org/sites/default/files/assets/complaint\\_5.pdf](https://www.aclu.org/sites/default/files/assets/complaint_5.pdf) [<http://perma.cc/7ZLQ-DCND>].

144 *Planned Parenthood of the Great Nw. v. Streuer*, No. 3AN-14-04711 CI (Alaska Super. Ct. Feb. 4, 2014), *available at* <https://www.aclu.org/reproductive-freedom/planned-parenthood-great-northwest-v-streuer-order-plaintiffs-motion-temporary> [<http://perma.cc/F8W6-2Q9F>].

145 *MKB Mgmt. Corp. v. Burdick*, No. 09-2011-CV-02205 (N.D. Dist. Ct. July 15, 2013), *available at* [http://jurist.org/paperchase/2013-07-15\\_MKBvBurdick\\_Perm\\_Injunction.pdf](http://jurist.org/paperchase/2013-07-15_MKBvBurdick_Perm_Injunction.pdf) [<http://perma.cc/4Z4U-WARK>], *aff'd*, 855 N.W.2d. 31 (N.D. 2014).

146 Jessica Mason Pielko, *Planned Parenthood Files Appeal Against Ruling in Case Challenging Iowa Telemedicine Abortion Ban*, RH REALITY CHECK (Apr. 29, 2014, 12:14 PM), <http://rhrealitycheck.org/article/2014/04/29/planned-parenthood-files-appeal-ruling-case-challenging-iowa-telemedicine-abortion-ban/> [<http://perma.cc/F4F4-XTHR>]; *Wisconsin Judge Clarifies Abortion Law*, WXOW (Aug. 1, 2014, 2:22 PM), <http://www.wxow.com/story/26045755/2014/07/17/wisconsin-judge-sides-with-planned-parenthood> [<http://perma.cc/X485-K86C>].

147 Jamie Ross, *Arizona Sued Over Medical Abortion Law*, COURTHOUSE NEWS SERV. (Apr. 11, 2014, 2:49 AM), <http://www.courthousenews.com/2014/04/11/66986.htm> [<http://perma.cc/83EC-DMK3>].

148 *Falls Church Med. Ctr v. Va. Bd. of Health*, No. CI 13-1362 (Va. Cir. Ct. June 10, 2013), *available at* [http://go.nationalpartnership.org/site/DocServer/RHW\\_Courts\\_Falls\\_Church\\_Med\\_Ctr\\_v\\_VA\\_Board\\_of\\_Health.pdf](http://go.nationalpartnership.org/site/DocServer/RHW_Courts_Falls_Church_Med_Ctr_v_VA_Board_of_Health.pdf) [<http://perma.cc/Z3RE-VZQ5>]; *State: Hodes & Nauser, MDs, P.A. et al. v. Robert Moser, M.D. et al.*, CTR. FOR REPROD. RIGHTS (Nov. 9, 2011), <http://reproductiverights.org/en/case/state-hodes-nauser-mds-pa-et-al-v-robert-moser-md-et-al> [<http://perma.cc/6L4D-FPX6>].

abortions twenty weeks after fertilization.<sup>149</sup>

Absent some significant change, advocates cannot hope to make widespread progress in the state courts and must continue to worry about the serious risk of bringing a case that will create bad law. The change necessary includes improved public and judicial understanding of the harms of TRAP laws and other restrictions and the value of reproductive control to women and families. Any increase in state protection for women could inform rulings in other states, as well as ultimately in the U.S. Supreme Court.

At least two conceptual issues could benefit from additional attention from state courts and, in the meantime, from advocates and academics. First, what is the appropriate standard of judicial review? Although the U.S. Supreme Court currently uses the *Casey* “undue burden” standard,<sup>150</sup> from *Roe* in 1973 through *Webster* in 1989 it used the more appropriate, traditional “strict scrutiny” standard that federal courts generally use to protect fundamental rights.<sup>151</sup> State courts are entirely free to continue to apply the more protective strict scrutiny standard under their own constitutions, but they rarely do. State courts should be encouraged to adhere to the initial and more protective standard, especially given this rare event where the U.S. Supreme Court has lowered the standard of protection for a right previously regarded as fundamental.

Equally important as which standard state courts adopt is how they apply the standard. State courts could evaluate “undue burdens” with care and understanding and thereby ultimately guide the U.S. Supreme Court to protect reproductive rights with due regard for the practical, cumulative effects of restrictions designed to appear innocuous or even beneficial to women, but with the actual purpose and effect of making abortion services unavailable.<sup>152</sup> Thus far, the lower federal courts have split on how to apply the undue burden standard. State courts should follow the lead of the U.S. District Court for the Middle District of Alabama, which recently applied the undue burden standard to strike down an admitting privileges requirement, considering “whether, examining the regulation in its real-world context, the obstacle is more significant than is warranted by the State’s

---

149 *Lathrop v. Deal*, No. 2012-CV-224423 (Ga. Super. Ct. Dec. 21, 2012), available at [https://www.aclu.org/files/assets/12.21.12\\_order\\_granting\\_interlocutory\\_injunctive\\_relief.pdf](https://www.aclu.org/files/assets/12.21.12_order_granting_interlocutory_injunctive_relief.pdf) [<http://perma.cc/EY7B-7SBL>].

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

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

152 See *supra* note 33.

justifications for the regulation.”<sup>153</sup> In reaching its conclusion, the court considered the following circumstances: a history of severe anti-abortion violence and destruction, including the murder of Dr. David Gunn; a decrease in the number of providers from twelve in 2001 to five in 2014; a nationwide scarcity of physicians who perform abortions; and the economic and psychological burdens on women, which would fall more harshly on certain identifiable groups of women.<sup>154</sup> The U.S. Court of Appeals for the Seventh Circuit similarly considered the relevance of other factors, including medical need, to the “undue burden” assessment: “The feebler the medical grounds, the likelier the burden, even slight, to be ‘undue’ in the sense of disproportionate or gratuitous.”<sup>155</sup>

In addition to the appropriate standard of review, state courts could develop additional conceptual bases for protecting reproductive rights, in particular by recognizing reproductive autonomy as vital to women’s equality. In 1973, the *Roe* Court could not realistically have understood the Texas criminal abortion ban as a form of sex discrimination reflecting sex stereotypes. As recently as 1961, the Court had cited women’s special role as mothers to uphold their discriminatory exclusion from mandatory jury service on the basis of their sex.<sup>156</sup> As of 1973, it had not yet held that women even are entitled to heightened protection under the Constitution’s Equal Protection Clause for the most blatant forms of sex discrimination. That came in 1976, with the adoption of “intermediate scrutiny” for sex discrimination in *Craig v. Boren*.<sup>157</sup> In between, in 1974, the Court wrote that discrimination on the basis of pregnancy was not sex discrimination—just discrimination between pregnant persons and non-pregnant persons.<sup>158</sup> Even forty years later, a majority of the Justices fail to recognize the sex equality dimension of government actions that prevent women from being able to decide whether and when to become mothers. In 2007, Justice Ruth Bader Ginsburg’s four-Justice dissent in *Gonzales v. Carhart* chastised the five-Justice majority for using reasoning in upholding the federal “partial birth” abortion ban that “reflects ancient notions about women’s place in the family and under the Constitution—ideas that have long since been

---

153 *Planned Parenthood Se., Inc. v. Strange*, No. 2:13cv405-MHT, 2014 WL 3809403, at \*9 (M.D. Ala. Aug. 4, 2014).

154 *Id.* The court noted that this approach to applying the undue burden test had support in some but not all federal courts applying the undue burden standard. *Id.* at \*7–8 (discussing other courts’ rulings).

155 *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2841 (2014).

156 *Hoyt v. Florida*, 368 U.S. 57 (1961).

157 429 U.S. 190 (1976).

158 *Geduldig v. Aiello*, 417 U.S. 484 (1974).

discredited.”<sup>159</sup> Justice Ginsburg famously suggested in 1985, before she had joined the Court, that the Equal Protection Clause might provide a stronger basis than the Due Process Clause for protecting women from abortion restrictions.<sup>160</sup> State court rulings that carefully and persuasively consider their own constitutional guarantees of equality—whether in the form of equal protection guarantees, equal rights amendments, or equal privileges and immunities provisions—also could guide the U.S. Supreme Court to appreciate the full extent of constitutional harms.

#### IV. State Courts and Reproductive Rights Beyond Challenges to Abortion Restrictions

As the U.S. Supreme Court in *Roe v. Wade* correctly noted, “the unborn have never been recognized in the law as persons in the whole sense.”<sup>161</sup> From early on, the assault on *Roe* has included efforts to change the legal status of the unborn more generally. For decades, a principal strategy for recriminalizing abortion has been to seek the creation of separate legal rights for fertilized eggs, embryos, and fetuses in as many contexts as possible, under state and federal law.<sup>162</sup> In their most sweeping form, proposed amendments to the federal and state constitutions would confer constitutional personhood from the moment of conception. Thus far, all such efforts at constitutional personhood have failed,<sup>163</sup> often following expensive campaigns in which supporters of reproductive justice seek to educate about the far-reaching consequences that could result not just in the abortion context, but also for contraception, assisted reproductive technologies, and the rights of women to bodily integrity and equal personhood.<sup>164</sup> Proposed personhood amendments, however,

159 550 U.S. 124, 185 (2007) (Ginsburg, J., dissenting).

160 Ginsburg, *supra* note 56.

161 410 U.S. 113, 162 (1973).

162 See, e.g., Lynn D. Wardle, *Restricting Abortion Through Legislation*, in *TO RESCUE THE FUTURE* 101, 108 (Dave Andrusko ed., 1983) (describing how state legislatures can contribute to overturning *Roe v. Wade*, including by enacting legislation “to extend the maximum permissible protection for the unborn”); Dawn E. Johnsen, Note, *The Creation of Fetal Rights: Conflicts with Women’s Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599 (1986).

163 RHRC Data: Personhood, RH REALITY CHECK (Apr. 8, 2014), <http://data.rhrealitycheck.org/law-topic/personhood/> [<http://perma.cc/X66K-U6VW>].

164 Lynn M. Paltrow, *Roe v. Wade and the New Jane Crow: Reproductive Rights in the Age of Mass Incarceration*, 103 AM. J. PUB. HEALTH 17 (2013); ACOG Statement on “Personhood Measures,” AM. CONGRESS OF OBSTETRICIANS & GYNECOLOGISTS (Feb. 10, 2012), [http://www.acog.org/About\\_ACOG/News\\_Room/News\\_Releases/2012/Personhood\\_Measures](http://www.acog.org/About_ACOG/News_Room/News_Releases/2012/Personhood_Measures) [<http://perma.cc/XQ3D-6JZJ>] (summarizing potential effects of

persist and appeared on the ballot in November 2014 in North Dakota and Colorado<sup>165</sup>—notwithstanding the voters' rejections of Colorado personhood amendments in 2008 and 2010.

More pernicious, less sweeping efforts abound to create separate rights for developing fetuses and embryos in a variety of circumstances under state and federal law. Some of these efforts are framed as for the purpose of protecting pregnant women. A principal example are feticide laws in thirty-eight states that typically apply when a pregnant woman is the target of a vicious assault—but that define the victim as the unborn, rather than the woman.<sup>166</sup> Other efforts identify the pregnant woman herself as the direct target of state prosecutors, courts, or legislatures.<sup>167</sup> These types of legal actions result in published

---

adoption); Jennifer Preston, *Infertility Group Battles Anti-Abortion Bills in Virginia and Other States*, *The Lede*, N.Y. TIMES (Feb. 24, 2012), <http://thelede.blogs.nytimes.com/2012/02/24/infertility-group-battles-anti-abortion-bills-in-virginia-and-other-states/> [<http://perma.cc/N39E-CSQA>]; cf. *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014) (holding certain for-profit employers have a right to deny health care coverage to employees based on the employer's religious opposition to contraception, in some instances premised on a belief that some forms of contraception may operate by preventing implantation of a fertilized ovum).

165 S. Con. Res. 4009, 63d Leg. Assemb. (N.D. 2013), available at <http://www.legis.nd.gov/assembly/63-2013/documents/13-3060-02000.pdf?20141002135309> [<http://perma.cc/M72P-RW9S>]; LEGISLATIVE COUNCIL OF THE COLO. GEN ASSEMBLY, 2014 STATE BALLOT INFORMATION BOOKLET 1–6 (2014) (discussing proposed Amendment 67); *Ballot Measures: 2014 Anti-Choice Ballot Measures: Colorado Amendment 67*, NARAL PRO-CHOICE AM., <http://www.prochoiceamerica.org/government-and-you/state-governments/ballot-measures/> [<http://perma.cc/LK4-GJZ3>] (last visited Oct. 11, 2014). Both proposed amendments ultimately failed. Nathalie Baptiste, *Anti-Choice 'Personhood' Measures Fail in North Dakota and Colorado*, AM. PROSPECT (Nov. 5, 2014), <http://prospect.org/article/anti-choice-personhood-measures-fail-north-dakota-and-colorado> [<http://perma.cc/5HDK-TBY4>].

166 *Fetal Homicide Laws*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx> (last updated Feb. 2013) [<http://perma.cc/8Z8J-TVHT>]; Imani Gandy, *Feticide Laws Advance 'Personhood,' Punish Pregnant Women*, RH REALITY CHECK (Jan. 9, 2014, 8:44 AM), <http://rhrealitycheck.org/article/2014/01/09/feticide-laws-advance-personhood-punish-pregnant-women/> [<http://perma.cc/M9YX-UQ3H>]; Kate Sheppard, *Pregnant? That Might Get You Arrested*, MOTHER JONES (Jan. 16, 2013, 10:43 AM), <http://www.motherjones.com/mojo/2013/01/study-women-denied-legal-rights-because-pregnancy> [<http://perma.cc/B5YT-ANMH>].

167 See, e.g., Lynn Paltrow, *Pregnant Drugs Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALBANY L. REV. 999, 1035–38 (1999); Nora Caplan-Bricker, *How the "Crack Baby" Scare Armed the Pro-Life Cause*, NEW REPUBLIC (Oct. 29, 2013), <http://www.newrepublic.com/article/115396/how-crack-baby-scare-armed-pro-life-cause> [<http://perma.cc/9BRN-3AYA>] (“[T]he Wisconsin [‘Cocaine Mom’] law was ushered through legislatures in 1997 by anti-abortion lobbyists, not drug crusaders. It missed the war on cocaine by almost a decade, and was written after the idea that drug abuse was uniquely damaging to fetuses had been roundly debunked. . . . Rather, the law Beltran is challenging—along with others of its kind—was a sidelong way of codifying the argument that a fetus is a person with rights separate from its mother’s.”).

judicial opinions in far fewer cases than challenges to abortion restrictions, but National Advocates for Pregnant Women (NAPW) published a comprehensive study in April 2014 examining 413 such cases between 1973 and 2005.<sup>168</sup> NAPW also has identified 250 additional cases since 2005.<sup>169</sup> The following excerpt from the report's executive summary conveys why the composition of state courts is critical to safeguarding women's rights and health, particularly women of color and poor women, who are disproportionately the victims of these discriminatory actions:

In each of the 413 cases, pregnancy was a necessary element and the consequences included: arrests; incarceration; increases in prison or jail sentences; detentions in hospitals, mental institutions and drug treatment programs; and forced medical interventions, including surgery. Data showed that state authorities have used post-Roe measures including feticide laws and anti-abortion laws recognizing separate rights for fertilized eggs, embryos and fetuses as the basis for depriving pregnant women – whether they were seeking to end a pregnancy or go to term – of their physical liberty. The findings make clear that if so called “personhood” measures are enacted, not only will more women who have abortions be arrested, such measures would create the legal basis for depriving all pregnant women of their status as full persons under the law.<sup>170</sup>

This study also makes clear that efforts aimed at public opinion and political engagement are critical, both in bolstering state courts in their ability to protect against infringement of rights and in building democratic pressure against the punitive laws and executive actions that drive these cases.

Several examples just from 2014 illustrate the diversity of contexts in which state courts have confronted efforts to specially punish or control women on the basis of pregnancy. A New Jersey woman was reported to child and family service authorities for potential abuse

---

168 Paltrow & Flavin, *supra* note 15.

169 *Id.*

170 *Executive Summary: Paltrow & Flavin, “Arrests of and forced interventions on pregnant women in the United States (1973-2005): The implications for women’s legal status and public health,” Journal of Health Politics, Policy and Law*, NAT’L ADVOCATES FOR PREGNANT WOMEN (Jan. 25, 2013), [http://advocatesforpregnantwomen.org/main/publications/articles\\_and\\_reports/executive\\_summary\\_paltrow\\_flavin\\_jhpl\\_article.php](http://advocatesforpregnantwomen.org/main/publications/articles_and_reports/executive_summary_paltrow_flavin_jhpl_article.php) [<http://perma.cc/U9WS-QYAJ>]; see also Paltrow & Flavin, *supra* note 15.

or neglect for receiving medically prescribed methadone treatment while pregnant.<sup>171</sup> A New York woman was convicted of second-degree manslaughter and sentenced to three to nine years in prison for being involved in a car accident while eight-months pregnant; a jury acquitted her of any wrongdoing with respect to the deaths of the driver and passenger of the other car involved in the accident and thus declined to find that she was under the influence of any substance, yet found her guilty of manslaughter due to the loss of her pregnancy.<sup>172</sup> A Utah woman was charged with felony child endangerment for continuing to use illegal drugs while pregnant due to her methamphetamine addiction.<sup>173</sup> A sixteen-year-old Mississippi woman was charged with depraved heart murder when she suffered a stillbirth allegedly following illegal drug use.<sup>174</sup> Two Indiana women were charged with feticide, one for attempting suicide while pregnant,<sup>175</sup> and another for allegedly attempting to self-abort.<sup>176</sup> A Texas court finally ruled in favor of a pregnant woman who had been

---

171 D.Y.F.S. v. Y.N., 66 A.3d 237, 243 (N.J. Super. Ct. App. Div. 2013); *D.Y.F.S. v. Y.N.*, ACLU OF N.J., <https://www.aclu-nj.org/legaldocket/dyfs-v-yn> [http://perma.cc/K487-7ERQ] (last visited Oct. 11, 2014).

172 *People v. Jorgensen*, 113 A.D.3d 793 (N.Y. App. Div. 2014), *granting leave to appeal*, 23 N.Y.3d 1063, 2014 WL 4674691 (N.Y. Aug. 5, 2014). After the appellate division upheld the judgment against Jorgensen in January of 2014, the New York Court of Appeals (New York's highest court) accepted this case for review in the Spring of 2015 term.

173 Erin Albery, *Utah Mom Charged with Meth Use While Pregnant*, SALT LAKE TRIB. (Apr. 22, 2014, 8:16 PM), <http://www.sltrib.com/sltrib/news/57847739-78/baby-police-pregnant-woman.html.csp> [http://perma.cc/T7PU-3GDS]; Tara Culp-Ressler, *Utah Mom Charged with a Felony for Using Meth While Pregnant*, THINK PROGRESS (Apr. 22, 2014, 4:18 PM), <http://thinkprogress.org/health/2014/04/22/3429504/utah-felony-meth-pregnant/> [http://perma.cc/T3CP-4KTS]; *Pregnancy Under Attack: Utah Mom Charged with Felony for Using Drugs While Pregnant*, PUB. HEALTH WATCH (Apr. 23, 2014), <http://publichealthwatch.wordpress.com/2014/04/23/pregnancy-under-attack-utah-mom-charged-with-felony-for-using-drugs-while-pregnant/> [http://perma.cc/D42W-EPZA].

174 Due to a lack of scientific support for the claim that she used a criminalized drug while pregnant, charges were ultimately dismissed. *Mississippi Murder Charge Against Pregnant Teen Dismissed*, NAT'L ADVOCATES FOR PREGNANT WOMEN (Apr. 4, 2014), [http://advocatesforpregnantwomen.org/blog/2014/04/mississippi\\_murder\\_charge\\_agai.php](http://advocatesforpregnantwomen.org/blog/2014/04/mississippi_murder_charge_agai.php) [http://perma.cc/8UA8-4KKT]; Kate Sheppard, *Mississippi Could Soon Jail Women for Stillbirths, Miscarriages*, MOTHER JONES (May 23, 2013, 6:00 AM), <http://www.motherjones.com/politics/2013/05/buckhalter-mississippi-stillbirth-manslaughter> [http://perma.cc/Y7QN-CM2U].

175 After spending over two years in prison awaiting trial on charges of murder and attempted feticide, Bei Bei Shuai pleaded guilty to criminal recklessness, a class B misdemeanor, and was released upon a sentencing of 178 days time served. Susan Guyett, *Murder Charges Dropped Against Indiana Woman Who Ate Rat Poison While Pregnant*, REUTERS (Aug. 2, 2013).

176 Purvi Patel has been arrested and charged with negligent treatment of a child and feticide. Sally Kohn, *Indiana 'Feticide' Charge Is the Latest Fallout From States' Strict Anti-Abortion Laws*, DAILY BEAST (Aug. 27, 2014), <http://www.thedailybeast.com/articles/2014/08/27/indiana-feticide-charge-is-the-latest-fallout-from->



pronounced legally dead but was kept on “life support” for eight weeks against the wishes of her family and the directives in her living will.<sup>177</sup> A Pennsylvania woman was arrested for obtaining medication that would induce abortion at the request of her pregnant daughter and ultimately was charged with a felony count for medical consultation and judgment and with misdemeanors for simple assault and endangering the welfare of a child.<sup>178</sup> Finally, a New York woman, the mother of three children, is suing a hospital for performing a cesarean section against her express wishes, which resulted in her suffering a perforated bladder.<sup>179</sup>

In all contexts, the ultimate goal and cumulative effect of legislating, litigating, and prosecuting for the recognition of fetal personhood is to change societal attitudes in favor of a conception of fertilized eggs, embryos, and fetuses, at all stages of development, as entities independent of pregnant women. This goal, in turn, subjects pregnant women to state control and punishment based on perceived fetal interests that the government

---

states-strict-anti-abortion-laws.html [http://perma.cc/M7BC-3DF7].

177 Manny Fernandez & Erik Eckholm, *Pregnant, and Forced to Stay on Life Support*, N.Y. TIMES (Jan. 7, 2014), <http://www.nytimes.com/2014/01/08/us/pregnant-and-forced-to-stay-on-life-support.html> [http://perma.cc/XH2R-QPHC]; Manny Fernandez, *Judge Orders Hospital to Remove Pregnant Woman From Life Support*, N.Y. TIMES (Jan. 24, 2014), <http://www.nytimes.com/2014/01/25/us/judge-orders-hospital-to-remove-life-support-from-pregnant-woman.html> [http://perma.cc/W9MV-48B5]; *Hard to Imagine a More Absolute Denial of a Woman's Personhood*, NAT'L ADVOCATES FOR PREGNANT WOMEN (Jan. 19, 2014), [http://advocatesforpregnantwomen.org/blog/2014/01/hard\\_to\\_imagine\\_a\\_more\\_absolut.php](http://advocatesforpregnantwomen.org/blog/2014/01/hard_to_imagine_a_more_absolut.php) [http://perma.cc/Q6W-8BQU].

178 Robin Marty, *Mom Charged For Helping Daughter Obtain Illegal Abortion: Is This Our New Reality?*, CARE2 (Feb. 16, 2014), <http://www.care2.com/causes/mom-charged-for-helping-daughter-obtain-illegal-abortion-is-this-our-new-reality.html> [http://perma.cc/RV45-RAHL]; Tara Murtha, *Pennsylvania Woman Arrested for Ordering Daughter Abortion-Inducing Pills Online*, RH REALITY CHECK (Feb. 20, 2014), <http://rhrealitycheck.org/article/2014/02/20/pennsylvania-woman-arrested-ordering-daughter-abortion-inducing-pills-online/> [http://perma.cc/NAC4-FZB3]. For a discussion of how clinic closures have prompted women around the world to resort to obtaining (legally or illegally) medicine to induce abortion, see Emily Bazelon, *The Dawn of the Post-Clinic Abortion*, N.Y. TIMES MAG. (Aug. 28, 2014), <http://www.nytimes.com/2014/08/31/magazine/the-dawn-of-the-post-clinic-abortion.html> [http://perma.cc/9FK4-8EFB].

179 Amended Verified Complaint, *Dray v. Staten Island Univ. Hosp.*, No. 5005510/2014 (N.Y. Sup. Ct. filed Apr. 11, 2014), available at <https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=o8epZVpMGIUuC/0zwmwfp&system=prod> [http://perma.cc/49E5-AFLX]; Anemona Hartocollis, *Mother Accuses Doctors of Forcing C-Section and Files Suit*, N.Y. TIMES (May 16, 2014), <http://www.nytimes.com/2014/05/17/nyregion/mother-accuses-doctors-of-forcing-a-c-section-and-files-suit.html> [http://perma.cc/RR2K-VKUL].

privileges above those of the woman.<sup>180</sup> Although largely motivated by anti-abortion ends, the injurious recognition of separate rights for fertilized eggs, embryos, and fetuses extends to circumstances in which a woman desires to continue a pregnancy and bear a child. Rather than support women's strong interests in having a healthy pregnancy and giving birth to a healthy child when she chooses to continue a pregnancy, the government, through the creation of separate rights for embryos and fetuses, creates a potentially adversarial legal relationship between a woman and the State.<sup>181</sup> Because the recognition of this separate legal status is actually counterproductive to healthy pregnancies and children, this approach is opposed by major medical and public health organizations, including the American Medical Association, the American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, the American Public Health Association, the American Psychiatric Association, and the National Association of Public Child Welfare Administrators, among others.<sup>182</sup>

Thus far, in the vast majority of cases targeting pregnant women, state appellate courts have rejected these efforts, which typically entail requests to expand judicially, beyond their plain language and legislative intent, existing criminal and civil laws to make pregnant women legally liable for the outcome of their pregnancies. One notable example led to an

---

180 Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1315 (1991) (“[T]he only point of recognizing fetal personhood, or a separate fetal entity, is to assert the interests of the fetus against the pregnant woman.”); Maya Manian, *Lessons From Personhood’s Defeat: Abortion Restrictions and Side Effects on Women’s Health*, 74 OHIO ST. L.J. 75, 78 (2013) (“After years of an incremental approach to restricting access to abortion care, the movement to establish legal personhood at the moment of conception has recently revived. . . . While the language and form of these proposals vary from state to state (legislative bills . . . versus ballot initiatives . . .), each essentially attempts to secure legal rights for pre-born human beings starting from the moment of fertilization or conception.”).

181 See Dawn E. Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women’s Liberty*, 43 HASTINGS L.J. 569, 571 (1992); Lynn M. Paltrow, *PersonhoodUSA: Promoting a Radical, Fetal-Separatist Agenda*, HUFFINGTON POST (Oct. 25, 2010), [http://www.huffingtonpost.com/lynn-m-paltrow/personhoodusa-promoting-a\\_b\\_773572.html](http://www.huffingtonpost.com/lynn-m-paltrow/personhoodusa-promoting-a_b_773572.html) [<http://perma.cc/B9FC-CSB8>].

182 For a compilation of statements of medical and public health organizations regarding the prosecution and punishment of pregnant women, see NAT’L ADVOCATES FOR PREGNANT WOMEN, *supra* note 17; see also AM. COLL. OF OBSTETRICS & GYNECOLOGISTS, COMMITTEE OPINION: SUBSTANCE ABUSE REPORTING & PREGNANCY: THE ROLE OF THE OBSTETRICIAN–GYNECOLOGIST (2011) (reaffirmed 2012), available at <http://www.acog.org/~media/Committee%20Opinions/Committee%20on%20Health%20Care%20for%20Underserved%20Women/co473.pdf?dmc=1&ts=20120317T0442562459> [<http://perma.cc/WZX2-EUXU>]; Paltrow & Flavin, *supra* note 15, at 331 (citing over 250 professional and advocacy organizations and individual experts who have joined in amicus curiae briefs in such cases on the side of women); Erik Eckholm, *Specialists Join Call for Veto of Drug Bill*, N.Y. TIMES (Apr. 14, 2014), <http://www.nytimes.com/2014/04/15/us/politics/specialists-join-call-for-veto-of-drug-bill.html> [<http://perma.cc/LJ36-5JAW>].

opinion of the highest court governing the District of Columbia, wherein the D.C. Court of Appeals reversed a court-ordered cesarean section—but not until after the surgery had been performed and contributed to the death of the pregnant woman, who was ill with cancer and did not survive the surgery.<sup>183</sup> The baby was not viable and died two days later. The court declared: “[E]very person has the right, under the common law and the Constitution, to accept or refuse medical treatment.”<sup>184</sup>

In several published opinions, however, state courts have ruled against women in sweeping decisions that articulate a legal theory for state control of women that would support overturning *Roe* and also undermine women’s autonomy and bodily integrity—essentially, their full legal personhood—on the basis of pregnancy or even the capacity to become pregnant. For example, on April 18, 2014, the Alabama Supreme Court held that the word “child” in a state law includes fertilized eggs such that women may be arrested for using a controlled substance while pregnant, even in the absence of harm.<sup>185</sup> Two concurring justices, writing separately, went beyond even this sweeping opinion, relying on biblical citations and God’s authority to call for *Roe* to be overturned<sup>186</sup> and equating a woman who has an abortion to a “killer.”<sup>187</sup> Governmental authority to deprive women of rights and liberty because of hypothetical harm to their future children creates a slippery slope that has led already to forced medical interventions, civil commitment, and criminal convictions that have no analogue outside of pregnancy and cut to the core of self-determination. Independent state courts are essential to a proper interpretation of state statutes never intended to apply to such circumstances and to the development of common law and constitutional principles that respect individual autonomy and advance reproductive justice.

## V. Challenges and Recommendations

Reproductive rights advocates toil throughout the fifty states to protect women from scores of new pregnancy-based infringements imposed each year in what seems a bit like a cruel game of Whac-a-Mole, the arcade game where a player uses a mallet to strike down “moles” that unceasingly and more frequently pop up from holes despite the

---

183 *In re A.C.*, 573 A.2d 1235 (D.C. 1990) (en banc).

184 *Id.* at 1247.

185 *Ex parte Hicks*, No. 1110620, 2014 WL 1508698 (Ala. Apr. 18, 2014).

186 *Id.* (Moore, J., concurring specially).

187 *Id.* (Parker, J., concurring specially).

player's best efforts. Consider abortion restrictions: in the ten years from 2001 to 2010, states enacted 189 new abortion restrictions.<sup>188</sup> In the three years from 2011 to 2013, they enacted 205 restrictions.<sup>189</sup> Consider one state, South Dakota, where anti-abortion forces worked to close the state's single abortion clinic.<sup>190</sup> Not content with the burdens of a twenty-four-hour "waiting period" that often forces women to make two long trips, in 2011 the legislature tripled the mandatory delay to seventy-two hours.<sup>191</sup> This restriction will prove difficult for many women in a large state with one clinic, and terribly so for women struggling financially.<sup>192</sup> Even worse, the legislature decreed that during this delay, women must endure a visit to a "crisis pregnancy center"<sup>193</sup> for anti-abortion "counseling" aimed at talking them out of having an abortion, which often involves the use of medically inaccurate information.<sup>194</sup> Fortunately, a federal district court has temporarily enjoined the portion of the law forcing women to visit a crisis pregnancy center.<sup>195</sup> In 2013, the South Dakota legislature amended what already was the most draconian waiting-period law in the country to declare that weekends and holidays would not count toward the three days; on holiday weekends, the mandatory delay would be six days.<sup>196</sup>

---

188 NASH ET AL., *supra* note 7.

189 *Id.*

190 Alissa Quart, *The Red State Attack on Abortion Rights*, REUTERS (Apr. 30, 2013), <http://blogs.reuters.com/great-debate/2013/04/30/the-red-state-attack-on-abortion-rights/> [<http://perma.cc/D7CG-EX3A>].

191 H.B. 1217, 86th Leg., Reg. Sess. (S.D. 2011), available at <http://legis.sd.gov/docs/legsession/2011/Bills/HB1217HJU.pdf> [<http://perma.cc/SX4A-Z7A6>].

192 See, e.g., Brian Jackson, *South Dakota Legislature Passes Bill Requiring 72-Hour Waiting Period for Abortions*, JURIST (Mar. 4, 2011, 12:05 PM), <http://jurist.org/paperchase/2011/03/south-dakota-legislature-passes-bill-requiring-72-hour-waiting-period-for-abortions.php> [<http://perma.cc/GW3Y-BZXE>]; Kate Sheppard, *South Dakota Advances Bill Mandating Controversial Anti-Abortion Counseling*, MOTHER JONES (Feb. 22, 2011, 9:13 PM), <http://www.motherjones.com/mojo/2011/02/south-dakota-abortion-crisis-pregnancy-center-bill> [<http://perma.cc/8WJ2-92GA>].

193 Sheppard, *supra* note 192.

194 A.G. Sulzberger, *Women Seeking Abortions in South Dakota to Get Anti-Abortion Advice*, N.Y. TIMES (Mar. 22, 2011), <http://www.nytimes.com/2011/03/23/us/23sdakota.html> [<http://perma.cc/H5QY-V7FM>].

195 Planned Parenthood Minn., N.D., S.D. v. Daugaard, 799 F. Supp. 2d 1048 (D.S.D. 2011); Jodi Jacobson, *Court Blocks Anti-Choice Legislation in South Dakota*, RH REALITY CHECK (June 30, 2011), <http://rhrealitycheck.org/article/2011/06/30/court-blocks-antichoice-legislation-south-dakota-0/> [<http://perma.cc/L9TC-6Y4Y>].

196 GUTTMACHER INST., STATE POLICIES IN BRIEF AS OF JULY 1, 2014, at 2 (2014), [http://www.guttmacher.org/statecenter/spibs/spib\\_MWPA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf) [<http://perma.cc/3Q8M-QXU8>] (providing a chart indicating the South Dakota abortion restrictions that impose seventy-two-hour waiting periods that exclude holidays and weekends).

James Bopp, leader of both anti-abortion and anti-campaign finance regulation efforts, described the strategy behind this shotgun legal assault in a 2007 memo coauthored with Richard Coleson:

Efforts to educate, legislate, and litigate not only keep the abortion issue alive and change hearts and minds for long-term benefit, but they also translate into more disfavor for all abortions, which in turn reduces abortions. This is also true of such other “incremental” efforts as clinic regulations (which often shut down clinics), parental involvement, waiting periods, and informed consent. . . . The Supreme Court’s current makeup assures that a declared federal constitutional right to abortion remains secure for the present. . . . Eschewing incremental efforts to limit abortion where legally and politically possible makes the . . . strategic error of believing that the pro-life issue can be kept alive without such incremental efforts.<sup>197</sup>

Efforts to respond to those that seek to “shut down clinics,” and instead to work to advance reproductive justice for all, similarly must be multi-pronged and “educate, legislate, and litigate.” This essay concludes with four recommendations for encouraging state courts to play their full independent role in the protection of women’s reproductive rights.

First, and most obvious, affirmative litigation and the defense of women and reproductive health providers in the state courts must continue and should be pursued with an eye toward public education. As frustrating as it can be to combat the anti-abortion incremental strategy, reproductive rights advocates know their efforts are not a futile game. For every law enjoined and every clinic door kept open—and there have been many—numerous women and families retain their autonomy and dignity in making some of the most important decisions of their lives. Where the state court victory is built on an independent interpretation of a state constitution, that precedent may lay the groundwork for future rulings within that state and beyond, informing other state judiciaries and ultimately the U.S. Supreme Court. For example, the Supreme Court looks to the states when considering the “history and tradition” that informs interpretation of the U.S. Constitution’s protection of “liberty,” and recent developments in the states are most relevant to our evolving understandings, as Justice Kennedy wrote for the majority in *Lawrence v. Texas*:

Had those who drew and ratified the Due Process Clauses of the Fifth

---

197 Bopp & Coleson, *supra* note 33, at 6.

Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.<sup>198</sup>

We also, however, must address a core and limiting reality: many state courts are unreceptive or even hostile to reproductive rights claims, particularly in “red” and “purple” states where damaging laws and actions are most prevalent. The often-politicized method of judicial selection provides a partial explanation. Unlike federal judges who enjoy a measure of independence thanks to lifetime tenure guaranteed under the U.S. Constitution, most states choose their judges at least in part by popular election, making judges far more vulnerable to harmful political influences.<sup>199</sup> Thirty-nine states conduct elections of some kind for state judges,<sup>200</sup> including twenty-two that hold competitive elections<sup>201</sup> and others that require retention votes.<sup>202</sup> Judges who must run for office are vulnerable to the same distorting influences of money in politics that generally undermine our representative democracy and have been made worse by U.S. Supreme Court decisions that interpret the First Amendment as radically limiting the ability of Congress and state legislatures to regulate money in politics.<sup>203</sup> The same five Justices who comprise the Court’s current

---

198 539 U.S. 558, 578–79 (2003).

199 A.B.A. COAL. FOR JUSTICE, AM. JUDICATURE SOC’Y & MALIA REDDICK, JUDICIAL SELECTION: THE PROCESS OF CHOOSING JUDGES 7 (2008), [http://www.americanbar.org/content/dam/aba/migrated/JusticeCenter/Justice/PublicDocuments/judicial\\_selection\\_roadmap.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/JusticeCenter/Justice/PublicDocuments/judicial_selection_roadmap.authcheckdam.pdf) [<http://perma.cc/YVW5-5GHV>] (noting that “[t]he majority of states continue to use some form of elective system to select and/or retain their judges”).

200 ANNENBERG PUB. POL’Y CTR., JUDICIAL CAMPAIGNS: MONEY, MUDSLINGING, AND AN EROSION OF PUBLIC TRUST 1, [http://cdn.annenbergpublicpolicycenter.org/wp-content/uploads/newFactCheck\\_judicial\\_conference\\_THIS\\_IS\\_FINAL1.pdf](http://cdn.annenbergpublicpolicycenter.org/wp-content/uploads/newFactCheck_judicial_conference_THIS_IS_FINAL1.pdf) [<http://perma.cc/V6SA-QFAY>].

201 *State Court Issues: Competitive Elections*, JUSTICE AT STAKE, [http://www.justiceatstake.org/issues/state\\_court\\_issues/competitive-elections/](http://www.justiceatstake.org/issues/state_court_issues/competitive-elections/) [<http://perma.cc/C45D-P4BJ>] (last visited Oct. 11, 2014).

202 *Id.*; JUSTICE AT STAKE, 2014 STATE SUPREME COURT ELECTIONS (2014), [http://www.justiceatstake.org/file.cfm/media/news/final\\_2014\\_State\\_Supreme\\_Court\\_race\\_F5BA7FF4A753D.pdf](http://www.justiceatstake.org/file.cfm/media/news/final_2014_State_Supreme_Court_race_F5BA7FF4A753D.pdf) [<http://perma.cc/43QC-4KYZ>]; *Methods of Judicial Selection*, AM. JUDICATURE SOC’Y, [http://www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm?state](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state) [<http://perma.cc/4GY2-YNPK>] (last visited Oct. 11, 2014).

203 *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434 (2013) (five-four decision overturning limits on aggregate federal campaign contributions); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010)

bare majority in cases that invalidate campaign finance regulations also comprise the five-Justice majority that upheld the federal criminal ban on “partial birth abortions.”<sup>204</sup> *The New Politics of Judicial Elections, 2011-12*, a comprehensive report by Justice at Stake, the Brennan Center for Justice, and the National Institute on Money in State Politics, found state judicial races indistinguishable from ordinary political campaigns in many respects, including unprecedented levels of independent expenditures, difficulty identifying donors, and misleading targeting of candidates on substantive issues.<sup>205</sup> As Alicia Bannon of the Brennan Center for Justice noted in response to the 2014 announcement of a multi-million dollar Republican Party initiative to back ideologically conservative judges, “We’ve really seen judicial races become increasingly like an ordinary political contest, where judges essentially become politicians with robes.”<sup>206</sup> In many states, anti-abortion organizations have become central political players in judicial as well as other elections; they have supported or opposed judicial candidates based on predicted rulings in reproductive rights cases, and they have targeted judges for defeat in retention elections based on past rulings.<sup>207</sup>

---

(five-four decision holding that federal restrictions on independent political expenditures of corporations, associations, and labor unions violated the First Amendment). Other Supreme Court rulings of the last several years have the effect of making participation in elections by low-income Americans more difficult. *See, e.g.,* *Shelby Cnty. v. Holder*, 133 S. Ct. 594 (2012) (invalidating portions of the Voting Rights Act); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (upholding Indiana’s onerous voter identification requirement).

204 Chief Justice John Roberts and Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito comprised the majority in *McCutcheon*, 134 S. Ct. 1434, *Citizens United*, 558 U.S. 310, and *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding the Partial Birth Abortion Act of 2003).

205 ALICIA BANNON ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2011-12*, at 4 (Laura Kinney & Peter Hardin eds., 2013), <http://www.brennancenter.org/sites/default/files/publications/New%20Politics%20of%20Judicial%20Elections%202012.pdf> [<http://perma.cc/CG8E-RKVY>] (noting that the “2010 *Citizens United* ruling changed the political landscape for political contributions”). In the 2011-2012 election cycle, for example, state supreme court judicial candidates spent \$33.7 million on television advertisements. *Id.*

206 Wilson, *supra* note 22. Former Justice Sandra Day O’Connor earlier used the phrase “politicians in robes” to describe the danger of electing state court judges. John Schwartz, *Efforts Begun to End Voting for Judges*, N.Y. TIMES (Dec. 23, 2009), <http://www.nytimes.com/2009/12/24/us/24judges.html> [<http://perma.cc/A4E7-HED5>]. Another commentator noted that conservative interest groups are engaged in a strategic effort to “cement conservative policy by changing the rules of the game” and that “once [groups] successfully implemented contested elections or gubernatorial appointment, they can then fund judges and governors who will push a conservative agenda.” Zoe Greenburg, *Anti-Choice Groups Seek to Stack State Courts*, RH REALITY CHECK (July 24, 2014), <http://rhrealitycheck.org/article/2014/07/24/anti-choice-groups-seek-stack-state-courts/> [<http://perma.cc/7P4Q-Y8AJ>].

207 *See, e.g.,* Anthony Champagne, *Interest Groups and Judicial Selections*, 34 LOY. L.A. L. REV. 1391, 1402-06 (2001) (detailing the following initiatives: anti-choice groups’ 1997 \$2 million campaign to unseat two California Supreme Court justices based on their decision invalidating a state parental consent law; a 1990 campaign against the Florida chief justice because of a decision to strike a parental consent law; and a

Attention to the method of judicial selection, therefore, is a second essential component in promoting independent state courts that will fulfill their core responsibilities to protect rights and uphold state constitutions. Many leading jurists and public interest organizations have offered compelling reasons to insulate state judges from special interests that otherwise inappropriately bias judicial decisionmaking and discourage controversial rulings.<sup>208</sup> The specifics vary and are open to fair debate, but two forms of reform are clearly superior to privately funded competitive elections: systems of public financing, such as those in place in New Mexico and West Virginia,<sup>209</sup> and, even more promising, merit selection, employed in some fashion, for some courts, by two-thirds of states.<sup>210</sup> Since her retirement, former Supreme Court Justice Sandra Day O'Connor has been a leader in advocating for systems of merit selection, which currently are used to select all judges in only thirteen states; as she explained succinctly when advocating for one particular such system in July 2014, "You just can't have a fair and impartial system if you have cash in the court."<sup>211</sup> Typically, merit selection entails a nonpartisan commission that evaluates potential nominees and

---

successful 2000 campaign to defeat an Idaho justice based on speculation that she would legalize "partial-birth abortion"); Lisa Demer, *Anchorage Chief Judge Targeted by Social Conservatives in Tuesday's [sic] Election*, ALA. DISPATCH NEWS (Oct. 31, 2012), <http://www.adn.com/article/20121031/anchorage-chief-judge-targeted-social-conservatives-tuesdayaposs-election> [<http://perma.cc/QK3P-SLVG>] (explaining the initiatives of the anti-abortion group Alaska Family Action in opposition to the selection—via "up-or-down vote"—of Judge Sen Tan, who had joined in judicial decisions striking down state parental consent and funding restrictions); Travis Gettys, *Iowa's GOP Senate Candidates Vow to Block Judges Who Won't Follow 'Biblical Law'*, RAW STORY (Apr. 29, 2014), <http://www.rawstory.com/rs/2014/04/29/iowas-gop-senate-candidates-vow-to-block-judges-who-wont-follow-biblical-law/> [<http://perma.cc/4RKQ-NALP>] (describing concerted conservative and anti-abortion opposition to Iowa judges perceived as too liberal and noting that the head of the anti-abortion Family Leader group "warned that legal abortion and marriage equality would remove God's blessing from the U.S."); *Remember the Romano*, FAM. LEADER, <http://www.thefamilyleader.com/remember-the-romano/> [<http://perma.cc/6K7J-HN53>] (last visited Oct. 11, 2014) (opposing an Iowa District Court Judge because of a judicial decision regarding telemedicine abortion).

208 Margaret Ebrahim, *The Bible Bench*, MOTHER JONES (May/Jun. 2006), <http://www.motherjones.com/politics/2006/05/bible-bench> [<http://perma.cc/8HQT-PJJ6>].

209 *State Court Issues: Public Financing*, JUSTICE AT STAKE, [http://www.justiceatstake.org/issues/state-court\\_issues/public-financing/](http://www.justiceatstake.org/issues/state-court_issues/public-financing/) [<http://perma.cc/UX3M-63WN>] (last visited Oct. 11, 2014).

210 AM. JUDICATURE SOC'Y, JUDICIAL MERIT SELECTION: CURRENT STATUS (2011), [http://www.judicialselection.us/uploads/documents/Judicial\\_Merit\\_Charts\\_0FC20225EC6C2.pdf](http://www.judicialselection.us/uploads/documents/Judicial_Merit_Charts_0FC20225EC6C2.pdf) [<http://perma.cc/J4ZV-SPDW>]; *Judicial Election Methods by State*, JUDGEPIEDIA, [http://judgepedia.org/Judicial\\_election\\_methods\\_by\\_state](http://judgepedia.org/Judicial_election_methods_by_state) [<http://perma.cc/EFN7-RQY4>] (last visited Oct. 11, 2014); *Methods of Judicial Selection*, *supra* note 202.

211 Leslie Larson, *Sandra Day O'Connor Decries Letting 'Cash in the Court' with Judicial Elections*, N.Y. DAILY NEWS (July 11, 2014, 2:17 PM), <http://www.nydailynews.com/news/politics/sandra-day-o-connor-decries-letting-cash-court-judicial-elections-article-1.1863510#ixzz3C5CmjVZz> [<http://perma.cc/8B3Z-F25W>].



recommends the best among them to the governor, who then must choose from the commission's list. A retention election or evaluation by a committee follows the initial term of service.<sup>212</sup>

Merit selection, however, faces formidable opposition, including from abortion opponents who succeeded in their opposition in Minnesota, Ohio, and Pennsylvania.<sup>213</sup> In both Minnesota and Pennsylvania, the states' leading anti-abortion organizations were credited with defeating the efforts with threats to "score" a vote for merit selection as a "pro-abortion" vote when considering whether to endorse legislators up for re-election.<sup>214</sup> Even where merit selection is in place, retention elections offer opportunities for politicization, as is well known from the experience in Iowa, where a unanimous decision invalidating Iowa's refusal to allow same-sex couples to marry led to nationally funded campaigns that resulted in the defeat of three Iowa Supreme Court justices in 2010;<sup>215</sup> a fourth justice survived a retention challenge in 2012.<sup>216</sup> Anti-abortion groups also have joined with others to weaken merit selection systems, in efforts akin to the incremental efforts to make abortions services unavailable, state-by-state. For example, in Florida, Governor Rick Scott has rejected nineteen lists from the state bar recommending nominees to the Judicial

---

212 *Merit Selection: The Best Way to Choose the Best Judges*, AM. JUDICATURE SOC'Y, [http://www.judicialselection.us/uploads/documents/ms\\_descrip\\_1185462202120.pdf](http://www.judicialselection.us/uploads/documents/ms_descrip_1185462202120.pdf) [<http://perma.cc/5H4-HRNY>] (last visited Oct. 11, 2014); see also *What is Merit Selection?*, PENNSYLVANIANS FOR MODERN CTS., <http://www.pmconline.org/node/27> [<http://perma.cc/32WF-PGA2>] (last visited Oct. 11, 2014).

213 See, e.g., Billy Corriher, *Merit Selection and Retention Elections Keep Judges Out of Politics*, CTR. FOR AM. PROGRESS ACTION FUND (Nov. 1, 2012), <http://www.americanprogressaction.org/issues/civil-liberties/report/2012/11/01/43505/merit-selection-and-retention-elections-keep-judges-out-of-politics/> [<http://perma.cc/ZYJ3-B6TK>]; Josh Israel, *Special Interests Kill Proposal for Merit Selection of Judges in PA*, THINK PROGRESS (June 16, 2012, 3:02 PM), <http://thinkprogress.org/justice/2012/06/16/500331/special-interests-kill-proposal-for-merit-selection-of-judges-in-pa/> [<http://perma.cc/FP9Z-KUNV>]; Chris Mondics, *Trial Lawyers, Anti-Abortion Group Stymie Judicial Selection Bill*, INQUIRER (June 16, 2012), [http://articles.philly.com/2012-06-16/business/32255575\\_1\\_merit-selection-appellate-judges-anti-abortion-group](http://articles.philly.com/2012-06-16/business/32255575_1_merit-selection-appellate-judges-anti-abortion-group) [<http://perma.cc/4C3K-YKKJ>]; Jim Ragsdale, *Judicial Change Moves Ahead*, STAR TRIBUNE (Mar. 12, 2014, 3:10 PM), <http://www.startribune.com/politics/statelocal/249919231.html> [<http://perma.cc/AHY9-Q69N>].

214 Greenburg, *supra* note 206.

215 BANNON ET AL., *supra* note 205, at 27; A. G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES (Nov. 3, 2010), [http://www.nytimes.com/2010/11/04/us/politics/04judges.html?\\_r=0](http://www.nytimes.com/2010/11/04/us/politics/04judges.html?_r=0) [<http://perma.cc/Q8WM-PLYP>].

216 BANNON ET AL., *supra* note 205, at 30–33 (describing the excessively contentious retention election survived by Iowa Supreme Court Justice David Wiggins).

Nominating Commission.<sup>217</sup> In Alaska, the state nominating commission is composed of three attorneys, three public members, and the chief justice of the Alaska Supreme Court; anti-abortion organizations are seeking to add three new public members to the nominating commission, in order to dilute the votes of the attorneys.<sup>218</sup> Kansans for Life has made several attempts since 2010 to eliminate merit selection, including a successful effort in 2013 to eliminate it for the selection of Kansas Court of Appeals judges, and a 2014 announcement that they now are targeting the Kansas Supreme Court.<sup>219</sup> In both Alaska and Kansas, anti-abortion and anti-campaign finance regulation lawyer James Bopp filed lawsuits seeking to change the judicial selection processes.<sup>220</sup> Anti-abortion groups are open about their motivation. A spokesperson for Kansans for Life, for example, explained, “We have a pro-life house and a pro-life senate and a pro-life governor. . . . We pass pro-life legislation—and we get sued. The next frontier is the courts.”<sup>221</sup> Despite these opportunities for harmful politicization about which advocates for judicial independence must remain vigilant, merit selection remains less vulnerable to politicization than contested elections.

A third initiative to encourage state court independence is recusal reform, the need for which was explained by the American Bar Association<sup>222</sup> and highlighted by the Supreme

---

217 Martin Dyckman, *Rick Scott Threatens the Independence of Florida's Judiciary*, SAINT PETER'S BLOG (July 27, 2014), <http://www.saintpetersblog.com/archives/153938> [<http://perma.cc/R5J6-2FHR>]. Florida has also seen two ballot measures proposed since 2000 to change the merit selection system: a measure in 2001 that would have changed the retention requirements to standing for retention every six years and winning two-thirds approval and a measure in 2012 that would have required senate confirmation for supreme court justices and given the state legislature the authority to repeal rules governing the courts by a majority vote. Both initiatives failed. See PEOPLE FOR AM. WAY FOUND., ORDERING THE COURTS RIGHT WING ATTACKS ON JUDICIAL INDEPENDENCE 2000 (2001), [http://www.pfaw.org/sites/default/files/file\\_314.pdf](http://www.pfaw.org/sites/default/files/file_314.pdf) [<http://perma.cc/H39S-X8BF>]; *Justice is Served*, HERALD TRIB. (Nov. 8, 2012), <http://www.heraldtribune.com/article/20121108/OPINION/311089995?p=1&tc=pg> [<http://perma.cc/DJQ5-7RLY>].

218 Richard Mauer, *Amendment on Picking Judges Still Up in Air*, ALA. DISPATCH NEWS (Apr. 7, 2014), <http://www.adn.com/node/1526621> [<http://perma.cc/NC99-ZB57>].

219 Peter Hardin, *Group Urges End to Kansas High Court Merit Selection*, GAVEL GRAB (Jan. 23, 2014), <http://www.gavelgrab.org/?p=68145> [<http://perma.cc/L6GW-MU4U>]; Greenburg, *supra* note 206.

220 Scott Christiansen, *Battle for the Bench—Why Do Conservatives Want to Change the Way Alaska Picks Its Judges?*, ANCHORAGE PRESS (Sept. 2, 2009), [http://www.anchoragepress.com/news/battle-for-the-bench---why-do-conservatives-want/article\\_75d38f87-756e-5a59-9849-bcc14c5e049a.html](http://www.anchoragepress.com/news/battle-for-the-bench---why-do-conservatives-want/article_75d38f87-756e-5a59-9849-bcc14c5e049a.html) [<http://perma.cc/DA5J-HVE8>].

221 Greenburg, *supra* note 206 (internal quotation marks omitted).

222 *State Court Issues: Recusal*, JUSTICE AT STAKE, [http://www.justiceatstake.org/issues/state\\_court\\_issues/recusal/](http://www.justiceatstake.org/issues/state_court_issues/recusal/) [<http://perma.cc/3A73-TUTE>] (last visited Oct. 11, 2014) (citing the American Bar Association for the

Court's 2009 ruling in *Caperton v. Massey* that the plaintiff's due process rights were violated by the defendant's extraordinary level of campaign spending.<sup>223</sup> The American Bar Association called for states to adopt recusal procedures that counter the potential influence of campaign expenditures.<sup>224</sup> The Center for American Progress has developed a comprehensive system for evaluating the efficacy of recusal rules in the thirty-nine states that elect judges and found only eight states had satisfactory practices.<sup>225</sup> The Brennan Center for Justice has issued detailed recommendations for recusal reform, including both substantive standards and procedures that are designed to maintain the fairness and impartiality of the courts and the public's perception of fairness.<sup>226</sup>

A final component of a strategy to ensure that state courts fulfill their role in protecting fundamental rights would aim to improve popular and political understandings, at the state and grassroots level, of the centrality of reproductive rights to women's health and equality, as well as to the health of their families and society. Whatever the method of their appointment and retention, judges do not stray far from popular sentiment in fulfilling their constitutional responsibility to protect controversial rights and disfavored groups from political majorities. Governors making merit appointments and reappointments typically also will be influenced by political and popular sentiments. New Jersey Governor Chris Christie, for example, pledged to use his appointment authority to move the state courts to the ideological right, but political realities hindered him.<sup>227</sup> Thus, any strategy to secure

---

principle that "[f]ew actions jeopardize public trust in the judicial process more than a judge's failure to recuse in a case brought by or against a substantial contributor").

223 556 U.S. 868 (2009).

224 *Resolution 105C*, A.B.A., [http://www.americanbar.org/content/dam/aba/images/abanews/2014am\\_hodres/105c.pdf](http://www.americanbar.org/content/dam/aba/images/abanews/2014am_hodres/105c.pdf) [<http://perma.cc/SUC9-H7J8>] (last visited Oct. 11, 2014); see also BILLY CORRIHER & JAKE PAVIA, CTR. FOR AM. PROGRESS, STATE JUDICIAL ETHICS RULES FAIL TO ADDRESS FLOOD OF CAMPAIGN CASH FROM LAWYERS AND LITIGANTS (2014), [http://cdn.americanprogress.org/wp-content/uploads/2014/05/JudicialRecusal\\_crx.pdf](http://cdn.americanprogress.org/wp-content/uploads/2014/05/JudicialRecusal_crx.pdf) [<http://perma.cc/U9TK-5AC4>].

225 CORRIHER & PAVIA, *supra* note 224, at 3.

226 BRENNAN CTR. FOR JUSTICE, RECUSAL REFORM IN THE STATES, 2009–2010, <http://www.courts.state.tx.us/tjc/pdf/BrennanCenterForJusticeRecusalReforms.pdf> [<http://perma.cc/J3KG-XVGY>]; ADAM SKAGGS & ANDREW SILVER, BRENNAN CTR. FOR JUSTICE, PROMOTING FAIR AND IMPARTIAL COURTS THROUGH RECUSAL REFORM (2011), [http://www.brennancenter.org/sites/default/files/legacy/Democracy/Promoting\\_Fair\\_Courts\\_8.7.2011.pdf](http://www.brennancenter.org/sites/default/files/legacy/Democracy/Promoting_Fair_Courts_8.7.2011.pdf) [<http://perma.cc/9AZA-65ML>].

227 *E.g.*, Billy Corriher & Alex Brown, *Chris Christie's War on Judicial Independence*, CTR. FOR AM. PROGRESS (Feb. 4, 2014), <http://www.americanprogress.org/issues/civil-liberties/report/2014/02/04/82076/chris-christies-war-on-judicial-independence/> [<http://perma.cc/97A7-EUWR>]; Kevin Mooney, *Supreme Confidence*, AM. SPECTATOR (Feb. 15, 2011), <http://spectator.org/articles/38096/supreme-confidence> [<http://perma.cc/97A7-EUWR>].

state or federal constitutional protection for women's reproductive rights must attend not only to constitutional interpretation, litigation, and judicial selection, but also directly to state and local politics—and, even more broadly, to popular attitudes about pregnancy, contraception, abortion, sexuality, and women. Success in the state courts—as in the legislatures and federal courts—ultimately depends upon continuing to reach Americans' hearts and minds.

In sum, women's fundamental rights to control their own childbearing are under serious attack from several fronts, with harm to men and children as well. The targets, of course, are mothers, wives, sisters, daughters; most women who have abortions are mothers.<sup>228</sup> Many tools, both offensive and defensive, will prove vital in their defense, including the position of state courts as potential bastions with the power to shield those within their borders from the onslaught of attacks. Essential to promoting state courts' ability to protect individual rights from infringement by popular majorities is promoting the health of our democracy and bolstering esteem for those individual rights. All of these efforts, too, will build momentum toward the ultimate end: full protection of women's reproductive rights at the level of the U.S. Supreme Court and the U.S. Congress.<sup>229</sup> Reproductive justice demands an end to the state-by-state patchwork of terribly uneven protections under which the most vulnerable women—and their families—suffer the worst indignities and deprivations.

---

perma.cc/ZJ53-UJVU]; Paul Mulshine, *On Court Appointments, Christie Got His Clock Cleaned by Sweeney*, STAR LEDGER (May 24, 2014, 6:59 AM), [http://www.nj.com/opinion/index.ssf/2014/05/on\\_court\\_appointments\\_chris\\_christie\\_got\\_his\\_clock\\_cleaned\\_by\\_sweeney\\_mulshine.html](http://www.nj.com/opinion/index.ssf/2014/05/on_court_appointments_chris_christie_got_his_clock_cleaned_by_sweeney_mulshine.html) [<http://perma.cc/H4Y3-KGDX>].

228 R.K. JONES, LAWRENCE B. FINER & SUSHEELA SINGH, GUTTMACHER INST., CHARACTERISTICS OF U.S. ABORTION PATIENTS, 2008, at 8 (2010), <http://www.guttmacher.org/pubs/US-Abortion-Patients.pdf> [<http://perma.cc/HFE4-V2TD>] (sixty-one percent of women obtaining abortions have at least one child and thirty-four percent have two or more children).

229 Women's Health Protection Act of 2013, S. 1696, 113th Cong. (2013), available at <https://beta.congress.gov/bill/113th-congress/senate-bill/1696> [<http://perma.cc/CWC8-K8A5>]. The U.S. Congress possesses broad authority to remedy the problem through federal legislation, and a bill sponsored by Senator Richard Blumenthal of Connecticut would make substantial progress. *Id.* Although this measure was introduced in 2013, significant action in the short-term seems extremely unlikely given Congress's composition. *Id.*