

THE WELDON AMENDMENT; THE ONGOING RESTRICTIONS ON A
WOMAN'S RIGHT TO CHOOSE

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Introduction

At 17, Becky Bell died from complications from an illegal abortion, which she had as a desperate attempt to circumvent the shame of abiding by an Indiana law requiring minors to get parental consent before having an abortion.¹ Unfortunately, the world is not a pretty place, teens live in troubled homes, have abusive parents, or a relative who had caused the pregnancy.² Or like Becky who had a great relationship with her parents, she was just too afraid to talk to them about such a sensitive subject.³ Anti-choice politicians across the country are pushing to get similar laws passed to slowly chip away at women's right to choose and to reduce the number of abortions.⁴ However, by

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¹ *In Remembrance: Women Who Died From Illegal and Unsafe Abortions*, National Organization for Women (December 9, 2004), available at <http://www.now.org/issues/abortion/120904women-who-died.html>.

² *Remembering Becky Bell*, Planned Parenthood Federation of America, Inc. (September 16, 2005), available at <http://www.plannedparenthood.org/pp2/portal/files/portal/webzine/newspoliticsactivism/fean-050916-becky-bell.xml>.

³ Id.

⁴ Id.

limiting women's access to safe abortions, anti-choice politicians are increasing the number of unsafe illegal abortions, and putting women like Becky Bell at risk.⁵

Across the United States abortion has been an issue on many politicians' agenda. Many pro-choice groups are afraid with the changing courts and right-to-life strategic campaigns that a women's constitutional right to choose may still be on the books, but, it will be nearly impossible to access the services. The new battle against abortion has taken a new strategy from trying to overturn *Roe* to restricting abortion services, by burdening women's access to abortion services.

Section one of the paper discusses the difficulties women had before the landmark decision of *Roe v. Wade*, which legalized abortion, and established women's right to choose as a fundamental constitutional right. Section two will analyze *Roe* and discuss the court's opinion that led up to their decision. Section three will analyze the Weldon amendment and the current restrictions that states have put on abortion in order to limit women's access to the services. This section will also discuss the Supreme Court's rulings on such restrictions and whether they are constitutional. Section four will examine *Ayotte v. Planned Parenthood of Northern New England* and its possible effect on abortion access. Section five will discuss the federal government's involvement and its effect on women's health. Section six will analyze how the changing Supreme Court could significantly change a woman's right to choose. Section seven will examine *State of California v. United States* and *National Family Planning and Reproductive Health Association, Inc. v. Ashcroft*, the first challenge to the Weldon Amendment, and section eight will consider the general consensus of the American population, their view on abortion, and how public policy should effect the Court.

⁵ Id.

I. Abortion Before Roe v. Wade

Prior to 1973, abortion was part of America in both legal and illegal forms.⁶ The basis for laws that made abortion illegal was not from religious groups or moral crusades, but from lobbying by the medical profession.⁷ Medical professionals were concerned about the safety of women who underwent abortions.⁸

Before the Court's decision in *Roe*, 17 states had legal abortion services beyond those necessary to save a woman's life.⁹ However, women seeking an abortion had a limited amount of choices. The choices were demeaning and embarrassing, and could have led to injury or death.¹⁰ Illegal abortions, also known as "back-alley abortions," were quite common. "Estimates of the number of illegal abortions in the 1950s and 1960s ranged from 200,000 to 1.2 million per year."¹¹ Many of those women who had an

⁶ Rachel Benson Gold, *Lessons From Before Roe: Will Past Be Prologue?*, THE ALAN GUTTMACHER INSTITUTE: ISSUES IN BRIEF (August 2003) [hereinafter *Lessons From Before Roe*]. "The legal status of abortion has passed through several distinct phases in American history. Generally permitted at the nation's founding and for several decades thereafter, the procedure was made illegal under most circumstances in most states beginning in the mid-1800s." *Id.*

⁷ LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 30 (W. W. Norton & Company 1992) [hereinafter *Clash of Absolutes*].

⁸ *Id.*

⁹ *Id.* "Although legal abortions were largely unavailable until the years just before *Roe*, some women were always able to obtain the necessary approval for an abortion under the requirements of their state law." *Id.*

¹⁰ *Id.*

¹¹ *Lessons From Before Roe*. "One analysis, extrapolating from data from North Carolina, concluded that an estimated 829,000 illegal or self-induced abortions occurred in 1967." *Id.*

illegal abortion suffered injuries and had to be admitted to a hospital after an incomplete abortion.¹²

Since abortion was illegal in the U.S., American women had to seek out legal alternatives.¹³ In 1967, England changed its laws and permitted abortions for any woman with written consent by two physicians.¹⁴ “More than 600 American women made the trip to the United Kingdom during the last three months of 1969 alone; by 1970, package deals (including round-trip airfare, passports, vaccination, transportation to and from the airport and lodging and meals for four days, in addition to the procedure itself) were advertised in the popular media.”¹⁵ Only a small number of women who had the financial means were able to make such a journey.

In 1970, four states: Washington, New York, Hawaii, and Alaska, all repealed their antiabortion statutes and allowed licensed physicians to perform abortions.¹⁶ However, all but New York required at least 30-day residency within the state.¹⁷ Women from all over the country flocked to New York City to obtain a legal abortion.¹⁸ Again, abortions were still limited to only those women who could pay for the procedure plus the cost of travel and lodging.¹⁹

¹² Id.

¹³ Lessons From Before Roe.

¹⁴ Id.

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

II. Roe v. Wade

On January 22, 1973, the Supreme Court decided that the United States Constitution under the due process clause of the 14th Amendment protects a woman's right to choose whether to end her pregnancy.²⁰ "The constitutional question the Court answered in *Roe* is at the center of one of the most intense legal and political debates in American history, and as the [2000s continue,] a changing Supreme Court is again being asked to reconsider the issue."²¹

Roe v. Wade challenged an 1857 Texas statute that made it a crime to perform an abortion unless it was performed for the purpose of saving the life of the mother.²² The Court's opinion stated that during the first trimester the government may not interfere with a women's choice to terminate her pregnancy with a licensed physician.²³ In the second trimester the government can only interfere to the extent that it preserves and protects the woman's health.²⁴ "At approximately the beginning of the final third of the fetus's gestation, protection of fetal life also becomes a compelling reason sufficient under *Roe* to justify interference with the exercise of the right to choose abortion [and] at that point the government can also regulate, or even prohibit, abortion in order to protect fetal life unless the abortion is necessary to preserve the life or health of the woman."²⁵

²⁰ Clash of Absolutes, p. 10.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 11.

²⁴ *Id.*

²⁵ *Id.* at 12.

The Court also held that a state or local government could not overcome a woman's right by the theory that life begins at conception.²⁶ Since this historic decision, states have been slowly chipping it away by tailoring narrowly defined restrictions.

III. The Weldon Amendment and Its Affect

On November 19, 2004, Senator Dianne Feinstein (D-Cal.) and eight other female Senators urged that a law allowing health-care providers to discriminate against women and deny them access to reproductive health services not be included in the FY2005 Omnibus Appropriations bill.²⁷ However, this plea fell on deaf ears because there was no debate on the Senate floor or any hearings. On December 8, 2004, surrounded by smiling men, with not a woman around, President Bush signed this bill into law. This law, created by Representative Dr. Dave Weldon (R-Fl.),²⁸ known as the Weldon Amendment, prohibits local, state, and federal authorities from requiring any health care provider to provide, pay for, provide coverage of or give referrals for abortions.²⁹ The Amendment is better described as the Abortion Non-Discrimination Act, which prevents discrimination against health care professionals who either religiously or morally disagree with abortions. Under the Amendment, a "physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health

²⁶ Id.

²⁷ Letter from Senator Dianne Feinstein et al. (D-Cal.), United States Senate, to Senator Ted Stevens (R-Alaska), Chairman, Senate Committee on Appropriations (Nov. 19, 2004), *available at* <http://feinstein.senate.gov/04Releases/r-omnibus-abortion.htm> [hereinafter Letter From Senator].

²⁸ Congressional Yellow Book, p. 751, Summer 2005. Date of Birth: August 31, 1953; Began Service: 1995; Education: SUNY (Stony Brook) 1978 BS; SUNY (Buffalo) 1981 MD. Id.

²⁹ Consolidated Appropriation Act 2005, Pub. L. No. 108-447, § 508(a), (d)(1)-(2), 118 Stat. 2809 (2004) [hereinafter Weldon Amendment].

insurance plan, or any other kind of health care facility” may refuse abortions, counseling, or referrals, even in cases of rape, incest, or medical emergency.³⁰ “This new law goes well beyond normal ‘conscience clause’ protections already in law designed to accommodate those with moral or religious objections to providing abortion services and referrals.”³¹ Before the Weldon Amendment, if a health care provider received state funding and a doctor chose to give an abortion, then “the provider was obligated to provide abortion services, counseling, and referrals despite their religious or moral beliefs.”³² Most agree that forcing a health care professional to perform an abortion could violate their moral, ethical, or religious beliefs. This is considered a valid objection to performing the procedure.

The text of the Weldon Amendment states:

(d)(1) None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions. (2) In this subsection, the term “health care entity” includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization or plan.³³

However, this act essentially legalizes discrimination, allowing any health care provider “to refuse to perform or pay for abortions and even to tell pregnant women that

³⁰ Id.

³¹ *Background Information on Legal Challenges to the Weldon Law*, NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION, April 2005, *available at* www.nfprha.org [hereinafter *Background Information on Legal Challenges*].

³² Jill McGivering, *Abortion battle Rages on in US*, BBC NEWS, Washington, December 4, 2004, *available at* <http://news.bbc.co.uk/1/hi/world/americas/4067103.stm>.

³³ Weldon Amendment.

the option exists,” and thus it will extend the ability to discriminate to employers who can select insurance plans that do not protect women’s health.³⁴ “Physicians who oppose abortion already are not compelled by law to perform one[,] [b]ut now a hospital chief who opposes abortion could silence every doctor and nurse in his or her employment.”³⁵ In small towns, which do not have many health care providers, the amendment could essentially end legal abortion.³⁶ Essentially one person’s religious belief could affect the lives of many others who are not of the same faith. It’s an interesting issue for both sides of the argument to consider.

“Health-care providers who refuse to perform reproductive health services on grounds of conscience should give notice to all patients of their unwillingness to perform such services.”³⁷ Notice will give patients an opportunity to seek another health-care provider that will cover abortion services. Unfortunately, the Weldon Amendment does not require health care providers who do not provide abortion related services to give notice to their clients.

The National Right for Life Center’s, Legislative Director Douglas Johnson said “that existing federal and state laws dealing with the ‘conscience’ rights of doctors and nurses have often proven insufficient to protect hospitals and other health care providers

³⁴ *Chipping Away at Roe v. Wade*, THE LOS ANGELES TIME, November 28, 2004 [hereinafter *Chipping Away at Roe*].

³⁵ Id. “The gag order Bush imposed through executive order on his third day in office remains in effect, withholding U.S. aid from foreign health clinics if a worker in such places as India or Africa even mentions the abortion option.”

³⁶ Id.

³⁷ Center For Reproductive Rights: Briefing Paper, *Crafting an Abortion Law that Respects Women’s Rights: Issues to Consider*, August 2004 [hereinafter *Issues to consider*].

when they are faced with pro-abortion coercion by state officials and courts.”³⁸ For example in Alaska, despite the objections by its governing board, the Alaskan Supreme Court ordered a private community hospital to perform late second-trimester abortions.³⁹ Also, by attempting to force a Catholic hospital to build an abortion clinic, the American Civil Liberties Union of New Jersey has been discriminating against the hospitals’ pro-life policies.⁴⁰

Currently, there are no federal laws requiring hospitals to perform abortions, except in a medical emergency and “in fact, the 1973 Church amendment explicitly protects individuals who object to providing abortion care based on religious beliefs or moral convictions.”⁴¹ Despite the protection the Church amendment explicitly provides, abortion opponents’ argument that health care providers are being forced to provide abortions is simply not true; rather, the amendment is part of another strategy to deny women’s access to abortion-related services.⁴²

“There are regulations that impose burdensome requirements that are different and more stringent than regulations applied to comparable medical practices.”⁴³ In *City of*

³⁸ *Congress Approves Broad Shield to Protect Pro-Life Health Care Providers*, NATIONAL RIGHT TO LIFE, December 6, 2004, available at http://www.nrlc.org/news/2004/NRL12/congress_approves_broad_shield_t.htm.

³⁹ Steven Ertelt, *Pro Life Law Firm’s Brief Defends Hospital Abortion Conscience Clause*, December 23, 2004, LifeNews.com available at <http://www.lifenews.com/nat1068.html>.

⁴⁰ *Id.*

⁴¹ Background Information to Legal Challenges.

⁴² *Id.*

⁴³ *Targeted Regulation of Abortion Providers: Avoiding the “TRAP”*, CENTER FOR REPRODUCTIVE RIGHTS, August 2003, available at www.reproductiverights.org/pdf/pub_bp_avoidingthetrap.pdf [hereinafter TRAP].

Akron v. Akron Center for Reproductive Health, Inc., some requirements such as parental consent, informed consent, and 24-hour waiting period were found unconstitutional.⁴⁴ However, the Supreme Court’s decision in *Planned Parenthood v. Casey* in 1992, “adopted a new, lower standard of review that makes it more difficult to challenge abortion restrictions.”⁴⁵ The Weldon Amendment can be more burdensome than those provisions overturned in *Casey*. In small communities where there may be only one or two care facilities, women (especially ones without the means of transportation because of financial woes) who need abortion services will be unlikely to obtain them, if one or both facilities are not providing abortion care or referrals.

The Weldon Amendment may violate women’s right to choose. Under both *Roe* and *Casey*, purported health regulations can only be enforced if they serve the state’s interest in “promoting the health of abortion patients and if they have neither the purpose or effect of unduly burdening the woman’s ability to exercise her decision to have an abortion.”⁴⁶

“The Supreme Court has distinguished certain rights or liberties as ‘fundamental.’”⁴⁷ “Other rights—the ‘right’ to drive a car, say—may be abridged by government as part of a rational scheme to achieve some collective good.”⁴⁸ “Substantive

⁴⁴ *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).

⁴⁵ TRAP.

⁴⁶ *Id.*

⁴⁷ *Clash of Absolutes*, at 10.

⁴⁸ *Id.* “For example, some people (like children, or people with poor eyesight, or people who exceed their quota of traffic violations) may be denied the liberty to drive simply because the state has a rational reason, such as the promotion of highway safety.”

due process is the concept that certain rights are so fundamental to our traditions of justice that no matter what procedural guarantees government affords, government cannot abridge those rights.”⁴⁹ The foundation of substantive due process has been formed by the “liberty” clause of the Fourteenth Amendment.⁵⁰ Government’s showing of a compelling interest can only abridge a non-fundamental right; however, states have the power to restrict abortion, by showing a compelling interest.⁵¹ Currently, anti-abortion groups are focusing on protecting women’s health as a way to restrict women’s access to receiving these services.

In *Roe v. Wade*, the Supreme Court decided that a woman’s right to choose an abortion was a fundamental right.⁵² After the majority opinion in *Roe*, it was decided that a restriction to the fundamental constitutional right to choose must be narrowly tailored to promote a compelling interest.⁵³ Protecting a woman’s health and a viable fetus is considered to be a compelling interest.⁵⁴ Justice O’Connor wrote “the basic principles of *Roe* were best implemented by a test that would invalidate only those laws that placed an ‘undue burden’ on a woman’s ability to decide to have an abortion. Justice O’Connor stated that: ‘A finding of an undue burden is a shorthand for the conclusion that a state

⁴⁹ NORMAN REDLICH, BERNARD SCHWARTZ, AND JOHN ATTANASIO, UNDERSTANDING CONSTITUTIONAL LAW 167, (Legal Text Series 1995) [hereinafter Understanding Constitutional Law].

⁵⁰ *Id.*

⁵¹ Clash of Absolutes, at 10.

⁵² RONALD D. ROTUNDA AND JOHN E. NOWAK, CONSTITUTIONAL LAW: HORNBOOK SERIES 866 (Sixth Edition, Westgroup 2000) (1978) [hereinafter Constitutional Law].

⁵³ *Id.*

⁵⁴ *Id.* at 867.

regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”⁵⁵ States are allowed to refuse funding for abortions, “because the right to privacy includes only a right to choose to have an abortion without governmental interference and not a right to have abortion services provided by the government.”⁵⁶

As a result of the lack of government aid, such as Medicaid for abortions, women are finding it harder and harder to find geographically reasonable places to have an abortion. Betty Thompson, former director of an abortion clinic stated that there are hundreds of state abortion regulations making it difficult to access the services and the services will soon be unattainable if the regulations continue.⁵⁷ “With an ever-increasing number of state abortion regulations and a steady decline in abortion providers, the procedure, while still legal, has become daunting and expensive in many states.”⁵⁸ Statistics show that there is a steady decline in abortions in the United States.⁵⁹ There are

⁵⁵ Id at 868.

⁵⁶ Id at 867.

⁵⁷ Raney Aronson, *The Last Abortion Clinic*, PBS FRONTLINE, November 9, 2005 [hereinafter Frontline]. “In Mississippi, Medicaid offers support for women seeking to continue with an unintended pregnancy, but no state funds or facilities may be used for abortion services. In the last decade, all but one clinic providing pregnancy terminations in the state have closed. The last abortion clinic, in Jackson, is difficult to access for women outside the capital who do not own a car, who have limited funds for gas or who cannot easily take time off from work or child care responsibilities.” Id.

⁵⁸ Id. In Wisconsin, a new regulation has been passed requiring doctors who perform abortions, to tell a woman at least 20 weeks pregnant “fetuses have the physical structures necessary to experience pain and that abortion can cause substantial pain to a fetus.” *Abortion Fetus Pain Bill Passed in Wisconsin*, THE NEW YORK TIMES, November 9, 2005.

⁵⁹ Rebecca Wind, *Decades-Long Decline in Number and Rate of U.S. Abortions Continues*, THE ALAN GUTTMACHER INSTITUTE, News Release, May 19, 2005. “It takes time for political decisions to be reflected in the statistical data, so it is too soon to tell

now fewer abortion clinics in the U.S. than there were directly after *Roe*.⁶⁰ Eighty-three percent of the counties throughout the U.S. do not have an abortion clinic.⁶¹

A. The Weldon Amendment is Unconstitutional

The Weldon law is unconstitutionally vague based on its language. “A law is vague when an ordinary person cannot understand what conduct is prohibited or fails to establish guidelines to prevent ‘arbitrary and discriminatory enforcement’ of the law.”⁶² “When ‘Congress desires to condition the States’ receipt of federal funds, it ‘must do so unambiguously..., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.’”⁶³ On January 25, 2005, California Attorney General Bill Lockyer filed suit in U.S. District Court against the Bush administration, asking the “Court to declare the new provision invalid and to prohibit its enforcement, arguing that the state could be slapped with the amendment’s severe financial penalties if, for example, it tried to enforce a state law that prohibits hospitals from refusing to perform abortions for women in emergency or life-threatening situations.”⁶⁴ The law

what the impact of Bush administration policies will be on U.S. abortion rates,” says Sharon Camp, president and CEO of the Guttmacher Institute. *Id.*

⁶⁰ Frontline.

⁶¹ *Id.*

⁶² *City of Chicago v. Morales*, 527 U.S. 41, 64-65 (1999), the Court invalidated a city ordinance that prohibited gang members from loitering in any public place. The law was unconstitutionally vague because it did not provide minimal guidelines for law enforcement and it did not give adequate notice to citizens in regards to the type of activity that was criminalized.

⁶³ Complaint, *State of California v. United States*, No. C 05 00328 JSW (N.D. Cal.). (*Citing* *South Dakota v. Dole*, 483 U.S. 203, 207 (1987)) [hereinafter *Complaint, California v. US*].

⁶⁴ Complaint, *California v. US*, *supra* note 63.

does not define the word “discrimination.” Moreover, a state could discriminate, by simply requiring certain health care entities to provide information about or referral for abortion services.⁶⁵ Since the term “discrimination” is vague, state governments cannot enact health care legislation to educate or inform patients of reproductive health choices without risking their federal funding,⁶⁶ thus leaving states questioning if they will lose billions of dollars if they protect the fundamental rights protected in *Roe v. Wade*.⁶⁷

In *Colautti v. Franklin*, the Supreme Court held that a Pennsylvania law was vague because it required a physician who was about to perform an abortion to first determine whether the fetus is still viable.⁶⁸ The requirement that a doctor determine whether the fetus was still viable is vague because it was the sole determination of the doctor whether it was viable.⁶⁹

B. The Weldon Amendment Provides No Health Exception

At least since the U.S. Supreme Court’s historic 1973 decision in *Roe v. Wade*, American women’s constitutional right to seek an abortion has had no interference from the government when it was necessary to protect their lives or health.⁷⁰ The constitutional right to privacy was now broad enough to protect a woman’s decision whether or not to

⁶⁵ Jason Green, *Refusal Clauses and The Weldon Amendment: Inherently Unconstitutional and a Dangerous Precedent*, JOURNAL OF LEGAL MEDICINE, September 2005.

⁶⁶ *Id.*

⁶⁷ Complaint, *California v. US*, at 1.

⁶⁸ *Colautti v. Franklin*, 439 U.S. 379 (1979).

⁶⁹ *Id.*

⁷⁰ Complaint, *California v. US*, at 4.

terminate her pregnancy.⁷¹ According to the Court, “a state’s interest in protecting maternal health is not compelling until the second trimester of pregnancy and its interest in potential life is not ‘compelling’ until viability, the point in pregnancy at which there is a reasonable possibility for the sustained survival of the fetus outside the womb and thus the state may – but is not required to – prohibit abortion after viability, except when it is necessary to protect a woman’s life or health.”⁷² Restrictions on abortion usually have an express exception for the life or health of the mother. However, the Weldon Amendment has no such express exception.⁷³ Also according to the Attorney General of California, it could “possibly subject the States to potential loss of billions of dollars if they seek to enforce state laws securing a woman’s constitutional right to an emergency abortion without impermissible government interference.”⁷⁴ To challenge an abortion restriction successfully, the challenged law must purposefully or in effect, create a substantial obstacle for women seeking an abortion.⁷⁵ In *Stenberg v. Carhart*, the U.S. Supreme Court reaffirmed *Casey* by striking down a Nebraska law, which contained an abortion restriction that did not have a health exception.⁷⁶ The Court in *Carhart* states, “laws that restrict abortion must contain health exceptions even if only a few women would

⁷¹ *Roe v. Wade: Its History and Impact*, PLANNED PARENTHOOD, October 2005, available at <http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/abortion/fact-roe-wade-history.xml> [hereinafter *Roe v. Wade, Its History and Impact*].

⁷² *Id.*

⁷³ Complaint, *California v. US*, at 1.

⁷⁴ *Id.* At 1.

⁷⁵ *Roe v. Wade: Its History and Impact*.

⁷⁶ *Id.*

otherwise be at risk.”⁷⁷ Justice O’Connor is nearly always the swing voter in abortion cases, however, in her concurring statement, she stated that she “would uphold a narrower ban on abortion that would include a health exception.”⁷⁸

IV. The Supreme Court’s Decision in Ayotte Could Create a Substantial Challenge to Abortion Access

Currently, the U.S. Supreme Court is set to decide two issues in *Ayotte v. Planned Parenthood of Northern New England et al*, a case that involves a New Hampshire law that requires parental consent from both parents 48 hours before a doctor can perform an abortion, for a woman under the age of 18.⁷⁹ ⁸⁰ As NARAL argues “[t]his decision could drastically reduce, if not eliminate, the ability to challenge the constitutionality of abortion restrictions in court.”⁸¹ Jennifer Dalven states the first issue is that “the New Hampshire law contains no exception for circumstances in which the delay would

⁷⁷ *Stenberg v. Carhart: A Legal Analysis*, AMERICAN CIVIL LIBERTIES UNION, July 1, 2000, available at <http://www.aclu.org/ReproductiveRights/ReproductiveRights.cfm?ID=11354&c=148>, (quoting *Stenberg v. Carhart*, 530 U.S. 914 (2000)).

⁷⁸ *Id.* (quoting Justice O’Connor in her concurring opinion in *Stenberg v. Carhart*, 530 U.S. 914, 947 (2000)).

⁷⁹ *Teen Sex and Pregnancy*, ALAN GUTTMACHER INSTITUTE, September 1999. Each year, almost 1 million teenage women, 10% of all women aged 15-19 and 19% of those who have had sexual intercourse, became pregnant.

⁸⁰ Jennifer Dalven, *Ayotte v. Planned Parenthood: A Matter of Women’s Health*, AMERICAN CIVIL LIBERTIES UNION, Press Release, September 26, 2005 [hereinafter *A Matter of Women’s Health*].

⁸¹ *New U.S. Supreme Court Case – Ayotte v. Planned Parenthood of Northern New England*, NARAL PRO-CHOICE AMERICA FOUNDATION, September 2, 2005, available at <http://www.naral.org/facts/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=17889> [hereinafter *New U.S. Supreme Court Case*].

seriously endanger a young women's health."⁸² There are no exceptions for victims of rape, incest, child abuse or when a woman's health is in danger.⁸³ There is only an exception if the minor's death is imminent.⁸⁴ The lower court found, "a health exception is required at any state of pregnancy because 'a State may promote but not endanger a woman's health when it regulates the methods of abortion.'"⁸⁵ The court should invalidate this law primarily because it would require women who are the victim of incest to get the perpetrator's consent to terminate the pregnancy. However, supporters of the law believe that the health exception is a loophole for doctors to bypass the restrictions. They believe that the definition of health can extend to a woman's emotional or psychological wellbeing.

The second issue the Court will hear is the more important of the two issues. It is the standard of review. Specifically, what must be shown to a court to strike down an abortion restriction? What standard will the court follow? The court can either follow the standard set forth in *Casey* or a much stricter standard set forth in *United States v. Salerno*.⁸⁶ As one scholar put it:

If the Supreme Court chooses the *Casey* standard, it will not matter that there are certain instances in which the state abortion regulation is valid and does not impose an 'undue burden.' Rather it will have to show that an 'undue burden' is imposed 'in a large fraction of cases.' However, if the Supreme Court adopts the *Salerno* standard, if a party can show that

⁸² A Matter of Women's Health.

⁸³ New U.S. Supreme Court Case. "The notification requirement may be waived only if a young woman's life is threatened (but even then only under certain circumstances), or if she obtains permission from a judge." *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* (quoting from *Planned Parenthood of Northern New England v. Heed*, 296 F. Supp. 2d 59, 65 (D.N.H. 2003)).

⁸⁶ New U.S. Supreme Court Case.

there is at least one situation in which the regulation is valid, then the court will not be able to declare the regulation facially unconstitutional. If the Court adopts the standard of review advocated by anti-choice activists and the defendant in this case (the state of New Hampshire), virtually no abortion-related law could be struck down as unconstitutional on its face. Even the total abortion ban struck down in *Roe* would be upheld under the standard they advocate.⁸⁷

“The State of New Hampshire argued in the lower courts that a health exception is not needed in parental notification laws, since the goal of those laws is to ‘protect minors from undertaking the risks of abortion without the advice and support of a parent.’”⁸⁸ The courts have allowed restrictions to *Roe* if the court feels like those restrictions serve the state’s interest in promoting the health of abortion patients. If this were truly how opponents of abortion felt, then placing restrictions on abortion is not the right way to protect a woman’s health. For example, if pro-life activists were concerned about a woman’s health, they would allow abortions to be routinely performed in hospitals. The issue of woman’s health is just another strategy on the part of pro-life activists to eliminate a woman’s right to choose. As Susan Dudley stated “[a]bortion has not always been so safe and between the 1880’s and 1973, abortion was illegal in all or most states, and many women died or had serious medical problems as a result.”⁸⁹ Thankfully,

⁸⁷ Aseem Gupta and Kenneth Hwang, *Supreme Court Oral Argument Previews, Ayotte v. Planned Parenthood of Northern New England* (04-1144), LEGAL INFORMATION INSTITUTE, available at <http://www.law.cornell.edu/supct/cert/04-1144.html> [hereinafter Supreme Court Oral Argument Previews].

⁸⁸ New U.S. Supreme Court Case. (Quoting *Planned Parenthood of Northern New England v. Heed*, 390 F. 3d 53, 59 (1st Cir. 2004)).

⁸⁹ Susan Dudley, *Safety of Surgical Abortion*, NATIONAL ABORTION FEDERATION, 1996, available at http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/safety_of_abortion.pdf [hereinafter Safety of Surgical Abortion]. “Around the world, in countries where abortion is illegal, it remains a leading cause of maternal death. An estimated 78,000 women worldwide die each year from unsafe abortions. Many of the doctors who

surgical abortion is one of the safest types of medical procedures, and risks of complications from a first trimester abortion are far less frequent and serious than the complications of giving birth.⁹⁰ Also, the American Medical Association found that restrictions that cause delays or obstacles could increase the health risks involved with the procedure.⁹¹ As stated by NARAL, “[t]he World Health Organization estimates that close to 600,000 women die every year of causes related to pregnancy or childbirth – more than one woman every minute of every day.”⁹²

V. Federal Government’s Involvement in Abortion Access

In 1970, President Nixon signed into law Title X (ten) of the Public Health Service Act, and since then Title X has been a focal point for the nation’s family planning program, providing millions of low-income women with services ranging from contraception to pap smears to breast cancer screening.⁹³ Despite the overwhelming support for subsidized family planning, pro-life groups and conservative Congress have

perform abortions in the United States today are committed to providing this service under medically safe conditions because they witnessed and still remember the tragic cases of women who appeared in hospitals after botched, illegal abortions.” *Id.*

⁹⁰ *Id.*

⁹¹ NARAL, *Leading Medical Groups Oppose Obstacles to Abortion*, July 10, 2002, (quoting American Medical Association (AMA), *Induced Termination of Pregnancy Before and After Roe v. Wade, Trends the Mortality and Morbidity of Women*, JAMA, vol. 268, no. 22 (Dec. 1992): 3236).

⁹² *Global Gag Rule*, NARAL PRO-CHOICE CALIFORNIA, January 14, 2004 available at www.prochoiceamerica.org.

⁹³ *Title X; The Nation’s Cornerstone Family Planning Program*, NARAL Pro-Choice American Foundation, January 1, 2005, available at <http://www.prochoiceamerica.org/facts/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=16529>.

tried to starve the program by cutting funding.⁹⁴ The program provides good health care for women who cannot afford such services. However, Title X explicitly states that it will not provide funds for an abortion,⁹⁵ it must only offer pregnant women medical information, which includes counseling and referrals for abortion.⁹⁶ Additionally, unless Title X receives adequate funding from the government, many women will be unable to obtain even these services.⁹⁷ The Bush Administration has significantly cut back funding for the program.

During the 1970s, Title X noticeably started expanding by providing preventive services to unmarried teenagers at risk of pregnancy and providing community sex education programs to inform teenagers and help prevent unwanted pregnancies.⁹⁸ According to Planned Parenthood by 1979, “the number of family planning clinics in the U.S. reached 5,195. The number of clients served by family planning clinics totaled 4,486,000, an increase of 10 percent since 1976.”⁹⁹ Because of anti-abortion groups’ failure to overturn *Roe* on constitutional amendments, they changed their focus to family

⁹⁴ *Id.*

⁹⁵ Title X of the Public Health Service Act, 42 U.S.C. § 300a-6.

⁹⁶ 42 C.F.R. § 59.5(a)(5)(I).

⁹⁷ Center for Reproductive Rights; *Title X Family Planning, America Must Continue Its Commitment to Reproductive Health*, January 2004 [hereinafter *Title X Family Planning*]. “Clinics receiving Title X funds not only provide critical health services, they also save the federal Government money. Title X clinic services prevent pregnancies, reduce the need for abortion, lower rates of sexually transmitted disease, including HIV, detect breast and cervical cancer at its earliest stages, and generally improve women’s overall health.” Complaint at 5, *National Family Planning and Reproductive Health Association Inc. v. Ashcroft* (D. D.C. 2004).

⁹⁸ *A History of Planned Parenthood*, PLANNED PARENTHOOD, available at www.plannedparenthood.org [hereinafter *A History of Planned Parenthood*].

⁹⁹ *Id.*

planning providers with harassment, arson, and terrorism.¹⁰⁰ In 1981 under President Ronald Reagan’s supervision, funding for family planning providers was drastically cut for both international and domestic programs, despite reduction of unintended pregnancies and the need for abortion from such programs.¹⁰¹ At a United Nations Population Conference in Mexico City, the “Mexico City Policy” was created, which prevents nongovernment organizations from receiving any U.S. family planning funding if they provide any abortion services, counseling, or referrals.¹⁰² They are prevented from even mentioning the word “abortion.”¹⁰³ Organizations that did not comply with the newly enacted policy had their funding completely cut off.¹⁰⁴

¹⁰⁰ Id. In a 1994 U.S. Supreme Court upholds a buffer zone around health care clinics to help protect access to the clinic. *Madsen v. Women’s Health Center*, 512 U.S. 753 (1994).

¹⁰¹ Id.

¹⁰² Id. The Alan Guttmacher Institute’s report on “*Teen Pregnancy in Industrial Countries* demonstrates that the U.S. teen pregnancy rate of 96 per 1,000 is the highest in the developed world. The study finds that developed countries with the most accessible contraceptive services, the most effective programs for sexuality education, and the most liberal societal attitudes toward sex, have the lowest rates of pregnancy, abortion, and childbearing among teens.” The film, *The Silent Scream* is a scare tactic to prevent pregnant women from having an abortion. The film “epitomizes the anti-abortion strategy by dramatically shifting the focus of the abortion debate away from compassionate concern for the woman to an exaggerated concern for the fetus. Although riddled with scientific, medical, and legal inaccuracies, *The Silent Scream* will continue to be a key tool in anti-choice propaganda efforts, and will be shown worldwide to troubled women who turn to so-called ‘crisis pregnancy centers’ for assistance with their problem pregnancies.”

¹⁰³ Chipping Away Roe.

¹⁰⁴ A History of Planned Parenthood. “PPFA announces its refusal to comply: and the International Planned Parenthood Federation and the United Nations Fund for Population Activities are defunded.” Id.

Despite lawmakers or the government's intent in their involvement in women's abortion access it interferes with the doctor and patient relationship.¹⁰⁵ The American Medical Association's policy is "to strongly condemn any interference by the government or other third parties that causes a physician to compromise his or her medical judgment as to what information or treatment is in the best interest of the patient... [and] to vigorously pursue legislative relief from regulations or statutes that prevent physicians from freely discussing with or providing information to patients about medical care and procedures or which interfere with the physician-patient relationship."¹⁰⁶

To this day, the Mexico City Policy, now referred to as the "Global Gag Rule," has had a significant impact on women around the world.

In 1988, a domestic restriction known as the "Gag Rule" was imposed on Title X services, which prohibited counseling about, or referrals for, abortions and required physical and financial separation of abortion-related activities from Title X-funded services.¹⁰⁷ The Court in *Rust v. Sullivan* upheld the federal regulations, and Chief Justice Rehnquist stated that the regulations do not violate the First Amendment free speech rights of the Title X recipients and their doctors or infringe on a woman's Fifth Amendment right to choose whether to terminate a pregnancy.¹⁰⁸ Dissenters argued that

¹⁰⁵ *Leading Medical Groups Oppose Obstacles to Abortion*, NARAL PRO-CHOICE AMERICA, July 10, 2002.

¹⁰⁶ *Id.* (Quoting AMA, *Freedom of Communication Between Physicians and Patients*, Policy Compendium 2000, sec. 5.989, at http://www.ama-assn.org/appsp/online/ph_online?f_n=resultLink&doc=policyfiles/HOD/H-5.989.HTM&s_t=freedom+of+communication&catg=AMA/CnB&catg=AMA/CEJA&catg=AMA/HOD&&nth=1&&st_p=0&nth=1&.)

¹⁰⁷ *Rust v. Sullivan*, 500 U.S. 173 (1991).

¹⁰⁸ *Id.*

the regulations prohibited a woman from receiving a referral for an abortion even if the pregnancy has placed her in danger.¹⁰⁹ The argument was rejected by stating that the regulations only prohibit abortion referrals for family planning services and referring a woman because she is endangered is not considered a referral for family planning purposes.¹¹⁰ However, the Weldon amendment, which allows health care providers to consciously object to providing referral to pregnant women seeking an abortion, is “incompatib[le] with the patient’s long-standing entitlement to referrals under the Title X family planning program.”¹¹¹ Also, the Amendment calls into question Title X guidelines that clearly state, “abortion referral requirement is a condition of receiving federal Title X funding.”¹¹² Clinics may be led to believe that they can undermine the doctor-patient relationship by not informing their patients about their medical options.¹¹³

The reason why the government can impose these restrictions and arguably participate in political expression is to subsidize people on the condition that they engage in or refrain from a certain kind of speech.¹¹⁴ The government can grant money on the condition that they do not perform a certain activity; however they cannot regulate their

¹⁰⁹ Constitutional Law, at 1077.

¹¹⁰ Id. At 1077.

¹¹¹ *Federal Refusal Clause, Limits Access to Reproductive Health Services and Referrals and Tramples State Sovereignty*, NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION, July 2005, available at <http://www.nfprha.org> [hereinafter Federal Refusal Clause].

¹¹² Background Information on Legal Challenges.

¹¹³ Constitutional Law, at 1077.

¹¹⁴ Id. at 1075.

speech.¹¹⁵ In *Rust*, the Title X doctors argued that the government was regulating their speech, their ability to tell their clients about abortion services.¹¹⁶ In response to the Court’s ruling, Congress voted to overturn the gag rule, but narrowly failed to override President George Herbert Walker Bush’s veto.¹¹⁷

For more than three decades, Title X has been providing family planning services and preventive health care to low income and/or uninsured individuals who may otherwise lack access to health care.¹¹⁸ However, with the increase in federal and state fiscal crisis, there is a strain on Medicaid, and the number of uninsured Americans is on the rise.¹¹⁹ According to the National Family Planning and Reproductive Health Association, “[t]he vast majority of Title X clients are uninsured and do not qualify for Medicaid.”¹²⁰ Thus with the increase of uninsured Americans who cannot qualify for Medicaid, there is an increase in demand for Title X family planning services. However, “had Title X funding kept pace with medical inflation since FY 1980, it would now be funded at \$643 million instead of the FY 2004 level of \$278 million. In other words, taking inflation into account, funding for Title X in constant dollars is 58% lower today

¹¹⁵ Id. at 1076.

¹¹⁶ *Rust v. Sullivan*, 500 U.S. 173 (1991).

¹¹⁷ A History of Planned Parenthood.

¹¹⁸ *Title X National Family Planning Program Critical Women’s Health Program Struggles to Meet Increasing Demand*, NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION, May 31, 2004, available at www.nfprha.org/pac/factsheets/titlex.asp.

¹¹⁹ Id.

¹²⁰ Id.

than it was in FY 1980.”¹²¹ At the same time, the cost of contraceptive and diagnostic tests are continuing to rise and put a strain on Title X resources.¹²² Yet, with an 83% increase in ineffective abstinence-only education, the Bush Administration is wasting money.¹²³

Before 1976 there were nearly 300,000 abortions funded by the government through Medicaid (a cooperative federal-state program).¹²⁴ Henry Hyde, a member of the House of Representatives (R) from Illinois, has been fighting to restrict Medicaid funding for abortions throughout the country for such a long time that such actions at the federal level are considered Hyde Amendments.¹²⁵ Antiabortion activists consider a ban on all Medicaid funded abortions a close second to overturning *Roe* because of the significant reduction of abortions.¹²⁶ However, many pro-choice activists fear that many of the 300,000 poor women would not be able to afford an abortion and express their fundamental right to choose.¹²⁷ As Laurence Tribe stated, “The right-to-life movement

¹²¹ *Id.*

¹²² Title X Family Planning. The cost of contraceptives has risen from an average of \$8 in 1995 to \$12.50 in 2001. Also, the cost of diagnostic tests and the number of tests provided have increased. Finally, Medicaid, a joint federal-state program that subsidizes health care for the low-income Americans, is unable to cover the full cost of a visit. Title X must find ways to fill in the gap between the subsidized coverage and the total of the cost. Title X indicates an average of \$118 on an initial visit, but is only reimbursed an average of \$62. *Nowhere But Up: Rising Costs For Title X Clinics*, The Alan Guttmacher Institute, Issues in Brief, Series No. 1 (2003).

¹²³ A History of Planned Parenthood.

¹²⁴ Clash of Absolutes, at 151.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 152.

[has] succeeded in shifting the Medicaid funding debate from the merits of pro-life and pro-choice arguments to the role of government in encouraging or discouraging abortion.”¹²⁸ In 1976, the House passed the Hyde Amendment, 207 to 167, despite having no exceptions for funding abortions when pregnancy and childbirth endanger a woman’s life and despite a similar weaker proposal that was struck down two years earlier in a 247 to 123 vote.¹²⁹ Initially the Senate rejected the amendment, but after a House-Senate conference committee, a compromise was reached and there was an explicit exception added for situations where the woman’s health was endangered.¹³⁰ Thus states must cover those abortions that meet life endangerment, rape or incest exceptions. Fortunately, this ban on Medicaid funding has to be reenacted each year.¹³¹

However, on the day the amendment was passed, Cora McRae, a twenty-five year old pregnant mother of four below the poverty level, brought suit in New York asking for a judgment that would provide federal funding to cover her abortion.¹³² Judge John Dooling ordered the abortion to be funded and “allowed the case to continue as a class action and found the law unconstitutional.”¹³³ Before the Supreme Court reviewed Judge Dooling’s ruling, it had decided “that neither state nor federal government were required to subsidize non-therapeutic abortions” in the case of *Maier v. Roe*.¹³⁴ Even though the

¹²⁸ Id. at 153.

¹²⁹ Id.

¹³⁰ Id. at 153 – 154.

¹³¹ Id. at 154.

¹³² Id.

¹³³ Id.

¹³⁴ Constitutional Law, at 902.

Maier decision dealt with state funding, it was clear to the Court that it was also applicable to federal funding and the Supreme Court set aside Judge Dooling's injunction and sent the case back to reconsider it with the new *Maier* decision.¹³⁵ And in response to the Court's actions, thirty-six states moved to cut off their state Medicaid reimbursements.¹³⁶ In 1980 in *Harris v. McRae*, the Court upheld *Maier* and that not only did the Hyde Amendment prevent federal funding for nearly all abortions but that it extended to the states.¹³⁷ In Justice Stewart's opinion, he stated that the amendment placed no obstacle in the path of a woman's right to choose, and the reason for a woman's failure to have her right is because of her own lack of resources and not because of a government action.¹³⁸

Thus, poor women had no claim of right to public funding for abortions. Many activists against this amendment asserted that supporters did not want to defend human life but fetal life.¹³⁹

In *Webster v. Reproductive Health Service*, the Supreme Court upheld a Missouri law that prohibited public funding and public facilities for the use of abortion services.¹⁴⁰ However, in regards to the Weldon Amendment, co-written by Dave Weldon and Henry Hyde, Chief Justice Rehnquist's opinion in *Webster*, noted, "A different analysis might

¹³⁵ Clash of Absolutes, at 154.

¹³⁶ A History of Planned Parenthood.

¹³⁷ *Harris v. McRae*, 448 U.S. 297 (1980).

¹³⁸ 448 U.S. at 315-316.

¹³⁹ Clash of Absolutes, at 155.

¹⁴⁰ *Webster v. Reproductive Health Service*, 492 U.S. 490 (1989).

apply if a particular State had socialized medicine and all of its hospitals and physicians were publicly funded. This case might also be different if the State barred doctors who performed abortions in private facilities from the use of public facilities for any purpose.”¹⁴¹ Thus, the state’s ability to refuse abortion services does not extend to private sector abortions.¹⁴²

VI. The Changing Supreme Court and Its Effect on Abortion Access

After Justice Sandra Day O’Connor’s resignation and Chief Justice William Rehnquist’s death during the summer of 2005, the judicial makeup of the U.S. Supreme Court can change considerably. Upon President George W. Bush’s first day in office, he clearly established that he would want to appoint judicial nominees that would further his conservative agenda by overturning *Roe*. On July 1, 2005, Justice O’Connor announced that she would be leaving the bench to be with her ailing husband in her home state of Arizona. For her replacement President Bush announced that he would nominate John Roberts to the highest court in the land. However, before John Roberts could be sworn in, Chief Justice William Rehnquist passed away, and before he was six feet under, President Bush announced that Roberts would be Chief Justice and the vacancy of Justice O’Connor was left open.

John Roberts’ credentials are quiet impressive; he attended Harvard for both undergrad and law school; clerked for both Judge Henry Friendly and Justice Rehnquist; was partner in a prominent private firm, was special assistant to attorney general, was associate counsel to the president, and was political deputy at the attorney general’s

¹⁴¹ 492 U.S. at 510 n. 8, (citing *Harris v. McRae*, 448 U.S. 297, 317 n. 19 (1980)).

¹⁴² Constitutional Law, at 904.

office; and was confirmed to the U.S. Court of Appeals for the D.C. Circuit.¹⁴³ However, his record on issues such as the right to privacy and women’s reproductive freedom should be a concern for those who value such rights.

As the Principal Deputy Solicitor General for the first Bush Administration, he demonstrated his views toward the above issues.¹⁴⁴ First he argued for “Operation Rescue, a previously convicted clinic bomber and others that a federal civil rights law was inapplicable to their nationwide conspiracy.”¹⁴⁵ Also, he co-authored a brief suggesting that *Roe* should be overturned.¹⁴⁶

Supporters of Roberts argue that these were simply actions taken by a lawyer representing his clients.¹⁴⁷ As deputy solicitor general, Roberts has “considerable discretion in charting [his] legal course.”¹⁴⁸ As Yale law professor and former Solicitor General, Drew S. Days has explained, “Although the Solicitor General is appointed by the President and serves under the Attorney General, he has gradually come to enjoy a tradition of independence in carrying out his official responsibilities. He is only rarely subject to direction by either the President or the Attorney General, and as a practical matter, he is in most cases *final decisionmaker* with respect to both designing a strategy

¹⁴³ Charles Lane, *John G. Roberts*, Washington Post at A13, July 2, 2005, available at http://www.washingtonpost.com/wp-dyn/content/article/2005/07/01/AR2005070102247.html?nav=rss_print/asection.

¹⁴⁴ *What John Roberts’ Actions As Deputy Solicitor General Say About His Own Ideology*, NARAL PRO-CHOICE AMERICA, August 24, 2005, available at <http://www.prochoiceamerica.org> [hereinafter John Roberts as Deputy Solicitor].

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

for government litigation in the Supreme Court and deciding whether to appeal trial court decisions adverse to the government.”¹⁴⁹ Roberts has spoken in great lengths about the power the Solicitor General has.¹⁵⁰ He stated, “The president is the chief executive, but so many intra-executive branch disputes end up in the Solicitor General’s office and were resolved by the solicitor general saying, ‘Well, this is the position we are going to take before the Supreme Court,’ and that became the executive branch position.”¹⁵¹ Roberts also noted that “[he] basically got to decide which side of th[e] case [he] wanted to be on.”¹⁵²

During the late 1980s to the early 1990s in the U.S., there was widespread violence at abortion clinics. For example, pro-life extremists were responsible for 359 clinic blockades.¹⁵³ By arguing that women’s civil rights had not been violated, Roberts supported Operation Rescue, a pro-life group who would protest outside reproductive

¹⁴⁹ Id. (citing Drew S. Days, *When the President Says “No”*: A Few Thoughts of Executive Powers and the Tradition of Solicitor General Independence, 3 J. App. Pract. & Process 509 (2001) (emphasis added)).

¹⁵⁰ John Roberts as Deputy Solicitor, *supra* note 144.

¹⁵¹ Id. (citing John Roberts, Address at the Rex E. Lee Conference on the Office of Solicitor General of the United States, Brigham Young University and J. Reuben Clark Law School (Sept. 12-13, 2002)).

¹⁵² Id.

¹⁵³ *In A Climate of Widespread Clinic Violence and Pleas From Women and State Law Enforcement John Roberts Sided With Operation Rescue & Anti-Choice Extremists*, NARAL PRO-CHOICE AMERICA, August 23, 2005, available at <http://www.prochoiceamerica.org>. “Anti-choice extremists were responsible for approximately 48 bombings and arsons in 24 states.” (Citing National Abortion Federation (NAF), *NAF Violence and Disruption Statistics: Incidents of Violence & Disruption Against Abortion Providers in the U.S. & Canada* (Sept. 16, 2004)) “Since 1977, anti-choice extremists have directed over 4,200 reported acts of violence against abortion providers and reproductive health clinics, including bombings, arsons, death threats, kidnappings, and assaults, as well as over 92,000 reported acts of disruption, including bomb threats, intimidation, and harassing calls.” Id.

health clinics preventing women from entering and expressing their constitutionally protected right to choose.¹⁵⁴

Secondly, Robert's record of opposition to women's reproductive freedom clearly stood out when he co-authored a brief asking for the Supreme Court to overturn *Roe*. As Deputy Solicitor General, Roberts wrote in his brief for the government in *Rust*, that the Supreme Court wrongfully decided *Roe* and that women's fundamental right to choose is not supported by the Constitution.¹⁵⁵

To fill Justice O'Connor's position, President Bush nominated his friend and fellow Texan Harriet Miers. Ms. Miers had no experience as a constitutional law lawyer and had no judicial experience. She had been White House counsel long enough to be considered an intern. Despite the lackluster qualifications, President Bush told reporters and the far right conservatives who were worried that Ms. Miers was not conservative enough to "trust me." President Bush seems to believe being of the Evangelical faith was a good enough qualification; unfortunately for Bush and Miers that was not enough and she was asked to withdraw her nomination, which she did.

With declining approval ratings from both sides of the line and a White House investigation and possibly more indictments looming, President Bush had to make a political appointment, so he nominated Samuel A. Alito. Alito has a long paper trail after fifteen years on the court of appeals, and he has a strong right-wing reputation.

The issue that concerns many is that he may be too conservative. As a Third Circuit judge, Alito heard *Casey* before it reached the Supreme Court and he was the lone dissenter in part, arguing that all the law's restrictions on abortion were constitutional.

¹⁵⁴ National Organization for Women v. Operation Rescue, 506 U.S. 263 (1993).

¹⁵⁵ Brief for the Respondent at 7, *Rust v. Sullivan*, 1989 U.S. Briefs 1391 (1990).

While most restrictions were upheld by the Supreme Court as constitutional, the spousal notification provision was held unconstitutional. In Alito's opinion he wrote, "an undue burden may not be established simply by showing that a law will have a heavy impact on a few women but that instead a broader inhibiting effect must be shown."¹⁵⁶ Alito's opinion sounds very similar to the standard of review issue in *Ayotte* that the Supreme Court is set to hear in fall 2005. Alito seems to lean towards the stricter standard set out in *Salerno*, a non-reproductive case, thus dangerously compromising women's health and their access to safe and legal abortions. Fortunately, with Harriet Miers withdrawal of her nomination, Alito if confirmed to the bench would not take the seat until the spring semester, leaving Justice O'Connor on the bench to hear *Ayotte*.

VII. *State of California v. United States and National Family Planning And Reproductive*

Health Association, Inc. v. Ashcroft: Challenging the Weldon Amendment

Bill Lockyer, the Attorney General of California, has brought suit against the United States to block a federal spending restriction known as the "Weldon Amendment."¹⁵⁷ Bill Lockyer states this amendment "could deny \$49 billion in federal funds to California if the state enforces women's constitutional right to emergency abortion care."¹⁵⁸ The state must enforce these rights against a health care provider who either morally or religiously is opposed to abortion and refuses to perform abortion or

¹⁵⁶ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F. 2d 682, 721 (3d Cir. 1991).

¹⁵⁷ Office of the Attorney General, State of California, *Attorney General Lockyer Files Court Challenge to Block Federal Attack on Women's Health Care Rights, Education Chief O'Connell Also Opposes Denial of Funds If State Protects Abortion Rights*, Press Release, January 25, 2005 [hereinafter Office of the Attorney General].

¹⁵⁸ *Id.*

related services.¹⁵⁹ He also stated, “with the Weldon amendment, President Bush and Congress are denying women [the] freedom [to make their own health care decisions].”¹⁶⁰ Bill Lockyer further stated, “funding restrictions could damage the state’s ability to improve our schools, make our children safer, aid jobless workers, collect child support from deadbeat parents, and provide child care to poor people trying to get on their feet.”¹⁶¹

Also challenging the law but on different grounds, National Family Planning and Reproductive Health Association (NFPRHA) has filed suit on behalf of 4,000 family planning clinics across the United States that receive federal funding through Title X.¹⁶² NFPRHA is calling for immediate relief and for no part of the Weldon Amendment to be enforced against any NFPRHA clinics.¹⁶³ Health care professionals are put in a no-win situation. If a publicly funded hospital forces a nurse who openly objects to abortions to give a patient a referral, then the hospital could be in violation of the Weldon Amendment; however, by not giving a referral, the hospital could be in violation of

¹⁵⁹ Office of the Attorney General, State of California, *Attorney General Lockyer Readies Court Challenge to Fight Federal Attack on Women’s Right to Choose; Boxer, Feinstein and Pelosi Also Oppose Move to Block Funds If State Enforce Abortion Laws*, Press Release, December 8, 2004.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Group Sues Over Conflicting Abortions Laws*, NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION, Associated Press, December 13, 2004, available at <http://www.nfprha.org>.

¹⁶³ *Id.*

receiving Title X federal funding.¹⁶⁴ As NFPRHA states, “the Weldon Amendment impedes the rights of Title X clinics and their physicians to provide referral services.”¹⁶⁵

The Weldon amendment exceeds Congress’s given power under the Spending Clause, violates the 10th Amendment by infringing on state sovereignty, and violates women’s fundamental right to abortion services.¹⁶⁶ “Under the Spending Clause, Congress may not condition the receipt of federal funds in such a way as to leave the States with no practical alternative but to comply with the federal restrictions.”¹⁶⁷ The remedy asks for the amendment to be struck down and prohibited to be enforced, “or declare that enforcement of state laws requiring provision of emergency medical services, including abortion care, does not violate the amendment.”¹⁶⁸ Moreover, the amendment is implying that states restrict women’s right in order to get billions of dollars in education and labor funds.¹⁶⁹

The Emergency Medical Treatment and Active Labor Act (EMTALA), ensures that women who need emergency medical care for an abortion will not be turned away.¹⁷⁰ However, the Weldon amendment leaves hospitals to believe women in these grim

¹⁶⁴ Id.

¹⁶⁵ Complaint at 13, National Family Planning and Reproductive Health Association Inc. v. Ashcroft (D. D.C. 2004).

¹⁶⁶ Complaint, California v. US, at 10.

¹⁶⁷ Id.

¹⁶⁸ Office of the Attorney General.

¹⁶⁹ Rebecca Vesely, *California Sues U.S. Over Budget’s Abortion Ban*, WOMEN’S E NEWS, February 7, 2005, available at <http://www.womensenews.org/article.cfm/dyn/aid/2176/context/archive>.

¹⁷⁰ Federal Refusal Clause.

circumstances can be turned away.¹⁷¹ Moreover, Dave Weldon, M.D., stated that it was his opinion that this amendment does not conflict with EMTALA.¹⁷² The Weldon Amendment specifically states, “none of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions. [T]he term ‘health care entity’ includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility.”¹⁷³ Thus, under the Weldon amendment, there are no exceptions that the health care provider must provide a referral when the health of the woman is in jeopardy.

VIII. Opinion Polls On Abortion

The majority of Americans believe that abortion should stay legal.¹⁷⁴ However, the media, misconstruing polls, may have one believe that America is split on the issue.¹⁷⁵ According to news reports in 2003, 53.6 percent of America believed that abortion should

¹⁷¹ Id.

¹⁷² Press Release, *U.S. Representative Dave Weldon, M.D. Dismayed BY Aggressive Abortion Advocacy in California Lawsuit*, U.S. Congressman Dave Weldon, M.D., January 26, 2005.

¹⁷³ Weldon Amendment.

¹⁷⁴ Cynthia L. Cooper, *Polls on Abortion Can Be Misleading*, WOMEN’S E NEWS, February 26, 2001, available at <http://www.womensenews.org/article.cfm?aid=461>. [hereinafter *Polls on Abortion*].

¹⁷⁵ Id.

be legal, this being the smallest percentage since 1970.¹⁷⁶ Moreover, the polling question was whether one was pro-life or pro-choice.¹⁷⁷ This creates a significant problem because the “pro-life” or “pro-choice” label does not consider one’s viewpoints, which are significantly different from the “pro-life” or “pro-choice” label alone.¹⁷⁸ In 2000, Gallup Poll’s survey, which included people’s viewpoints, showed that only nineteen percent of Americans believed that abortion should be illegal.¹⁷⁹ It is still considerably similar to the 1975 data in which twenty-two percent believed abortion should be illegal.¹⁸⁰ With these significantly low numbers for those who oppose abortion, the Supreme Court, in making their decision on abortion, should consider public policy. The majority of Americans continue to support a woman’s right to choose abortion.

Conclusion

Roe v. Wade established a woman’s fundamental right to choose whether to terminate her pregnancy.¹⁸¹ Since that historic decision, lawmakers have been encroaching on women’s right to privacy by carefully restricting and narrowing women’s access, by essentially making it impossible to access those fundamental services. Many Court decisions have come down since then and all have continued to recognize *Roe* as

¹⁷⁶ Robert B. Bluey, *Youth Attitudes on Abortion Encourage Pro-Life Groups*, CNS NEWS, CYBER NEWS SERVICE, April 4, 2003, available at <http://www.cnsnews.com>.

¹⁷⁷ Polls on Abortion.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Roe v. Wade*, 410 U.S. 113 (1973).

having precedence. However, with the changing Supreme Court, many fear the new nominees will shift the pendulum and overrule *Roe*.

The last case to reach the Supreme Court was *Stenberg v. Carhart* in 2000, which threw out a Nebraska law banning late-term procedure, which contained no health exceptions.¹⁸² In 2003, President Bush signed into law a similar ban known as the Partial-Birth Abortion Ban Act.¹⁸³ Since then the law has been ruled unconstitutional by three federal judges; however, the appeals are pending.¹⁸⁴ The federal government and many other states have adopted this ban but it is yet to go into effect.¹⁸⁵ The legal standard of review that will be decided in *Ayotte* is important because the “partial-birth ban” appeals could reach the Supreme Court by spring 2006, with Roberts and Alito on the bench.¹⁸⁶

The Weldon Amendment is one of many strategic attacks to come to limit women’s right to choose and to pave the way to overturn *Roe*. Pro-choice advocates will have to continue to fight each one at a time. The Weldon Amendment is unconstitutionally vague; an ordinary person will not be able to determine whether they are complying with the set guidelines. Also, despite what opponents of health care exceptions argue, exceptions for medical emergency, rape, and incest are necessary to prevent discrimination against women.

¹⁸² Bill Mears, *Abortion Returns to High Court’s Docket: Justices to Hear Two High-Profile Cases This Week*, CNN WASHINGTON BUREAU, November 29, 2005 [hereinafter *Abortion Returns to High Court’s Docket*].

¹⁸³ *Id.*

¹⁸⁴ *Chipping Away at Roe*.

¹⁸⁵ *Abortion Returns to High Court’s Docket*.

¹⁸⁶ *Id.*