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The Unconstitutionality of Ohio's House Bill 125: The Heartbeat Bill

Jessica L. Knopp

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I. INTRODUCTION

Pro-life legislation has been at the forefront of Ohio's political agenda for 2011. With newly elected Republican governor John Kasich,[1] a Republican dominated Ohio House of Representatives,[2] and a Republican dominated Ohio Senate,[3] several pro-life bills have been

1. *About: John R. Kasich Governor of Ohio*, OHIO.GOV (2012), http://governor.ohio.gov/About/GovernorKasich.aspx.

2. *Members Displayed by Name*, WELCOME TO THE OHIO HOUSE OF REPRESENTATIVES, OF THE 129TH GENERAL ASSEMBLY (2012), http://www.house.state.oh.us/index.php?option=com_displaymembers&Itemid=57.

3. *The Ohio Senate*, THE 129TH GENERAL ASSEMBLY, OHIO SENATE MEMBERS (2012) http://www.ohiosenate.gov/directory.html.

considered, debated, and passed by the Ohio legislature and ultimately signed into law.

For example, H.B. 78/S.B.72, The Viable Infants Protection Act,[4] is currently pending in the Ohio Senate. The Viable Infants Protection Act prohibits an abortion after twenty weeks if the physician determines that the fetus is "viable."[5] "Viability" means that the physician determines that the fetus is capable of life outside the womb.[6] H.B. 298/S.B. 201,[7] referred to as the "Defund Planned Parenthood Act"[8] by pro-life supporters, re-prioritizes federal family planning dollars distributed to state health centers that promote "family planning services."[9] This bill would have the practical effect of allocating federal funds to organizations like Planned Parenthood last.[10]

In June 2011, Governor Kasich signed into law H.B. 153, which

4. S.B. 72, 129th Gen. Assemb., Reg. Sess. (Ohio 2011), *available at* http://www.legislature.state.oh.us/BillText129/129_SB_72_PS_Y.pdf.

5. *Id.*

6. *Id.* (as used in sections 2919.16 to 2919.18 of the Ohio Revised Code. Sec. 2919.16(M) defines "viable" as "the stage of development of a human fetus at which in the determination of a physician, based on the particular facts of a woman's pregnancy that are known to the physician and in light of medical technology and information reasonably available to the physician, there is a realistic possibility of the maintaining and nourishing of a life outside of the womb with or without temporary artificial life-sustaining support.").

7. H.B. 298, 129th Gen. Assemb., Reg. Sess. (Ohio 2011), *available at* http://www.legislature.state.oh.us/BillText129/129_HB_298_I_Y.pdf; S.B. 201, 129th Gen. Assemb., Reg. Sess. (Ohio 2011), *available at* http://www.legislature.state.oh.us/BillText129/129_SB_201_I_Y.pdf.

8. Peter J. Smith, *Ohio Lawmakers Seek to Defund Planned Parenthood, Fund Public Health Centers*, LIFESITENEWS.COM (July 13, 2011), *available at* http://www.lifesitenews.com/news/ohio-lawmakers-seek-to-defund-planned-parenthood-fund-public-health-centers/.

9. H.B. 298/S.B. 201, 129th Gen. Assemb., Reg. Sess. (Ohio 2011) (enacting O.R.C. 3701.033 (A) All funds distributed by the department of health for the purpose of providing family planning services, including funds the department receives through the "Maternal and Child Health Block Grant," Title V of the "Social Security Act," 95 Stat. 818 (1981), 42 U.S.C. 701, as amended, and through Title X of the "Public Health Service Act," 84 Stat. 1504 (1970), 42 U.S.C. 300a, as amended, shall be awarded as follows: (1) The department shall award funds with foremost priority given to eligible public entities that provide family planning services, including community health clinics and similar health facilities operated by state, county, or local government entities. (2) To the extent funds are available after the department determines that all eligible public entities have been fully funded under division (A)(1) of this section, the department may award funds to nonpublic entities in the following order of descending priority: (a) Federally qualified health centers, as defined in section 3701.047 of the Revised Code; (b) Nonpublic entities that provide comprehensive primary and preventive care services in addition to family planning services; (c) Nonpublic entities that provide family planning services, but do not provide comprehensive primary and preventive care services.).

10. *Id.*; *see also Ohio Right to Life Renews Effort to Defund Planned Parenthood*, OHIO RIGHT TO LIFE (May 16, 2012, 3:39 PM), http://www.ohiolife.org/press-releases/2012/5/16/ohio-right-to-life-renews-effort-to-defund-planned-parenthoo.html.

bans the performance of abortions in public hospitals and prohibits abortion coverage in insurance plans for public employees.[11] H.B. 153 also requires the Ohio Department of Health to apply for federal abstinence education grants.[12] In November of 2011, Governor Kasich also signed into law H.B. 63/S.B. 8, which increased the evidentiary standard for minors' knowledge regarding abortions.[13] Effective February 2012, when a minor seeks an abortion, the juvenile court must determine by "clear and convincing evidence" that "the minor is sufficiently mature and well enough informed to decide intelligently whether to have an abortion."[14] In December 2011, Governor Kasich signed into law H.B. 79, which excludes abortion coverage from the State Exchange, which Ohio must create as required by the new federal health care law introduced by President Barack Obama.[15] Additionally, states throughout the country are attempting to pass similar pro-life legislation, including Mississippi, South Dakota, and Colorado, among many others.

Perhaps the most controversial piece of pro-life legislation introduced in 2011 is Ohio's H.B. 125,[16] commonly referred to as "The Heartbeat Bill."[17] If passed into law, H.B. 125 would require physicians

11. Am. Sub. H.B. 153, 129th Gen. Assemb., Reg. Sess. (Ohio 2011) (enacted), *available at* http://www.legislature.state.oh.us/BillText129/129_HB_153_EN_N.html. For final analysis, see http://www.lsc.state.oh.us/analyses129/11-hb153-129.pdf.

12. *Id.* (OHIO. REV. CODE. § 3701.0211 enacted to read as follows, "Sec. 3701.0211. For each year that federal funds are made available to states under Title V of the 'Social Security Act,' 124 Stat. 352 (2010), 42 U.S.C. 710, as amended, for use in providing abstinence education, the director of health shall submit to the United States secretary of health and human services an application for the allotment of those funds that is available to this state. The director shall use the funds received in accordance with any conditions under which the application was approved.").

13. Am. H.B. 63, 129th Gen. Assemb., Reg. Sess. (Ohio 2011) (enacted), *available at* http://www.legislature.state.oh.us/BillText129/129_HB_63_EN_N.pdf.; S.B. 8, 129th Gen. Assemb., Reg. Sess. (Ohio 2011), *available at* http://www.legislature.state.oh.us/BillText129/129_SB_8_I_Y.pdf.

14. H.B. 63; S.B. 8 (enacting Ohio Rev. Code § 2919.121(C)(3) "If the court finds by clear and convincing evidence that the minor is sufficiently mature and well enough informed to decide intelligently whether to have an abortion, the court shall grant the petition and permit the minor to consent to the abortion.").

15. Am. H.B. 79, 129th Gen. Assemb., Reg. Sess. (Ohio 2011) (enacted) *available at* http://www.legislature.state.oh.us/BillText129/129_HB_79_EN_N.pdf (enacting Ohio Rev. Code § 3901.87(A) "No qualified health plan shall provide coverage for a nontherapeutic abortion. (B) As used in this section: (1) "Nontherapeutic abortion" has the same meaning as in section 124.85 of the Revised Code. (2) "Qualified health plan" means any qualified health plan as defined in section 1301 of the "Patient Protection and Affordable Care Act," 42 U.S.C. 18021, offered in this state through an exchange created under that act.").

16. Am. Sub. H.B. 125, 129th Gen. Assemb., Reg. Sess. (Ohio 2011), *available at* http://www.legislature.state.oh.us/BillText129/129_HB_125_PH_Y.pdf.

17. *The Heartbeat Bill: If the Heartbeat is Detected, the Baby is Protected*, THE HEARTBEAT

to check the fetus of a pregnant woman for a "heartbeat."[18] If the fetus has any detectable cardiac activity, the physician is required to inform the woman in writing, and the woman must sign a form acknowledging that the fetus has cardiac activity.[19] Additionally, if the fetus is found to have cardiac activity, the woman is banned from having an abortion unless it is a medical emergency.[20]

H.B. 125 does not have a rape exception, which means that women who conceived through violence would be required to proceed to term with the fetus if the fetus is older than just a few weeks.[21] H.B. 125 also subjects physicians to discipline if the physician fails to determine if the fetus has a detectable cardiac activity.[22] Naturally, the introduction of a bill this controversial attracted local and national media attention.[23]

BILL, http://www.heartbeatbill.com/ (last visited Oct. 17, 2012); Aaron Marshall, *Ohio Senate Republicans Plan to Move 'Heartbeat' Bill*, CLEVELAND.COM (Nov. 25, 2011, 7:25 PM), *available at* http://www.cleveland.com/open/index.ssf/2011/11/senate_republicans_planning_to.html; Darrel Rowland, *Ohio Voters Evenly Split on 'Heartbeat Bill,'* THE COLUMBUS DISPATCH (Jan. 19, 2012, 2:08 PM), *available at* http://www.dispatch.com/content/stories/local/2012/01/19/quinnipiac-poll-heartbeat-bill-fracking.html.

18. H.B. 125 (enacting Ohio Rev. Code § 2919.19(A)(2) "'Fetal heartbeat' means cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac . . . . (C)(1) Except when a medical emergency exists that prevents compliance with this division, no person shall perform an abortion on a pregnant woman prior to determining if the fetus the pregnant woman is carrying has a detectable fetal heartbeat.").

19. *Id.* (enacting Ohio Rev. Code § 2919.19(D)(2) "If the person who intends to perform an abortion on a pregnant woman detects a fetal heartbeat in the unborn human individual that the pregnant woman is carrying, no later than twenty-four hours prior to the performance of the intended abortion, both of the following apply: (a) The person intending to perform the abortion shall inform the pregnant woman in writing that the unborn human individual that the pregnant woman is carrying has a fetal heartbeat and shall inform the pregnant woman . . . to the best of the person's knowledge. . .the statistical probability of bringing the unborn human individual to term . . . (b) The pregnant woman shall sign a form acknowledging that the pregnant woman has received information from the person intending to perform the abortion that the unborn human individual that the pregnant woman is carrying has a fetal heartbeat . . . .").

20. *Id.* (enacting Ohio Rev. Code § 2919.19(C)(1) "Except when a medical emergency exists that prevents compliance with this division, no person shall perform an abortion on a pregnant woman prior to determining if the fetus of the pregnant woman is carrying a detectable fetal heartbeat. Any person who performs an abortion on a pregnant woman based on the exception in this division shall note in the pregnant woman's medical records that a medical emergency necessitating the abortion existed.").

20. *Id.* (enacting Ohio Rev. Code § 2919.19(A)(6) "Cardiac activity means a biologically indefinable moment in time, normally when the fetal heartbeat is formed in the gestational sac.").

21. *Id. See also* Al Gerhardstein, *Opposition Testimony to HB 125* (Mar. 9, 2011), http://www.ppao.org/Legislation/129th/HB125/HB125_Gerhardstein.pdf.

22. H.B. 125 (enacting O.R.C. 2919.19(C)(4) "If a physician performs an abortion on a pregnant woman prior to determining if the fetus the pregnant woman is carrying has a detectable fetal heartbeat, the physician is subject to disciplinary action . . . .").

23. Stephanie Condon, *Abortion battles spring up nationwide as states test the limits of Roe v. Wade*, CBSNEWS (Mar. 21, 2011, 5:00 AM), http://www.cbsnews.com/8301-503544_162-

This Comment analyzes the constitutionality of Ohio's controversial H.B. 125 under the Fourteenth and First Amendments to the United States Constitution in the context of current United States Supreme Court precedent. Part II outlines Ohio's current abortion laws, describes Ohio's role in creating anti-abortion legislation and case law, provides a context of other abortion bills occurring nationwide, and explains H.B. 125. Part III analyzes how H.B. 125 is unconstitutional under the Fourteenth Amendment in its current form, analyzes its constitutionality if the bill was modified to be a consent-only bill, and analyzes its unconstitutionality under the Establishment Clause of the First Amendment in light of Supreme Court precedent addressing abortion.

II. THE REGIONAL AND NATIONAL PUSH FOR PRO-LIFE LAWS

A. Ohio's Current Abortion Laws & Ohio as the Catalyst of Informed Consent Provisions

In Ohio, abortion is defined as "the purposeful termination of a human pregnancy by any person, including the pregnant woman herself, with an intention other than to produce a live birth or to remove a dead fetus or embryo."[24] Absent certain exceptions, after a fetus is viable, abortion procedures are prohibited.[25] Viability is defined as "the stage in development of a human fetus at which in the determination of a physician . . . there is a realistic possibility of the maintaining and nourishing of a life outside of the womb with or without temporary artificial life-sustaining support."[26] After twenty-two weeks, abortions are prohibited unless the fetus is not viable.[27]

Like many states, Ohio also mandates that the woman seeking an abortion wait a specified period of time and receive certain information prior to an abortion procedure in order to ensure that the woman's choice

20044823-503544.html; Erik Eckholm, *Anti-Abortion Groups Are Split on Legal Tactics*, N.Y TIMES (Dec. 4, 2011), *available at* http://www.nytimes.com/2011/12/05/health/policy/fetal-heartbeat-bill-splits-anti-abortion-forces.html?_r=2&ref=ohio; Catherine Candisky, *Ohio House Approves Anti-Abortion Bills*, THE COLUMBUS DISPATCH (June 28, 2011), *available at* http://www.dispatch.com/content/stories/local/2011/06/28/ohio-house-approves-heartbeat-bill.html; Ann Sander, *Abortion Foes Push Fetal Heartbeat Bills in States*, MSNBC (Oct. 12, 2011, 3:31:17 PM), http://www.msnbc.msn.com/id/44879242/ns/politics-more_politics/t/abortion-foes-push-fetal-heartbeat-bills-states/#.TyL1N5ibLNY.

24. OHIO REV. CODE ANN. § 2919.11 (West 2012).
25. *Id.* § 2919.17(A).
26. *Id.* § 2919.16(M).
27. *Id.* § 2919.18(A)(1).

to have an abortion is informed. These laws are frequently dubbed "informed consent provisions."[28] Ohio, and particularly the city of Akron, was the catalyst for many of the nation's informed consent provisions.

In 1983, *City of Akron v. Akron Center for Reproductive Health*[29] examined the constitutionality of laws designed to prevent a woman from obtaining an abortion absent the recognition of certain information.[30] The ordinances: mandated that an abortion could only be performed in a hospital setting; required a pregnant woman to wait twenty-four hours prior to receiving an abortion to deliberate over the decision; required the physician to inform the woman about the development of the fetus, the status of her pregnancy, physical and emotional complications that may result from pregnancy; and required the physician to give the woman a list of agencies that can assist the woman with adoption and childbirth.[31] The City of Akron argued that providing a woman with this information was part of the "informed consent" process because it made her decision to have an abortion more informed, and these ordinances protected the life of the woman.[32]

Although the United States Supreme Court held Akron's ordinances unconstitutional,[33] the Supreme Court reconsidered similar ordinances in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[34] and found certain informed consent provisions constitutional.[35]

28. Christine L. Raffaele, *Validity of State "Informed Consent" Statutes by Which Providers of Abortions Are Required to Provide Patient Seeking Abortion with Certain Information*, 119 A.L.R.5TH 315 (2004).

29. City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

30. *Akron Ctr. Reprod. Health*, 462 U.S. at 421-23.

31. *Id.* at 421-23. Just four years previously, the United States District Court for the Northern District of Ohio found these Akron ordinances unconstitutional in Akron Center for Reproductive Health v. City of Akron, 479 F. Supp. 1172. The district court held unconstitutional the "truly informed consent" provisions of the ordinance, which required the physician to give the pregnant woman a detailed description of the "anatomical and physiological characteristics of the particular unborn child . . . ." *Id.* at 1203. The court reasons this provision violated the woman's right to privacy and went "far beyond what is permissible in pursuance of [the State's] interest." *Id.*

32. *Akron Reprod. Health*, 462 U.S. at 442.

33. *Id.* at 421-23.

34. 505 U.S. 833 (1992).

35. *Id.* at 881. *See also*, TRACY A. THOMAS, JUSTICE & LEGAL CHANGE ON THE SHORES OF LAKE ERIE: A HISTORY OF THE UNITED STATES DISTRICT FOR THE DISTRICT OF OHIO 20-21 (Paul Finkelman & Roberta Alexander, eds. 2012). Tracy A. Thomas is Professor of Law at The University of Akron School of Law. She teaches Remedies, Women's Legal History, and Family Law. Professor Thomas received her B.A. degree from Miami University and J.D. degree from Loyola Law School, Los Angeles, where she was the production editor of the Loyola of Los Angeles International and Comparative Law Journal. Professor Thomas is the co-editor of

In *Casey*, a twenty-four hour waiting period[36] and a statute that required the pregnant woman to receive certain information, including information about adoption and childbirth, were held constitutional.[37] Since *Casey*, Ohio has enacted many informed consent provisions designed to "ensure that the woman's choice is informed" and "designed to . . . persuade the woman to choose childbirth over abortion."[38]

After the *Casey* decision, Ohio immediately enacted a law requiring a twenty-four hour waiting period originally introduced in *Akron Reproductive Health*. Then, Mississippi[39] and Pennsylvania quickly enacted a twenty-four hour waiting period.[40] In the mid to late 1990's, eight states also enacted waiting periods as part of their informed consent laws: Indiana,[41] Kansas,[42] Kentucky,[43] Louisiana,[44] Michigan,[45] Nebraska,[46] Utah,[47] and Wisconsin.[48] In the 2000's, eight more states enacted twenty-four hour waiting periods: Alabama,[49] Georgia,[50] Idaho,[51] Minnesota,[52] Missouri,[53] Oklahoma,[54] Texas,[55] and Virginia.[56] More recently, in 2010, both West Virginia[57] and South Carolina[58]

FEMINIST LEGAL HISTORY: ESSAYS ON WOMEN AND LAW (Tracy A. Thomas & Tracey Jean Boisseau eds., NYU Press 2011). She is currently at work on a book about Elizabeth Cady Stanton and the Feminist Foundations of Family Law under contract with NYU Press. *Available at* http://www.uakron.edu/law/faculty/profile.dot?identity=700609.

36. 505 U.S. at 885.

37. *Id.* at 881.

38. *Id.* at 878. *See also* Jennifer Y. Seo, *Raising the Standard of Abortion Informed Consent: Lessons to Be Learned from the Ethical and Legal Requirements for Consent to Medical Experimentation*, 21 COLUM. J. GENDER & L. 357, 359-60 (2011) (arguing that informed consent provisions constitute informational manipulation).

39. MISS. CODE ANN. § 41-41-33(1)(a) (West 2012) (H.B. No. 982 took effect in 1991).

40. 18 PA. CONS. STAT. ANN. § 3205(a)(1) (West 2012).

41. IND. CODE § 16-34-2-1.1(a)(1) (West 2012) (S.E.A. No. 311 enacted in 1995).

42. KAN. STAT. ANN. § 65-6709(a) (West 2012) (S.B. 204 enacted in 1997).

43. KY. REV. STAT. ANN. § 311.725(1)(a) (West 2012) (H.B. 85 enacted in 1998).

44. LA. REV. STAT. ANN. § 40:1299.35.6(B)(3) (West 2012) (H.B. No. 2246 enacted in 1995).

45. MICH. COMP. LAWS ANN. § 333.17014(h) (West 2012) (S.B. No. 384 enacted in 1994).

46. NEB. REV. STAT. § 28-327(2) (West 2012) (L.B. 110 enacted in 1993).

47. UTAH CODE. ANN. § 76-7-305(2)(a) (West 2012) (S.B. 60 enacted in 1993).

48. WIS. STAT. ANN. § 253.10(3)(c)(1) (West 2012) (A.B. 441 enacted in 1995).

49. ALA. CODE § 26-23A-4(a) (West 2012) (S.B. No. 33 enacted in 2002).

50. GA. CODE ANN. § 31-9A-3(1) (West 2012) (H.B. No. 197 enacted in 2005).

51. IDAHO CODE. ANN. § 18-609(4) (West 2012) (S.B. No. 1299 enacted in 2000).

52. MINN. STAT. ANN. § 145.4242(a)(2) (West 2012) (S.F. No. 187 enacted in 2003).

53. MO. ANN. STAT. § 188.039(2) (West 2012) (H.B. No. 156 effective in 2003).

54. OKLA. STAT. ANN. tit. 63, § 1-738.2(B)(2) (West 2012) (H.B. No. 1686 effective in 2005).

55. TEX. CODE. ANN. § 171.012(a)(4) (Vernon 2012) (H.B. No. 15 effective in 2003).

56. VA. CODE ANN. §18.2-76(B)(5) (West 2012) (H.B. No. 1833 enacted in 2003).

57. W.VA. CODE ANN. § 16-2I-2(b) (West 2012) (S.B. No. 597 enacted in 2010).

enacted the waiting period, and in 2011 North Carolina[59] enacted a waiting period despite the governor's veto.

South Dakota is in the process of attempting to pass the nation's most conservative waiting period, requiring women to wait seventy-two hours prior to an abortion.[60] A federal judge granted a preliminary injunction to prohibit the waiting period from going into effect because it is likely unconstitutional under current Supreme Court precedent.[61] Because South Dakota only has one abortion clinic in the entire state,[62] implementing a seventy-two hour waiting period may mean that a woman must wait an entire month between her first consultation and the abortion procedure if the same doctor is required to perform both the consultation and the procedure.[63]

In addition to the waiting period, Ohio takes additional measures to ensure that the woman's choice is "informed" or "persuaded."[64] Ohio mandates that a pregnant woman receive certain information designed to affect her abortion decision. For example, the woman must receive materials that include information designed to discourage her from having an abortion and encourage her to pursue "family planning."[65] This information that the State is required to give "describe[s] the embryo or fetus" and "list[s] agencies that offer alternatives to abortion."[66] Additionally, this information must be provided in-person and must take place before the twenty-four hour waiting period begins.[67]

B. New Mechanisms for Pushing the Legal Boundaries of Informed Consent

Since *Akron Reproductive Health* and *Casey*, states have found new methods to ensure "informed consent" prior to an abortion procedure. Requiring the performance of an ultrasound on the patient's uterus prior

58. S.C. CODE ANN. § 44-41-330(D) (West 2012) (H.B. 3245 enacted in 2010).

59. N.C. GEN. STAT. ANN. § 90-21.82(1) (West 2012) (H.B. 854 enacted in 2011).

60. S.D. Codified Laws §34-23A-56 (2012).

61. Planned Parenthood Minnesota, North Dakota, South Dakota v. Daugaard, 799 F. Supp. 2d 1048 (D.S.D. 2011).

62. *Id.* at 1065.

63. *Id.* at 1064. Additionally, the district court examined the geographic distances the women would be required to travel, the financial burdens, the effect the waiting period would have on the woman's choice to a surgical or non-surgical abortion, and the impact it would have on women who are victims of abuse. *Id.* at 1065.

64. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992).

65. OHIO REV. CODE ANN. § 2317.56(C) (West 2012).

66. *Id.* § 2317.56(B)(2)(c).

67. *Id.* § 2317.56(B)(1)&(2).

to an abortion procedure is yet another way states are allegedly ensuring that "the woman's choice is informed."[68] Ultrasounds are commonly used during pregnancy to examine the fetus and provide a physical picture of the fetus.[69] Although Ohio did not pioneer the use of ultrasounds, the legal arguments that are made in their support can be traced to *Akron Reproductive Health*, the catalyst of informed consent provisions.

In 1996, Utah was the first state to introduce the use of an ultrasound as a prerequisite to having an abortion.[70] In the late 1990's, Louisiana also followed suit and in the 2000's, seventeen states also enacted ultrasound laws: Alabama,[71] Arizona,[72] Arkansas,[73] Florida,[74] Georgia,[75] Idaho,[76] Indiana,[77] Kansas,[78] Michigan,[79] Mississippi,[80] Nebraska,[81] North Dakota,[82] Ohio,[83] Oklahoma,[84] South Carolina,[85] West Virginia,[86] and Wisconsin.[87]

However, not all ultrasound laws have remained unchallenged. In 2011, Texas introduced H.B. 15, a bill that would require an ultrasound to be performed prior to an abortion procedure.[88] In addition to mandating the use of an ultrasound and requiring the image to be shown to the pregnant woman, the law would also require that the physician that performs the ultrasound provide a verbal interpretation of the

68. *Casey*, 505 U.S. at 878. *See also* Carol Sanger, *Seeing is Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351 (2008) (arguing that the use of ultrasounds has become a mechanism in the law to deter women from having abortions).

69. *Definition of Pregnancy Ultrasound*, MEDICINE NET.COM (Sept. 20, 2012), http://www.medterms.com/script/main/art.asp?articlekey=9509.

70. UTAH CODE. ANN. §76-7-305(3)(d)(6) (West 2012) (H.B. 222 enacted in 1996).

71. ALA. CODE §26-23A-4(b)(4) (West 2012) (S.B. No. 333 enacted in 2002).

72. ARIZ. REV. STAT. ANN. § 36-2156(A)(1)(b) (West 2012) (H.B. 2416 enacted in 2011).

73. ARK. CODE. ANN. § 20-16-602 (West 2012) (S.B. 729 enacted in 2003).

74. FLA. STAT. ANN. § 390.0111(3)(a)(1)(b) (West 2012) (C.S.H.B. 1127 enacted in 2011).

75. GA. CODE ANN. § 31-9A-3(4) (West 2012) (H.B. No. 147 enacted in 2007).

76. IDAHO CODE. ANN. § 18-609(5) (West 2012) (H.B. No. 248 enacted in 2007).

77. IND. CODE ANN. § 16-34-2-1.1(3) (West 2012) (S.E.A. No. 76 enacted in 2005).

78. KAN. STAT. ANN. § 65-6709(h) (West 2012) (H.B. No. 2035 enacted in 2011).

79. MICH. COMP. LAWS. ANN. § 333.17015(8) (West 2012) (H.B. No. 4446 enacted in 2006).

80. MISS. CODE ANN. § 41-41-34 (West 2012) (S.B. No. 2391 enacted in 2007).

81. NEB. REV. STAT. § 28-327(2)(e)&(3) (West 2012) (L.B. 675 enacted in 2009).

82. N.D. CENT. CODE § 14-02.1-07 (West 2012) (H.B. No. 345 enacted in 2009).

83. OHIO REV. CODE. ANN. § 2317.561 (West 2012) (H.B. No. 314 enacted in 2008).

84. OKLA. STAT. ANN. tit. 63, § 1-738.3d (West 2012) (H.B. No. 2780 enacted in 2010)

85. S.C. CODE ANN. § 44-41-330(A) (2012) (H.B. No. 3355 enacted in 2008).

86. W. VA. CODE ANN. § 16-2I-2(b)(4) (West 2012) (S.B. No. 597 enacted in 2010).

87. WIS. STAT. ANN. § 253.10(d)(1)&(g) (West 2012).

88. H.B. 15, 82nd Leg., Reg. Sess. (Tex. 2011), *available at* http://www.legis.state.tx.us/tlodocs/82R/senateamendana/pdf/HB00015A.pdf#navpanes=0.

ultrasound image, the presence of cardiac activity, and the presence of organs.[89] Additionally, the physician is required to "make audible the heart auscultation" and provide a verbal explanation of what the auscultation means.[90]

A class of plaintiffs, collectively known as "Texas Medical Providers Providing Abortion Services" challenged the law in district court, seeking an injunction.[91] The district court determined that three portions of the statute were unconstitutionally vague[92] and held that the compelled speech requirements upon the physicians were unconstitutional violations of the First Amendment, thus resulting in the injunction being granted in part.[93] On appeal to the Fifth Circuit, the Court of Appeals reversed the district court and vacated the preliminary injunction reasoning that the plaintiffs "failed to demonstrate constitutional flaws in H.B. 15" and accordingly could not prove a likelihood of success on the First Amendment and vagueness claims.[94]

Ohio's H.B. 125 would seek to push these informed consent provisions to an entirely new level.

C. The National Push for Pro-Life Legislation

In addition to Ohio, many states have considered drastic pro-life measures in 2011. Mississippi introduced Initiative 26, commonly referred to as the "Personhood Amendment."[95] Initiative 26 was an attempt to change the definition of a person under the Mississippi State Constitution.[96] The one sentence amendment to the state's constitution would read: "The term 'person' or 'persons' shall include every human

89. *Id.* (amending TEX. HEALTH & SAFETY CODE. ANN. § 171.012(B) "the physician who is to perform the abortion displays the sonogram images in a quality consistent with current medical practice in a manner that the pregnant woman may view them; (C) who is to perform the abortion provides, in a manner understandable to a layperson, a verbal explanation of the results of the sonogram images, including a medical description of the dimensions of the embryo or fetus, the presence of cardiac activity, and the presence of external members and internal organs . . . .").

90. *Id.*

91. Tex. Med. Providers Performing Abortion Serv.'s v. Lakey, 806 F. Supp. 2d 942 (W.D. Tex. 2011), *vacated in part*, 667 F.3d 570 (5th Cir. 2012).

92. *Id.* at 947.

93. *Id.* at 969-75.

94. Tex. Med. Providers Performing Abortion Services v. Lakey, 667 F.3d 570, 584 (5th Cir. 2012).

95. *Debating Mississippi's "Personhood Amendment,"* CBSNEWS (Oct. 26, 2011, 11:14 PM), http://www.cbsnews.com/8301-201_162-20126236/debating-mississippis-personhood-amendment/.

96. H.C. 44, 2011 Reg. Leg. Sess. (Miss. 2011), *available at* http://billstatus.ls.state.ms.us/documents/2011/pdf/HC/HC0044IN.pdf.

being from the moment of fertilization, cloning or the functional equivalent thereof."[97] The goal of Mississippi's Personhood Amendment was to establish that an unborn fetus is a person, thus resolving the question of when life begins and requiring the fetus be given Fourteenth Amendment protection.[98]

The Personhood Amendment made no exceptions for abortion in the case of rape, incest, or saving the life of the mother, therefore making all abortions homicides.[99] Opponents also believed that the amendment unconstitutionally encroached upon a woman's reproductive choices because it could potentially limit in-vitro options and make the morning after-pill, a common hormonal contraceptive, illegal.[100] But even in ultra-conservative Mississippi, a state with only one abortion clinic,[101] the ballot was struck down by more than 55% of the voters.[102]

Other states have proposed bills with goals and language similar to Mississippi's Amendment 26. Georgia's pending SB 169 seeks to make it unlawful for any person to knowingly create an in-vitro human embryo by any means.[103] South Carolina's pending Senate Bill 450,

97. *Id.*

98. *See* Roe v. Wade, 410 U.S. 113, 158-59 (1973) ("All this, together with our observation . . . that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person' as used in the Fourteenth Amendment does not include the unborn . . . . Texas urges us that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained the respective discipline of medicine, philosophy, and theology are unable to arrive an any consensus, the judiciary, at this point in the development of man's knowledge, is not in the position to speculate as to the answer.").

99. H.C. 44, Laura Basset, *As Mississippi Debates Extreme 'Personhood' Amendment, Advocates Ask Where Are The Dems?*, HUFF POST POLITICS (Sept. 23, 2011, 10:44 AM), http://www.huffingtonpost.com/2011/09/23/mississippi-abortion-personhood_n_976872.html.

100. Mallory Simon, *Mississippi Gov. Supports Amendment to Declare Fertilized Egg a Person*, CNN (Nov. 7, 2011, 11:47 AM), http://www.cnn.com/2011/11/04/us/mississippi-personhood-amendment/index.html; *Mississippi's "Personhood Amendment" Fails at Polls*, CBSNEWS (Nov. 8, 2011, 11:29 PM), *available at* http://www.cbsnews.com/8301-250_162-57321126/mississippis-personhood-amendment-fails-at-polls/.

101. JACKSON WOMEN'S HEALTH ORGANIZATION, http://gynpages.com/jwho/ (last visited October 16, 2012).

102. Katherine Q. Seelye, *Mississippi Voters Reject Anti-Abortion Measure*, N.Y. TIMES (Nov. 8, 2011), *available at* http://www.nytimes.com/2011/11/09/us/politics/votes-across-the-nation-could-serve-as-a-political-barometer.html; Aaron Blake, *Anti-abortion 'Personhood' Amendment Fails in Mississippi*, THE WASHINGTON POST (Nov. 8, 2011), *available at* http://www.washingtonpost.com/blogs/the-fix/post/anti-abortion-personhood-amendment-fails-in-mississippi/2011/11/08/gIQASRPd3M_blog.html.

103. S.B. 169, Ga. Gen. Assemb. (Ga. 2012), *available at* http://www1.legis.ga.gov/legis/2009_10/pdf/sb169.pdf.

also known as the "Life Beginning at Conception Act," establishes that "the right to life for each born and preborn human being vests at fertilization, and that the rights of Due Process and Equal Protection, guaranteed by . . . the Constitution . . . vest at fertilization . . . ."[104] However, Senate Bill 450 has sat in the Senate since early 2010 with no action.[105] In 2010, Colorado voted on Amendment 62, also a Personhood Amendment, which would make the term "person" apply to every human being from the beginning of the biological development of that human being.[106] Amendment 62 would have banned abortion, many forms of birth control, and embryonic stem cell research in Colorado.[107] Although the bill made it to the ballot for voting, it failed by a 73-27 margin.[108]

In addition to Ohio's attempted Heartbeat Bill, Ohio is mirroring Mississippi and Colorado by planning to introduce a personhood amendment that would effectively ban all abortions because a fertilized egg would be deemed a whole person.[109] The proposed amendment would change the Ohio Constitution to define a person as including

104. S. 450, S.C. 118th Sess. (S.C. 2012), *available at* http://www.scstatehouse.gov/sess118_2009-2010/bills/450.htm.

105. *History of Legislative Actions*, SOUTH CAROLINA GENERAL ASSEMBLY, http://www.scstatehouse.gov/sess118_2009-2010/bills/450.htm. (last visited Oct. 16, 2012).

106. Lynn Barteis, *Colorado "Personhood" Proposal's 2010 Ballot Title*, THE DENVER POST (Aug. 6, 2009, 01:00:00 AM), *available at* http://www.denverpost.com/politics/ci_13001371?source=bbapproved.

107. Cassandra Lopez, *Kids Voting: Amendment 62 Defines Life as Beginning at Conception*, THE DAILY SENTINEL (Oct. 24, 2010), *available at* http://www.gjsentinel.com/news/articles/amendment_62_defines_life_as_b; Linn & Ari Armstrong, *Am. 62 Would Ban the Pill, Endanger Women*, GRAND JUNCTION FREE PRESS (Sept. 19, 2010), *available at* http://www.gjfreepress.com/article/20100917/COLUMNISTS/100919972/1021&parentprofile=1062.

108. Joseph Boven, *Personhood Amendment Slammed by Voters*, THE COLORADO INDEPENDENT (Nov. 8, 2010), *available at* http://coloradoindependent.com/66224/personhood-amendent-slammed-by-voters.

109. Catherine Candisky, *Proposed 'Personhood' Ballot Wording Approved*, THE COLUMBUS DISPATCH (Jan. 10, 2012), *available at* http://www.dispatch.com/content/stories/local/2012/01/10/proposed-personhood-amendment-ballot-wording-approved.html; *What is the Ohio Personhood Amendment*, PERSONHOOD OHIO, (2012), http://personhoodohio.com/about:

The Ohio Personhood Amendment will read as follows:

"Person" and "men" defined:

(A) The words "person" in Article 1, Section 16, and "men" in Article 1, Section 1, apply to every human being at every stage of the biological development of that human being or human organism, including fertilization.

(B) Nothing in this Section shall affect genuine contraception that acts solely by preventing the creation of a new human being; or human "eggs" or oocytes prior to the beginning of the life of a new human being; or reproductive technology or In Vitro Fertilization (IVF) procedures that respect the right to life of newly created human beings.

"every human being at every stage of biological development, including fertilization," essentially criminalizing abortion.[110] Florida and Montana are also planning on placing similar personhood amendments on their state ballots.[111] Colorado is attempting to pass yet another constitutional amendment in 2012 that would make the definition of a "person" apply to "every human being regardless of the method of creation" and prohibits the "intentional killing of any person," which includes birth control.[112]

For now, Ohio's pro-life efforts are focused on H.B. 125, the Heartbeat Bill. The opening provisions of H.B.125 declare that according to "contemporary medical research,"[113] a "fetal heartbeat has become a key medical predictor that an unborn human individual will reach viability and live birth."[114] The bill also declares "cardiac activity begins at a biologically identifiable moment in time."[115] The bill then mandates that a physician determine if the pregnant woman's fetus "is carrying a detectable fetal heartbeat" prior to performing an abortion.[116] Using an ultrasound, this cardiac activity can be detected as early as six weeks.[117]

If the physician does in fact detect cardiac activity, the physician is required to have the woman sign a form acknowledging that the "unborn human individual" has a "fetal heartbeat,"[118] and the physician is prohibited from performing an abortion on the woman.[119] Additionally, H.B. 125 does not contain a rape exception and only permits an abortion in the case of a "medical emergency," defined as a condition that "so endangers the life of the pregnant woman or a major bodily function of the pregnant woman as to necessitate the immediate performance or

110. Aaron Marshall, *Anti-abortion Activists Want to Bring 'Personhood' Fight to Ohio Ballot*, CLEVELAND.COM (Dec. 2, 2011, 6:00 PM), http://www.cleveland.com/open/index.ssf/2011/12/personhood_fight_may_be_coming.html.

111. Mallory Simon, *Mississippi Gov. Supports Amendment to Declare Fertilized Egg a Person*, CNN (Nov. 7, 2011, 11:47 AM), http://www.cnn.com/2011/11/04/us/mississippi-personhood-amendment/index.html.

112. Electra Draper, *Colorado Group Launches Third Try for Personhood Amendment*, DENVERPOST.COM (Nov. 21, 2011, 12:49 PM), http://www.denverpost.com/breakingnews/ci_19384073.

113. Am. Sub. H.B. 125 § 2919.19(A), 129th Gen. Assemb., Reg. Sess. (Ohio 2011).

114. *Id.* § 2919.19(A)(5).

115. *Id.* § 2919.19(A)(6).

116. *Id.* § 2919.19(C)(1).

117. *Concerns Regarding Early Fetal Development*, AM. PREGNANCY ASSOC. (2008), http://www.americanpregnancy.org/pregnancycomplications/earlyfetaldevelopment.htm.

118. H.B. 125 § 2919.19(D)(2)(a)&(b).

119. *Id.* § 2919.19(E)(1).

inducement of an abortion."[120]

This Comment examines whether Ohio's H.B. 125 is constitutional under the Fourteenth Amendment and the Establishment Clause of the First Amendment in the context of United States Supreme Court precedent on abortion.

III. HOW H.B. 125 IS UNCONSTITUTIONAL UNDER THE FOURTEENTH AND FIRST AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. H.B. 125 Violates a Woman's Right to Privacy under the Fourteenth Amendment

Roe v. Wade[121] is the bedrock Supreme Court decision addressing abortion. In *Roe*, the Supreme Court considered the constitutionality of a Texas law that prohibited abortion except for saving the life of the pregnant woman.[122] In examining the constitutionality of the laws, the Court first decided whether a woman had a right to an abortion.[123] Although the Supreme Court recognized that the Constitution does not expressly state a right to privacy, the Court recognized that a right to privacy exists under the Fourteenth Amendment's concept of personal liberty,[124] and this liberty is broad enough to encompass a woman's right to terminate her pregnancy.[125]

However, a woman's right to terminate her pregnancy is not absolute because the State also has a compelling interest in safeguarding the health of the pregnant woman, seeking to maintain medical standards, and protecting prenatal life.[126] The Court reasoned that the State's interest in regulating abortion becomes compelling at the point of viability because that is when the fetus can presumably have meaningful life outside of the mother's womb.[127] Under *Roe*, viability was at the end of the first trimester of pregnancy.[128] Therefore, prior to viability, a woman's abortion decision was to be "free of interference by the

120. *Id.* § 2919.19(B)(6).
121. Roe v. Wade, 410 U.S. 113 (1973).
122. *Id.* at 113.
123. *Id.* at 129.
124. *Id.* at 153. The Court also listed previous cases that guaranteed certain areas or zones of privacy from the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. *Id.* at 152-53.
125. *Id.* at 153.
126. *Id.* at 154.
127. *Id.* at 163.
128. *Id.*

State."[129]

In subsequent decisions, the Supreme Court wrestled with defining the parameters of abortion in a variety of contexts under the privacy right embedded in the Fourteenth Amendment. In 1976, the Supreme Court in *Planned Parenthood of Central Missouri v. Danforth*,[130] upheld an informed consent provision requiring written consent by the woman prior to having the surgical abortion procedure[131] and struck down state laws requiring the consent of spouses[132] and parents[133] before an abortion procedure. In 1979 in *Belloti v. Baird*,[134] the Supreme Court again decided that minors need not receive parental consent prior to obtaining an abortion and gave states latitude for assessing whether minors were mature enough to elect an abortion procedure.[135] In 1983, the Supreme Court found unconstitutional the informed consent provisions mandating the twenty-four hour waiting period and acknowledgment of certain information in Ohio's *City of Akron v. Akron Center for Reproductive Health*.[136] That same year, in *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft*,[137] the Supreme Court found unconstitutional a law requiring that abortions performed in the second trimester must be performed in a hospital, reasoning that the provision was similar to that in *Akron Center for Reproductive Health*.[138]

In *Thornburgh v. American College of Obstetricians & Gynecologists*,[139] the Supreme Court found unconstitutional a law that required pregnant women to hear a state-scripted speech designed to

129. *Id.*

130. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976).

131. *Id.* at 52, 66-67. (The Missouri statute required "before submitting to an abortion during the first [twelve] weeks of pregnancy a woman must consent in writing to the procedure and certify that her consent is informed and freely given and is not the result of coercion.").

132. *Id.* at 71-72.

133. *Id.* at 74-75.

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

135. *Id.* at 647-48. The court concluded that every minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interests.

136. City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

137. Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476 (1983).

138. *Id.* at 481-482.

139. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

deter them from having an abortion.[140] In *Webster v. Reproductive Health Services*,[141] the Supreme Court upheld a state law that banned public employees from performing abortions, reasoning that the state need not commit any resources to facilitating abortions.[142] In *Rust v. Sullivan*,[143] the Supreme Court upheld a federal regulation prohibiting abortion counseling in clinics that receive federal funding,[144] commonly referred to as the "gag rule."[145] Then, in 1992, the Supreme Court decided *Planned Parenthood v. Casey*, which overruled *City of Akron v. Akron Productive Health* and *Thornburgh v. American College of Obstetricians & Gynecologists*, and revisited *Roe*. *Casey* provides the constitutional framework to analyze Ohio's H.B. 125.

In *Casey*, the Supreme Court examined the constitutionality of Pennsylvania's abortion laws, which required that a woman seeking an abortion wait twenty-four hours prior to obtaining the procedure and be required to receive certain information designed to persuade her to choose live birth, among other restrictions.[146] The Court revisited *Roe*, and the joint opinion determined that *Roe's* essential holdings were reaffirmed.[147] Therefore, under *Roe* and *Casey*, a woman still has the right to choose an abortion prior to viability, the State retains power to restrict abortion after fetal viability, and the State has a legitimate interest from the outset of pregnancy in protecting the health and life of the fetus.[148] In the joint opinion, the Court again recognized that a woman's right to choose an abortion derives from her privacy right under the Fourteenth Amendment, and this liberty is on a "rational continuum" which requires state laws that seek to limit that right to be carefully scrutinized.[149] The Court again drew the viability line from

140. *Thornburgh*, 476 U.S. at 747-48.

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

142. *Id.* at 509 ("[t]he State's decision here to use public facilities and staff to encourage childbirth over abortion "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy," *citing* Harris v. McRae, 448 U.S. 297, 315 (1980).).

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

144. *Id.* at 175.

145. Christopher C. Lund, *Keeping the Government's Religion Pure: Pleasant Grove City v. Summun*, 104 NW. U. L. REV. COLLOQUY 46, 56-57 (2009); Nancy Pineles, *Rust on the Constitution: Politics and Gag Rules*, 37 HOW. L.J. 83 (1993).

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

147. *Id.* at 846 (Joint opinion by O'Connor, Kennedy, Souter) (Stevens and Blackmun concurring and dissenting in part).

148. *Id.* (Justice Blackmun opined in his concurrence and dissent that the joint opinion failed to recognize another essential holding of *Roe v. Wade*, which was the use of strict scrutiny in assessing a privacy right). *Id.* at 929.

149. *Id.* at 847-48.

Roe in *Casey*, stating, "the woman's right to terminate her pregnancy before viability is the most central principle of *Roe*. It is a rule of law and a component of liberty we cannot renounce."[150]

Although the Supreme Court stated in *Casey* that *Roe's* trimester framework was not unworkable,[151] it transformed the *Roe* trimester analysis into an undue burden test.[152] The Court reasoned that the trimester framework was not an essential holding of *Roe*, that informed consent provisions do not interfere with the privacy rights recognized in *Roe*, and the trimester framework undervalues the states' interest in potential life.[153] The Court then created the "undue burden" standard to analyze laws that seek to regulate abortion prior to viability.[154]

Under *Casey*, an undue burden exists if its purpose or effect is to "place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[155] If a statute places an undue burden on a woman seeking an abortion prior to viability, it is unconstitutional because at this point, the statute may not hinder "a woman's free choice."[156] The Court also reaffirmed that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability," with viability being recognized at twenty-eight weeks in *Roe*, or twenty-three to twenty-four weeks under *Casey*, recognizing that medical technology advances.[157]

In contrast, Ohio's H.B. 125 would seek to regulate abortion according to cardiac activity, which can occur as early as five to six weeks.[158] This law would thus seek to regulate abortion prior to viability.[159] Therefore, H.B. 125 is subject to the undue burden analysis under *Casey*.[160] Under the undue burden test, if H.B. 125 seeks to place a substantial obstacle in the path of a woman seeking an abortion prior to

150. *Id.* at 871.

151. *Id.* at 855.

152. *Id.* at 876. For more information on the undue burden standard, *see* Linda J. Wharton et. al., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 YALE J.L. & FEMINISM 317 (2006).

153. *Casey*, 505 U.S. at 873.

154. *Id.* at 876.

155. *Id.* at 877-78.

156. *Id.* at 877.

157. *See id.* at 860.

158. *Concerns Regarding Early Fetal Development*, AM. PREGNANCY ASSOC. (2008), http://www.americanpregnancy.org/pregnancycomplications/earlyfetaldevelopment.htm. (Five and a half to six and a half weeks is usually a very good time to detect either a fetal pole or even a fetal heart beat by vaginal ultrasound).

159. Am. Sub. H.B. 125 § 2919.19, 129th Gen. Assemb., Reg. Sess. (Ohio 2011).

160. *See Casey*, 505 U.S. at 878.

viability, the statute is unconstitutional.[161] Here, the substantial obstacle H.B. 125 would place in the path of a woman seeking an abortion is prohibiting the abortion after the detection of cardiac activity. This obstacle is more than a mere obstacle; it is a state mandated decision because it entirely eliminates a woman's right to choose.[162] Because H.B. 125 makes the choice for the woman, H.B. 125 violates the undue burden test under *Casey*, thus making H.B. 125 unconstitutional. Furthermore, H.B. 125 is unconstitutional under the Fourteenth Amendment to the United States Constitution because it eliminates a woman's right to privacy and choice declared constitutionally protected under *Roe* and *Casey*.

Even in the context of the national push for pro-life legislation, H.B. 125 is a drastic bill because it completely eliminates a woman's right to choose an abortion, in direct violation of forty years of Supreme Court precedent interpreting the Fourteenth Amendment. In the bill's current form, there are only two ways it could be constitutional. First, Ohio would have to overturn both *Roe* and *Casey*, thus eliminating a woman's right to an abortion under the Fourteenth Amendment and therefore allowing the states to regulate and proscribe abortion. Second, H.B. 125 could be constitutional by redefining the point of viability at the point of detectable cardiac activity. Because both *Roe* and *Casey* hold that states are free to regulate or even proscribe abortion after viability,[163] if medicine could establish that viability exists at the detection of cardiac activity, then states could arguably proscribe abortions as early as five to six weeks. *Roe* even states that the point at which the state's interest becomes compelling is determined "in light of present medical knowledge."[164]

Planned Parenthood of Central Missouri v. Danforth is an example of how one state sought to expand the definition of viability.[165] In *Danforth*, a Missouri statute defined "viability" as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems."[166] Plaintiffs challenged the constitutionality of the statute, arguing that this definition of viability was too broad under the

161. *See id.*
162. *See id.*
163. *Id.* at 879; Roe v. Wade, 410 U.S. 113, 163-64 (1973).
164. *Roe*, 410 U.S. at 163.
165. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 63 (1976).
166. *Id.* at 63.

definition of viability given under *Roe*,[167] which specifically referred to viability as "potentially able to live outside the mother's womb, albeit with artificial aid," and presumably capable of "meaningful life outside the mother's womb."[168] The plaintiffs also stated that Missouri's definition of viability amounted to a legislative determination of what is properly a matter for medical judgment.[169] The Supreme Court upheld the definition of viability as constitutional in *Danforth*, stating it fit the parameters in *Roe*,[170] and noted further viability is "a matter of medical judgment, skill, and technical ability, and we preserved the flexibility of the term."[171]

Therefore, because viability is a flexible term, if medicine could establish that viability now begins at an earlier point, such as when there is detectable cardiac activity, H.B. 125 could be constitutional. However, *Danforth* cautioned that it is not the function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period.[172] The Court reasoned that the time when viability is achieved varies with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the attending physician.[173] The *Danforth* opinion suggests that if states seek to specifically define viability, the statute must allow for the physician to have some discretion.

Given that viability is currently defined by case law as a fetus having meaningful life outside the womb and indicating respiratory function,[174] contemporary medicine likely cannot establish, or ever establish, that viability of the fetus is as early as five to six weeks unless the definition of viability changes. Additionally, H.B. 125, in its current form, does not attempt to redefine viability by the detection of cardiac activity but labels cardiac activity as a "medical predictor" that the fetus will reach viability.[175] Furthermore, recognizing that abortions should be prohibited after an identifiable point in time because the fetus becomes a person, such as the detection of cardiac activity, implicates First Amendment issues.

If H.B. 125 were a consent-only bill, it would be more likely to be

167. *Id.*
168. *Roe*, 410 U.S. at 160-63.
169. *Danforth*, 428 U.S. at 63.
170. *Id.* at 64.
171. *Id.*
172. *Id.*
173. *Id.*
174. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860 (1992).
175. Am. Sub. H.B. 125 § 2919.19(A)(5), 129th Gen. Assemb., Reg. Sess. (Ohio 2011).

constitutional. A consent-only bill means that H.B. 125 would instead only require that the cardiac activity be detected and that the woman be informed of the detection of cardiac activity prior to having the abortion procedure. To be a consent-only bill, H.B. 125 would not prohibit the woman from seeking an abortion if cardiac activity is in fact detected.

Ohio has many mechanisms in place to ensure that a woman's consent is fully informed prior to obtaining an abortion. Under current Ohio law governing abortion, a woman seeking the procedure: must go to an abortion clinic at least twenty-four hours prior to the procedure;[176] receive information about family planning agencies that can assist the woman throughout her pregnancy, agencies that assist in adoption and agencies that offer medical assistance for prenatal, childbirth and neonatal care; and also receive information about support obligations from the father.[177] The woman must then also receive information about the anatomical and physiological characteristics of the zygote, embryo, or fetus for various weekly increments throughout the pregnancy and information regarding the probable time at which the fetus becomes viable.[178] After the woman receives all of this information, she is required to sign a consent form stating that she received all of these materials and she voluntarily, knowingly, and intelligently consents to the abortion.[179]

If H.B. 125 were enacted as a consent-only bill, the woman would also be required to acknowledge additional information. Under H.B. 125 the physician is required to determine whether the fetus has detectable cardiac activity.[180] A physician determines whether there is cardiac activity by performing an ultrasound.[181] Under Ohio law, if an ultrasound is performed at any time prior to the abortion, the physician must provide the pregnant woman the opportunity to view the active ultrasound image and offer to provide the woman with a physical picture of the ultrasound.[182]

H.B. 125 would then additionally mandate that if a physician detects cardiac activity using the ultrasound, the physician would be required to inform the pregnant woman of the statistical probability of

176. OHIO REV. CODE. ANN. § 2317.56(B)(2) (West 2012).

177. *Id.* § 2317.56(C)(1).

178. *Id.* § 2317.56(C)(2).

179. *Id.* § 2317.56(B)(3)(a)&(b).

180. H.B. 125 § 2919.19(C)(4).

181. *Women's Health Information: Ultrasound in Pregnancy*, SOC'Y OF OBSTETRICIANS & GYNECOLOGISTS OF CANADA (May 4, 2011), http://www.sogc.org/health/pregnancy-ultrasound_e.asp.

182. OHIO REV. CODE. ANN. § 2317.561 (West 2012).

bringing the "unborn human individual" to term.[183] Moreover, the pregnant woman would be required to sign a form acknowledging she received the information from the physician, understands the fetus has a "fetal heartbeat," and is "aware of the statistical probability of bringing the unborn human individual . . . to term."[184] Therefore, if H.B. 125 were enacted as a consent-only provision, a pregnant woman in Ohio would be required to sign *two* written consent forms, one regarding family planning materials and the other regarding fetal cardiac activity, be asked *twice* to see the ultrasound image of the fetus, and go to the clinic *twice* to comply with the twenty-four hour waiting period.

H.B. 125's supposed informed consent provisions must be analyzed in context of the parameters set forth in *Casey*. *Casey* holds that states are free to pass regulations that express "a profound respect for the life of the unborn" if the regulations "are not a substantial obstacle of [a woman's] right to choose."[185] *Casey* determined Pennsylvania's statute mandating a twenty-four hour waiting period was not an undue burden, and therefore constitutional, because the waiting period ensured that the woman's decision is "more informed" and "deliberate" and did not strike the Court as "unreasonable."[186] *Casey* also upheld the informed consent provisions requiring the woman be given information on the medical effects of abortion and information on childbirth, child support, and agencies that provide adoption, reasoning that these materials ensure that the woman apprehends the full scope of her decision.[187]

However, the amount of information, the content of the information, and the two signed consent forms that Ohio would require a woman to sign if H.B. 125 were enacted into a consent-only law go beyond ensuring that the woman's "decision is mature and informed"

183. H.B. 125 § 2919.19(D)(2)(a).

184. *Id.* § 2919.19(D)(2)(b).

185. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877-78 (1992).

186. *Id.* at 885. *But see* Justice Steven's dissenting opinion, arguing that the twenty-four hour waiting period is coercive by wearing down the ability of the woman to exercise her constitutional right to an abortion and upholding the waiting period reflects the court's belief that women are less capable of making major decisions without statutory deliberation periods, and the waiting period creates a presumption that the abortion decision is wrong. *Id.* at 918. Justice Steven's stated the "State cannot presume a woman failed to reflect adequately merely because her conclusion differs from the State's perspective." *Id.* at 919. *See also* Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223 (2009) (exploring the law's failure to treat pregnant women as capable of making their own decisions concerning whether to have an abortion).

187. 505 U.S. at 881-82. For further discussion on Planned Parenthood's informed consent provisions, *see* FEMINIST LEGAL HISTORY 122-24 (Tracy A. Thomas & Tracey Jean Boisseau eds., N.Y. Univ. Press 2011).

and expressing a "preference for childbirth over abortion"[188] because this information also places a substantial obstacle in the path of a woman seeking an abortion prior to viability under the undue burden test.[189] Because the acknowledgment of all this information goes beyond mere persuasion, H.B. 125's requirements in conjunction with Ohio's current laws have the purpose of furthering the potential life of the fetus prior to viability and hinder the woman's free choice to elect the procedure prior to viability.[190]

Proponents of drastic informed-consent provisions argue laws like this are constitutional under *Casey* because the acknowledgement of this amount of information is just another state mechanism of ensuring the woman's choice is truly informed. Additionally, *Casey* makes clear that states are free to pass regulations that express a profound respect for the life of the unborn.[191] Because this information can arguably be dubbed "informed consent" within the meaning of *Casey*, federal pro-life legislators are attempting to push a consent-only version of Ohio's Heartbeat bill, arguing that the information does fall within legal informed consent provisions.

In October 2011, Republican U.S. Representative Michele Bachmann introduced H.R. 3130 to Congress, commonly referred to as the "Heartbeat Informed Consent Act."[192] This Act would require: the woman receive an ultrasound prior to an abortion, ultrasound images be displayed for the woman to view while the ultrasound is being performed, and a medical description of the ultrasound images of the fetus's cardiac activity be given.[193] If the woman's egg was fertilized at least eight weeks prior to the ultrasound procedure, then it is required that a fetal monitor be used to make the fetal heartbeat audible to the

188. *Casey*, 505 U.S. at 883.

189. *See id.* at 878.

190. *See id.* at 877.

191. *See id.*

192. H.R. 3130, 112th Cong., 1st Sess. (2011); *Bachmann Introduces Pro-Life Heartbeat Legislation*, BACHMAN.HOUSE.GOV (Oct. 6, 2011), http://bachmann.house.gov/News/DocumentSingle.aspx?DocumentID=263425.

193. H.R. 3130, 112th Cong., 1st Sess. (2011) *available at* http://www.govtrack.us/congress/billtext.xpd?bill=h112-3130 (enacting § 3402 "Requirement of Informed Consent (b)(1) Prior to a woman giving informed consent to having any part of an abortion performed, the abortion provider who is to perform the abortion, a certified technician, or another agent of the abortion provider who is competent in ultrasonography shall—(A) perform an obstetric ultrasound on the pregnant woman; (B) during the performance of the ultrasound, display the ultrasound images (as described in paragraph (2)) so that the pregnant woman may view the images; and (C) provide a medical description of the ultrasound images of the unborn child's cardiac activity, if present and viewable.").

woman.[194]

The "findings" cited for the necessity of this bill are that "the presence of a heartbeat in a woman's unborn child will be a material consideration to many women contemplating abortion,"[195] "the presence of a heartbeat in a woman's unborn child is a developmental fact that illustrates to the woman that her baby is already alive,"[196] and "[a] fetal heartbeat is therefore a key medical indicator that an unborn child is likely to achieve the capacity for live birth,"[197] among other reasons. The bill stresses that a woman must be made known of the fetal heartbeat because "ensuring full informed consent is imperative"[198] and that the "State has an interest in ensuring so grave a choice is well informed."[199] Representative Bachmann states, in support of her bill, "A pregnant woman who enters an abortion clinic is faced with a decision that will forever change two lives. That's why she must have the very best information with which to make that decision."[200]

Although requiring that a woman listen to a fetus's cardiac activity is debatably an undue burden within the meaning of *Casey*, H.R. 3130 is closer to coming within constitutional bounds when compared to Ohio's H.B. 125. Unlike H.B. 125, H.R. 3130 does not mandate that upon detection of a fetal heartbeat the woman can no longer elect an abortion

194. *Id.* (enacting § 3402(c)(1) "Requirement- Prior to a woman giving informed consent to having any part of an abortion performed, if the pregnancy is at least 8 weeks after fertilization (10 weeks from the first day of the last menstrual period), the abortion provider who is to perform the abortion, a certified technician, or another agent of the abortion provider shall, using a hand-held Doppler fetal monitor, make the embryonic or fetal heartbeat of the unborn child audible for the pregnant woman to hear.").

195. *Id.* (enacting § 2 Findings. "The Congress finds as follows: (1) The presence of a heartbeat in a woman's unborn child will be a material consideration to many women contemplating abortion.").

196. *Id.* (enacting §2(2)).

197. *Id.* (enacting §2(6)).

198. *Id.* (enacting §2(8)).

199. *Id.* (enacting §2(8)).

200. Michelle Bauman, *Bachmann Introduces Heartbeat Informed Consent Act in Congress*, NAT'L CATHOLIC REGISTER (Oct. 12, 2011), http://www.ncregister.com/daily-news/bachmann-introduces-heartbeat-informed-consent-act-in-congress/. In addition to Representative Bachman's push for further regulation on women's reproductive choices, other politicians are also challenging women's reproductive rights. For example, as the 2012 presidential election debates start, Rick Santorum, a previous senator from Pennsylvania and 2012 Republication presidential candidate, opposes insurance companies providing prenatal screening because providing the screens will allegedly lead to women having more abortions. Santorum charges that the law requiring insurers to cover the tests is a way to encourage more women to have abortions that will "cull the ranks of the disabled in our society." For further reading *see* David Firestone, *Rick Santorum and the Politics of Theology*, N.Y. TIMES (Feb. 20, 2012, 12:37 AM), http://loyalopposition.blogs.nytimes.com/2012/02/20/rick-santorum-and-the-politics-of-theology/.

procedure. Because H.R. 3130 has an informed-consent approach and does not impose the state's choice on the woman, it may be constitutional under *Casey* because hearing a fetal heartbeat arguably may not place a "substantial obstacle in the path of a woman seeking abortion."[201] Because H.R. 3130 seeks to persuade, albeit *strongly* persuade, the woman to choose a live birth over abortion and is "reasonably related" to accomplishing the goal of live birth, it may be constitutional.[202] Therefore, if Ohio legislators want H.B. 125 to come closer to already established binding legal precedent, Ohio legislators should modify H.B. 125 to mirror H.R. 3130 to be a consent-only bill, although constitutional challenges surely still await under *Casey's* undue burden test.

Ultimately, in H.B. 125's current form, it is unconstitutional under *Casey* and *Roe* because Ohio, the state, is placing a substantial obstacle before a woman seeking to obtain an abortion procedure by eliminating her right to choose an abortion under her privacy right derived from the Fourteenth Amendment to the United States Constitution. Further, H.B. 125 also implicates First Amendment concerns in the way it seeks to regulate abortion at the point in time of detectable cardiac activity.

B. H.B. 125 Violates Ohioans' Right to be Free from State-Sponsored Religion under the First Amendment

In addition to H.B. 125's Fourteenth Amendment concerns, H.B. 125 also implicates First Amendment concerns regarding the Establishment Clause.[203] The First Amendment to the United States Constitution prohibits Congress and the States through the Fourteenth Amendment from passing laws that establish a national religion or from preferring one religion to another.[204] The focus of the Establishment Clause is neutrality,[205] and some members of the Supreme Court have asserted that this neutrality should take the form of a "wall of separation

201. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992).

202. *Id.* at 877.

203. *See* Martha A. Field, *Abortion and the First Amendment*, 29 U.C. DAVIS L. REV. 545, 551 (1996) (acknowledging that the Establishment Clause of the First Amendment can provide a foundation for access to abortion).

204. U.S. CONST. amend. I; *see generally*, Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104, 1104-10, 1119-26 (1979) (arguing that the first amendment should be construed to prohibit government establishment of particular political ideology).

205. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

between church and State."[206]

Opponents to H.B. 125 believe that H.B. 125 establishes religious principles on Ohioans by placing the value of the life of the potential fetus above the life of the mother[207] and by determining when a fetus becomes a person.[208] The determination of when a fetus becomes a person implicates religious values both for people that believe life begins after cardiac activity and for people that believe life begins at the moment of conception. While other First Amendment concerns arise in the abortion context,[209] this Comment focuses on Supreme Court precedent addressing the establishment of religion by the state through its abortion laws and how that precedent affects H.B 125.

In a series of cases addressing funding for abortion through state and federal medical plans, the Supreme Court routinely dismissed alleged Establishment Clause violations. In *Maher v. Roe*,[210] the Supreme Court upheld a Connecticut welfare regulation under which Medicaid recipients received payments for medical services related to

206. March v. Chambers, 463 U.S. 783, 802 (1983) (Brennan, J. dissenting).

207. *See Opposition Testimony to the Health & Aging Committee: Hearing on H.B.125 before the Ohio House of Representatives*, 112th Cong., 1st Sess. (2011) (statement of Rabbi Emily Rosenzweig, Ohio Religious Coalition for Reproductive Choice), *available at* http://www.ppao.org/Legislation/129th/HB125/HB125_Rosenzweig.pdf; *See Opposition Testimony to the Health & Aging Committee: Hearing on H.B.125 before the Ohio House of Representatives*, 112th Cong., 1st Sess. (2011) (statement of Allan Debelak, Pastor of Reedemer Lutheran Church in Columbus), *available at* http://ppao.org/Legislation/129th/HB125/HB125_Debelak.pdf.

208. *See Opposition Testimony to H.B. 125: Hearing on H.B.125 before the Committee on Health, Human Services, and Aging*, 112th Cong., 1st Sess. (2011) (Pastor David Meredith, Broad St. United Methodist Church), *available* at http://ppao.org/Legislation/129th/HB125/HB125_Meredith_121311.pdf.

209. *See* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 830-31 (1986), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (briefly addressing whether compelled speech on behalf of physicians violated the First Amendment); Rust v. Sullivan, 500 U.S. 173, 174 (1991) (holding that regulations prohibiting abortion as a method of family planning in counseling do not violate First Amendment free speech rights by impermissibly imposing viewpoint-discriminatory conditions by Government subsidies); 1 Am. Jur. 2d *Abortion and Birth Control* § 79 (2012). Another unreported effect of anti-abortion legislation is the effect it has on doctors willing to enter into the profession. Lydia Strauss, the Supervisor of Support Services for Capital Care Women's Center in Ohio, in a live interview, explained that the lack of physicians willing to perform abortions will soon be an epidemic. Regardless of whether proposed pro-life legislation actually passes, it contributes to the overall body of media hype regarding abortions and deters physicians from entering the profession because of its controversy. Ms. Straus stated that all of the abortion-providing physicians she works with in Ohio are older and seeking to retire soon, but there are no newer physicians that are willing to enter the practice. Based upon Ms. Straus's experience in the field, she believes that even if abortion remains legal in Ohio prior to viability, the lack of physicians willing to perform the procedure will be an epidemic soon. Interview with Lydia Strauss, Supervisor of Support Services for Capital Care Women's Center in Ohio (Dec. 6, 2011).

210. Maher v. Roe, 432 U.S. 464 (1977).

childbirth but not for therapeutic abortions.[211] The Supreme Court reasoned that unequal subsidization was permissible under *Roe* because the regulations did not place any obstacles in a pregnant woman's path to an abortion.[212] Additionally, the Court reasoned that while the regulation may effectuate Connecticut's views on abortion, the regulations did not impose a restriction on access to abortion itself.[213]

In *Poelker v. Doe*,[214] the Supreme Court found no constitutional violation when the city of St. Louis decided as matter of policy to only provide hospital services for childbirth and not abortions in the public hospital setting.[215] More recently in *Harris v. McRae*,[216] the Court considered whether an amendment to the Social Security Act violated the First Amendment.[217] The amendment prohibited the use of federal funds to reimburse people for abortions sought under Medicaid, absent some exceptions.[218] Plaintiffs challenging the amendment argued that the amendment violated the Establishment Clause of the First Amendment because it incorporated views of the Roman Catholic Church about the sinfulness of abortion and the time at which life begins.[219] The plaintiffs also argued that women seeking an abortion may also be doing so under Protestant and Jewish beliefs, and therefore the amendment violates the Free Exercise Clause by preventing a woman from exercising her religious beliefs.[220]

Without conducting a lengthy analysis, the Supreme Court dismissed the First Amendment claims in *Harris*, reasoning that a statute does not violate the First Amendment because "it happens to coincide or harmonize with the tenets of some or all religions."[221] To illustrate its point, the Court reasoned "that [although] the Judeaeo-Christian religions oppose stealing [that] does not mean that a State . . . may not, consistent with the Establishment Clause, enact laws prohibiting

211. *Id.* at 464.
212. *Id.* at 474.
213. *Id.*
214. Poekler v. Doe, 432 U.S. 519 (1977).
215. *Id.* at 521.
216. Harris v. McRae, 448 U.S. 297 (1980).
217. *Id.* at 302-311.
218. *Id.* at 302.
219. *Id.* at 318-319.
220. *Id.* at 311-19.
221. *Id.* at 319 (*quoting* McGowan v. Maryland, 366 U.S. 420, 442 (1961)); *see also* Crossen v. Breckenridge, 446 F.2d 833, 840 (6th Cir. 1971) (declining to address the argument that an abortion law "violates the establishment clause . . . in that it enacts as law the religious beliefs of certain groups not held by other persons.").

larceny."[222] The Court then categorized the amendment as a "reflection of traditionalist values towards abortion"[223] that, without more, did not violate the Establishment Clause.[224]

Maher, *Poelker* and *Harris* demonstrate how the Supreme Court rejects claims that the antiabortion statutes violate the Establishment Clause despite the role of religion in the abortion debate.[225] However, H.B. 125's religious concerns are distinguishable from *Maher*, *Poelker*, and *Harris* because the bill directly places an obstacle in the path of a woman seeking an abortion. *Maher* reasoned that although the funding allocation affected abortion, the funding itself did not place an obstacle in the path of a woman seeking an abortion, and therefore the regulation was constitutional under *Roe*.[226] H.B. 125, however, is distinguishable because not only does it place an obstacle in the path of a woman seeking an abortion, it seeks to make the decision for the woman, again raising the Fourteenth Amendment issues previously discussed.[227]

Establishment of religion concerns was briefly touched upon in *Roe* and *Casey*. *Roe* recognized that abortion must be a constitutional issue:

> One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion. . . . Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection.[228]

Additionally, *Casey* recognized that people will always disagree about the "profound moral and spiritual implications of terminating a pregnancy" and recognized "[s]ome of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control

222. *Harris*, 448 U.S. at 319.

223. *Id.*

224. *Id.* at 319-20.

225. *See* John Morton Cummings Jr., *The State, the Stork, and the Wall: The Establishment Clause and Statutory Abortion Regulation*, 39 CATH. U. L. REV. 1191, 1217-1218 (1990); David R. Dow, *The Establishment Clause Argument for Choice*, 20 GOLDEN GATE U. L. REV. 479, 479 (1990).

226. Maher v. Roe, 432 U.S. 464, 474 (1977).

227. *But see* Scott C. Idleman, *Religious Premises, Legislative Judgments, and the Establishment Clause*, 12 CORNELL J.L. & PUB. POL'Y 1, 6 (2002) (arguing that laws informed by religious moral premises generally do not, by that fact alone, violate the First Amendment).

228. Roe v. Wade, 410 U.S. 113, 116 (1973).

our decision."[229] The Court went on to state again that abortion is a constitutional, not a religious, issue.[230] Additionally, the Court recognized that the only religious aspect that should be involved in the abortion decision is the woman's own spirituality.[231]

Opponents of H.B. 125 believe the bill violates the First Amendment because of the way it values the life of the fetus above that of the mother by equating the life of the fetus with the life of the mother.[232] Jewish Rabbi Emily Rosenzsweig demonstrates that H.B. 125 directly opposes the Jewish faith morally by the way it values the potentiality of the fetus above the health and welfare of the already living woman.[233] In the Jewish faith, Exodus 21:22-23[234] distinguishes the legal status of the fetus as less than that of the pregnant woman by assigning a financial penalty for the death of the fetus but a capital penalty for the death of the woman.[235] Also, according to Jewish Babylonian Talmud Chullin 58a, rabbis are taught that the fetus is the thigh of its mother; the pregnant woman is the person, and the fetus is part of her body.[236] Because H.B. 125 seeks to prevent a woman from having an abortion after the detection of cardiac activity absent only a medical emergency, it therefore equates the value of the woman's life with the fetus, in direct contradiction to Jewish beliefs.

People following a Christian-based faith also believe that H.B. 125 encroaches into their religious beliefs and therefore constitutes an

229. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992).

230. *Id.* at 850 ("Our obligation is to define the liberty of all, not to mandate our own moral code.").

231. *Id*. at 852 ("The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.").

232. *See e.g.*, Brief of Amici Curiae of Religious Coalition for Reprod. Choice et al. in Support of Respondent at 10, 21, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830) (arguing that Nebraska's statute banning partial-birth abortion statute "has unconstitutionally imbedded into law certain religious beliefs over others" though framing the legal issue as one of "individual conscience").

233. *Opposition Testimony to the Health & Aging Committee: Hearing on H.B.125 before the Ohio House of Representatives*, 112th Cong., 1st Sess. (2011) (statement of Rabbi Emily Rosenzweig, Ohio Religious Coalition for Reproductive Choice), *available at* http://www.ppao.org/Legislation/129th/HB125/HB125_Rosenzweig.pdf.

234. *Exodus* 21:22-23 ([]"If people are fighting and hit a pregnant woman and she gives birth prematurely[a] but there is no serious injury, the offender must be fined whatever the woman's husband demands and the court allows. [] But if there is serious injury, you are to take life for life . . . .").

235. *Testimony to the Health & Aging Committee: Hearing on H.B.125 before the Ohio House of Representatives*, 112th Cong., 1st Sess. (2011) (statement of Rabbi Emily Rosenzweig, Ohio Religious Coalition for Reproductive Choice), *available at* http://www.ppao.org/Legislation/129th/HB125/HB125_Rosenzweig.pdf.

236. *Id.*

Establishment Clause violation. For example, Methodist Pastor David Meredith provided opposition testimony on behalf of Methodists and does not support H.B. 125.[237] The Book of Discipline of the United Methodist Church requires that Methodists be required to respect the life of the mother who may be severely damaged from an unacceptable pregnancy.[238] Some members of the United Church of Christ also do not support H.B. 125 because it contradicts The Sixteenth General Synod of the United Church of Christ, which "uphold[s] the right of men and women to have access to adequately funded family planning services, and to safe, legal abortions as one option among others."[239] By prohibiting women from accessing these services, H.B. 125 would establish the parameters by which some Christians practice their faith in the abortion context.

Pastor Allan Debelak of a Lutheran Church in Columbus, Ohio, states that the "sanctity of life" has so many meanings to the various Christian faiths and, to Lutherans, the "sanctity of life" means considering more "than the state of the fetus."[240] Reverend Robert Molsbury, the Conference Minister for the Ohio Conference of the United Church of Christ, perhaps sums up many of these Christians' opponents views best by stating, "House Bill 125 reflects an extreme expression of Christianity that even I, a faithful, practicing Christian, would find oppressive if it were to be enacted into law."[241]

The specific language used in H.B. 125, suggesting that the life of a fetus begins at a certain point in time, also raises First Amendment Establishment Clause concerns. Because America is home to many religions, religious diversity precludes a unanimous sectarian view of when life actually begins.[242] In reflecting on the Texas abortion laws

237. *Testimony –Ohio: to H.B. 125: Senate Health, Human Services, and Aging Committee in Opposition to H.B. 125*, 112th Cong., 1st Sess. (2011) (Pastor David Meredith, Broad St. United Methodist Church), *available* at http://ppao.org/Legislation/129th/HB125/HB125_Meredith_121311.pdf.

238. *Id.*

239. *Id.*

240. *Opposition Testimony to the Health & Aging Committee: Hearing on H.B.125 before the Ohio House of Representatives*, 112th Cong., 1st Sess. (2011) (statement of Allan Debelak, Pastor of Reedemer Lutheran Church in Columbus), *available at* http://ppao.org/Legislation/129th/HB125/HB125_Debelak.pdf.

241. *Opposition Testimony to the Health & Aging Committee: Hearing on H.B. 125 before the Ohio Senate*, 112th Congress 1st Sess. (2011) (statement of Reverend Robert Molsberry, Conference Minister for the Ohio Conference of the United Church of Christ), *available at* http://ppao.org/Legislation/129th/HB125/HB125_Molsberry121311.pdf.

242. Brief Amicus Curiae for American Jewish Congress at 11-17, Webster v. Reprod. Health Servs., 109 S. Ct. 3040 (1989) (No.88-605). Views regarding abortion defy unanimity, even within

that established life began at conception, *Roe* stated that the Court is not in a position to speculate "the difficult question of when life begins" because those trained in medicine, philosophy, and theology are unable to arrive at a consensus.[243] For those reasons, in *Roe* and *Casey*, the Court drew the line at viability—the precise determination of when life begins is impossible to make in light of the varying religious views of Americans. Furthermore, the viability-line is a constitutional and not religious line, and it allows states to prohibit abortions after viability because that is when the State's interest in preserving life becomes compelling.[244] *Roe* reasoned that viability is the appropriate line because "the fetus then presumably has the capability of meaningful life outside the mother's womb."[245]

Although H.B. 125 does not attempt to redefine viability by the moment of detectable cardiac activity,[246] it seeks to proscribe abortion at a point in time much earlier than viability. Some Christians take issue with this determination. For example, Methodist Pastor Meredith believes that abortion is consistent with Christian principles in certain situations and that H.B. 125 seeks to unconstitutionally espouse certain Christian religious principles on others by making a blanket determination for all persons of when life begins.[247] This determination also affects persons on the opposite spectrum, including religious pro-life groups, who believe that life begins prior to detectable cardiac activity and prior to viability.

For example, Ohio Right to Life (ORTL), Ohio's largest and long-serving pro-life non-profit, is a religious group that believes that a fetus is a person from the moment of conception and not at the point at which cardiac activity is detectable.[248] ORTL routinely works with elected

sects. While many Roman Catholics reject abortion, some allow it under certain circumstances. Baptists generally consider their opposition to abortion as non-binding. The Episcopal Church continues to support a woman's right to have an abortion, as do the Presbyterians, who focus on viability. Many Protestant theologians maintain that life does not begin at conception, as do many Jewish groups. *Id.*

243. Roe v. Wade, 410 U.S. 113, 159 (1973).

244. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992); *See* John Morton Cummings Jr., *The State, the Stork, and the Wall: The Establishment Clause and Statutory Abortion Regulation*, 39 CATH. U. L. REV. 1191, 1234-1237 (1990).

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

246. Am. Sub. H.B. 125 § 2919.19(A)(5), 129th Gen. Assemb., Reg. Sess. (Ohio 2011).

247. *Opposition Testimony to H.B. 125: Hearing on H.B.125 before the Committee on Health, Human Services, and Aging*, 112th Cong., 1st Sess. (2011) (statement of Pastor David Meredith, Broad St. United Methodist Church), *available* at http://ppao.org/Legislation/129th/HB125/HB125_Meredith_121311.pdf.

248. *Ohio Right to Life Mission*, OHIO RIGHT TO LIFE, http://www.ohiolife.org/mission-and-

officials to draft and pass laws that advocate for the fetus's right to life and argues that the right to life is the most fundamental right of all Americans' liberties and as "God's creation."[249] ORTL does not support H.B. 125 in its current form because it is not a conception-based bill. If H.B. 125 were a consent-only bill, thus requiring that the woman only be made known of the presence of a fetal heartbeat, then the organization would support the bill because it is requiring the woman to make a decision regarding an abortion based upon all the available information.[250] However, ORTL's position for nearly forty years has been that life begins at the moment of conception, not weeks later when the heartbeat begins.[251] H.B. 125 therefore "represents a potential step backwards in the truth of the matter,"[252] and determining that a fetus is a person at the point of cardiac activity, rather than conception, encroaches upon ORTL's religious beliefs.[253] Therefore, H.B. 125 implicates religious concerns for people on both sides of the spectrum—those that believe life begins earlier than cardiac activity and those that believe life begins later than cardiac activity—by defining a precise point in time at which a woman cannot have an abortion.

The language in H.B. 125 referring to cardiac activity beginning at a biologically identifiable point in time also poses an Establishment Clause issue. The Supreme Court in *Webster v. Reproductive Health*

beliefs (last visited Oct. 16, 2012).

249. *Ohio Right to Life Mission:"Who We Are Video,"* OHIO RIGHT TO LIFE, http://www.ohiolife.org/about-us/ (last visited Oct. 16, 2012) ("The right to life is the most fundamental of all our liberties as Americans and as God's creation," quote from Stephanie Krider, Ohio Right to Life Director of Legislative Affairs).

250. Letter from Ohio Right to Life to Representative Wachtmann (May 6, 2011), *available at* http://ppao.org/Legislation/129th/HB125/HB125_ORTL120711.pdf.

251. Letter from Ohio Right to Life to Chapter Leader (Mar. 22, 2011), *available at* http://www.ohiolife.org/storage/Affiliated%20Chapter%20Letter.pdf.

252. *Id.*

253. Ohio Right to Life (ORTL) has voiced other concerns regarding H.B. 125. ORTL understands the current Supreme Court case law does not support the bill and believes that a specific legal protocol must be followed in order to overturn Roe v. Wade and Planned Parenthood. The organization believes that if their pro-life legislation is not well timed it will be held unconstitutional because ORTL recognizes that members of the Supreme Court greatly affect the legislation's success. ORTL believes Justice Sotomayor and Kagan will not support the constitutionality of H.B. 125. ORTL believes that if the Supreme Court is ready to hold constitutional a heartbeat bill, it is ready to hold constitutional a conception-based bill. Additionally, ORTL fears more binding precedent reaffirming Roe v. Wade that ORTL and other pro-life supporters will have to overcome in the future. Lastly, ORTL believes that defending H.B. 125 will exhaust much needed treasury money and will award thousands of Ohio taxpayer dollars to pro-choice organizations' attorneys, thus ultimately supporting abortion. Letter from Ohio Right to Life to Chapter Leader (Mar. 22, 2011), *available at* http://www.ohiolife.org/storage/Affiliated%20Chapter%20Letter.pdf.

Services[254] addressed similar language to that used in H.B. 125. In *Webster*, the Supreme Court considered the constitutionality of a series of Missouri state laws that sought to regulate abortion. The preamble of Missouri's law contained "findings" by the state legislature that "[t]he life of each human being begins at conception" and that "unborn children have protectable interests in life, health, and well-being."[255] In *Webster*, the Court of Appeals determined that Missouri's declaration that life begins at conception was "simply an impermissible state adoption of theory of when life begins to justify its abortion regulations" and therefore unconstitutional.[256] However, the Supreme Court determined that this was not an unconstitutional law because the language was in the statute's preamble and merely expressed a "value judgment."[257] Because the preamble language was a value judgment and because of federalism concerns, the Court decided it was not empowered to decide "abstract propositions . . . for the government of future cases."[258]

In the dissenting opinion, Justice Stevens argued that absent a secular legislative declaration, the preamble was an Establishment Clause violation.[259] Justice Stevens continued that the preamble is an "unequivocal endorsement of a religious tenet of some but by no means all Christian faiths," "serves no identifiable secular purpose," and espouses Roman Catholic beliefs.[260]

H.B. 125's first section contains similar language to the preamble language of the Missouri statutes in *Webster*. The first section of H.B. 125 states, "Cardiac activity begins at a biologically identifiable moment in time, normally when the fetal heart is formed in the gestational sac"[261]

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

255. *Id.* at 501.

256. *Id.* at 503.

257. *Id.* at 506.

258. *Id.* at 506-07 (quoting Tyler v. Judges of Court of Registration, 179 U.S. 405, 409 (1900)).

259. *Id.* at 566 (J. Stevens, dissenting).

260. *Id.* at 566-569 ("As a secular matter, there is an obvious difference between the state interest in protecting the freshly fertilized egg and the state interest in protecting a 9-month-gestated, fully sentient fetus on the eve of birth. There can be no interest in protecting the newly fertilized egg from physical pain or mental anguish, because the capacity for such suffering does not yet exist; respecting a developed fetus, however, that interest is valid. In fact, if one prescinds the theological concept of ensoulment . . . a State has no greater secular interest in protecting the potential life of an embryo that is still "seed" than in protecting the potential life of a sperm or an unfertilized ovum.").

261. Am. Sub. H.B. 125 § 2919.19(A)(6), 129th Gen. Assemb., Reg. Sess. (Ohio 2011).

and later prohibits abortions after the detection of this cardiac activity.[262] Like the Missouri statutes, H.B. 125 makes a precise determination of exactly when life begins for all persons by prohibiting abortions after the determination of cardiac activity. The Supreme Court precedent in *Webster* suggests that this language may be a value judgment. However, H.B. 125's language is not labeled as a "preamble" but is a part of the statute itself. In H.B. 125, the heading declares that the language underneath the section is based on "contemporary medical research," perhaps in an attempt to provide a "secular purpose" to combat Justice Stevens' dissenting concerns in *Webster*. However, with the new makeup of the Supreme Court Justices, the Court may view H.B. 125's language as more than a mere value judgment, as the court did in *Webster*, and instead as an Establishment Clause violation.

Pre-viability prohibition of abortion is the product of religious beliefs that the detectable cardiac activity signifies the point in time in which life begins, co-mingling religious principles in a constitutional context. But *Casey* specifically used the viability line as the point of prohibition because it is a fair, constitutional, and independent factor that is separated from diverging religious principles.[263] H.B. 125 seeks to depart from this constitutionally-drawn line, therefore constituting an establishment of state-sponsored religion in violation of the First Amendment.[264]

IV. CONCLUSION

Although Ohio has been at the forefront of informed consent provisions starting with the Supreme Court decision in *Akron Reproductive Health*, Ohio has gone one step too far with H.B. 125. Even in the context of a push regionally, nationally, and federally for pro-life legislation, H.B. 125 is not constitutionally sound. Under *Casey*, H.B. 125 places an undue burden on a woman's reproductive decision by completely eliminating her decision to choose abortion, in direct violation of her right to privacy derived from the Fourteenth Amendment's concept of liberty. Even if H.B. 125 were enacted as a consent-only bill, it still arguably places an undue burden in the path of a

262. *Id.* § 2919.19(C)(1).

263. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870-71 (1992) ("Consistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw . . . . The viability line also has . . . an element of fairness . . . .").

264. *See* David R. Dow, *The Establishment Clause Argument for Choice*, 20 GOLDEN GATE U. L. REV. 479, 499 (1990).

woman seeking an abortion under *Casey* because it would require a woman to acknowledge an extensive amount of information prior to exercising her constitutionally protected right to an abortion.

Additionally, H.B. 125 violates Ohioans' First Amendment right to be free from state-sponsored religion by valuing the potential life of the fetus over the mother and making a blanket determination for all Ohioans when life begins and is worth protecting. In the midst of Ohio's efforts to push the pro-life agenda, Ohio legislators must take a step back and evaluate the constitutionality of the provisions they seek to impose, reflecting on over forty years of Supreme Court precedent addressing the very issue, and in light of the Fourteenth and First Amendments to the United States Constitution.