RELIGION'S POWER OVER REPRODUCTIVE CARE: STATE RELIGIOUS FREEDOM RESTORATION LAWS AND ABORTION

SOPHIA MARTIN SCHECHNER*

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INTRODUCTION

The debate surrounding women's access to reproductive care has once again been thrust into the national spotlight in the wake of the Supreme Court's 2014 decision in *Burwell v. Hobby Lobby Stores, Inc.*,[1] which enables owners of for-profit closely-held[2] corporations to deny their employees coverage under the Affordable Care Act ("ACA") for certain contraceptives. The four contraceptives[3] at issue in *Hobby Lobby* were prescription pills that the defendants believed cause abortions. The defendants in *Hobby Lobby* argued that by enabling their employees to possibly access these contraceptives pursuant to the Health and Human Services ("HHS") employee mandate under the ACA, they were facilitating abortions in violation of their religious beliefs.[4] This violation, the Court held, allowed the defendants to qualify for an exemption to the ACA's contraceptive mandate, under the federal Religious Freedom Restoration Act ("RFRA").[5]

Hobby Lobby differs from other Supreme Court cases considering a woman's constitutional right to reproductive care, because the Court in *Hobby Lobby* explicitly considered the religious objections to providing women with contraceptives. Previously, the Court had addressed these issues primarily in terms of privacy rights, avoiding "the pervasive religious aura that suffuses the abortion debate."[6] Thus, the Supreme Court in *Hobby Lobby* extended the contraception

* J.D. Candidate, Benjamin N. Cardozo School of Law, May 2016; B.A. English and Sociology, Cornell University, 2010. The author wishes to thank her mother, father and brother for their love, advice and support. The author would also like to thank the staff of the Cardozo Journal of Law & Gender for their hard work.

1 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

2 *Entities*, IRS, http://www.irs.gov/Help-&-Resources/Tools-&-FAQs/FAQs-for-Individuals/Frequently-Asked-Tax-Questions-&-Answers/Small-Business,-Self-Employed,-Other-Business/Entities/Entities-5 (last updated July 13, 2015). A closely held corporation has "more than 50% of the value of its outstanding stock owned (directly or indirectly) by 5 or fewer individuals at any time during the last half of the tax year; and is not a personal service corporation." *Id.*

3 *See* Jayne O'Donnell, Hobby Lobby *Case: What Birth Control is Affected?*, USA TODAY (June 30, 2014, 6:21 PM), http://www.usatoday.com/story/news/nation/2014/06/30/morning-after-iuds/11768653/. The four contraceptives were Plan B "morning after pill," Ella "morning after pill," and hormonal and copper intrauterine devices. *Id.*

4 *Hobby Lobby*, 134 S. Ct. at 2759 ("The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients. If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price—as much as $1.3 million per day, or about $475 million per year, in the case of one of the companies. If these consequences do not amount to a substantial burden, it is hard to see what would.").

5 42 U.S.C. §§ 2000bb to 2000bb4 (2006).

6 David R. Dow, *The Establishment Clause Argument for Choice*, 20 GOLDEN GATE U. L. REV. 479, 479 (1990) ("Both courts and commentators have treated the abortion issue primarily as a right to privacy question.").

and abortion debates into the purview of a debate about competing religious and secular beliefs under the law. At the center of the Court's decision is the RFRA, which, in essence, forbids the federal government from "substantially burden[ing] a person's exercise of religion."[7] The contraception and abortion debates inform each other in that:

> The philosophical divide over what constitutes effective and acceptable ways to further reduce the incidence of abortion in the United States has never been more stark. The rival policy approaches—one centered almost entirely on restricting women's choices, and the other on supporting and expanding them—have now become mutually exclusive. Better and more contraceptive use appears to have been the main driver of the most recent decline in U.S. abortion and is likely to be a key factor in future declines . . . .[8]

Thus, one side of the debate endorses a woman's right to choose abortion and have access to contraception, while the other supports restrictions or eviscerations of both.

Twenty-one states,[9] thus far, have enacted their own state RFRA statute modeled after RFRA—the latest state being Indiana, which signed its RFRA into law in July 2015.[10] Like RFRA, these state statutes could have the effect of "plac[ing] religious entities above a vast portion of the law."[11]

This Note seeks to identify several ways in which pro-choice advocates can address the threat that state RFRAs pose to women's access to reproductive care.

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[7] 42 U.S.C. § 2000bb-1 (2006).

[8] Joerg Dreweke, *U.S. Abortion Rate Continues to Decline While Debate Over Means to the End Escalates*, 17 GUTTMACHER INST. 2, 2 (2014), http://www.guttmacher.org/pubs/gpr/17/2/gpr170202.pdf.

[9] The following twenty-one states that have enacted their own RFRAs: Alabama, Arizona, Arkansas, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia. *See* ALA. CONST. art. 1, § 3.01 (2014); ARIZ. REV. STATE. ANN. § 41-1493 (1999); ARK. CODE ANN. § 16-123-403 (West 2015); CONN. GEN. STAT. ANN. § 52-571b (West 1993); FLA. STAT. ANN. §§ 761.01 to -05 (West 1998); IDAHO CODE ANN. § 73-402 (West 2000); 775 ILL. COMP. STAT. ANN. 35/1 (West 1998); IND. CODE ANN. § 34-13-9 (West 2015); KAN. STAT. ANN. § 60-5301 (West 2013); KY. REV. STAT. ANN § 446.350 (West 2013); LA. REV. STAT. ANN. § 13:5231 (2010); MISS. CODE. ANN. § 11-61-1 (West 2014); MO. ANN. STAT. § 1.302 (West 2009); N.M. STAT. ANN. §§ 28-22-1 to -5 (West 2000); OKLA. STAT. ANN. tit. 51, § 251 (West 2000); 71 PA. STAT. AND CONS. STAT. ANN. § 2404 (West 2002); 42 R.I. GEN. LAWS §§ 42-80.1-1 to -4 (West 1993); S.C. CODE ANN. §§ 1-32-10 to -60 (1999); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001 to 012 (West 1999); VA. CODE ANN. §§ 57-1 to -2.02 (West 2009).

[10] IND. CODE ANN. § 34-13-9 (West 2015).

[11] MARCI HAMILTON, GOD VS. THE GAVEL: THE PERILS OF EXTREME RELIGIOUS LIBERTY 274 (2d ed. 2014) (referring to the federal RFRA statute, Hamilton asserts, "Congress's action in passing RFRA . . . reopened the door to religious entities that had sought to trump generally applicable, neutral laws"). "Indeed [RFRA] covered far more instances than Justice Brennan's theory had been permitted to: It applied strict scrutiny to every law in the country, state or federal, executive, legislative, or judicial, and past or present. It was, as the petitioner's brief stated, 'breathtaking.' Thus, while *Smith* might have reinstated with clarity the principle that religious entities are properly subject to neutral, generally applicable laws, RFRA threatened to alter the regime altogether and to place religious entities above a vast portion of the law." *Id.*

This Note firstly argues that the state RFRAs of Missouri[12] and Alabama[13] violate the Establishment Clause and therefore are unconstitutional. It then goes on to argue in the alternative that pro-choice advocates can use these state RFRA statutes to their benefit. Advocates can assert that their religious beliefs are burdened by Missouri and Alabama's informed consent procedures in regards to abortion. They can argue that these procedures are designed to dissuade women from receiving abortions[14] and have no grounding in medical science.

Part I of this Note provides a background of the Supreme Court's jurisprudence surrounding abortion and contraceptives, thus providing context to the current and future abortion debates. Part II of this Note gives the history of the federal RFRA statute and then discusses the state RFRA statute of Missouri and the RFRA Constitutional Amendment of Alabama.

Part III first gives a brief history of the *Lemon* test;[15] the primary test used by the Supreme Court to evaluate Establishment Clause violations, and then argues that Missouri and Alabama's RFRAs violate the Establishment Clause. Part IV introduces examples from the religious precepts of Judaism, the Presbyterian Church, and the United Church of Christ specifically asserting that women have the right to make a free moral choice regarding the termination of pregnancy. Part IV also argues that a woman belonging to any one of these three faiths has her religious beliefs burdened by Missouri and Alabama's informed consent procedures, designed to dissuade a woman from undergoing an abortion.[16]

While this Note presents several ways to resist state RFRA statutes, some groups have already begun this fight. For example, "[i]n Oklahoma, Satanists are demanding a religious exemption from compulsory abortion counseling on the grounds that the false claims in the government-mandated scripts—abortion causes suicide and so on—violate their religious belief in science."[17] A systemic attack is necessary to both draw attention to and dismantle the state's complex juggernaut created to obstruct women's access to the constitutionally protected right to an abortion.

History has shown that "women will manage, as they always have, to end unwanted pregnancies, in spite of the law."[18] Without access to legal abortion, "[s]ome of their methods, including home abortion, won't be quite as safe as those

12 MO. ANN. STAT. § 1.302 (West 2009).

13 ALA. CONST. art. 1, § 3.01 (2014).

14 *See generally* Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1 (2012).

15 Lemon v. Kurtzman, 403 U.S. 602 (1978).

16 *See generally* Vandewalker, *supra* note 14.

17 Katha Pollitt, *Why It's Time to Repeal the Religious Freedom Restoration Act*, NATION (July 10, 2014), http://www.thenation.com/article/why-its-time-repeal-religious-freedom-restoration-act/, (saying that she does not believe these cases are going down the right road because "[p]eople with religious objections shouldn't have to listen to government speech" and "expanding the religious freedom of individuals or corporations is simply not a good way to make public policy").

18 Laura Fraser, *After* Roe v. Wade, MOTHER JONES MAG., July-Aug. 1992, at 47, 49.

available in a legal clinic. And others will be ineffective, or even disastrous: herbal potions, poisonous douches, sharp household utensils, con artists out to make a quick buck."[19] Activists, particularly those who have grown up in a world where women are able to access legal and safe abortions, must continue fighting against religious entities that are turning back the clock on women's social autonomy and equality through limiting access to abortive and contraceptive care. Unfortunately, this fight is just beginning.[20]

I. CONTRACEPTION, ABORTION, AND THE SUPREME COURT

"[N]ow the right to life has come to mean the right to enjoy life,—the right to be let alone . . . ."[21]

In popular discourse, the debate concerning abortion is framed as a debate concerning competing religious and secular beliefs; yet, the Supreme Court has been reluctant to explicitly analyze it as such. Right to abortion in the United States is protected as a privacy right under the Constitution.[22] This conceptualization was famously articulated in *Roe v. Wade*.[23] The right to privacy is decidedly not a material right, but instead concerns the intangibles that constitute the very core of personhood: dignity and autonomy, the right to choose who you are and have those choices be respected.[24] It is under this most general concept that a woman's right to choose came to be recognized under the law.[25]

A. Privacy Rights and Contraception: Setting the Stage for Roe v. Wade

The Fifth and Fourteenth Amendments both contain similar Due Process Clauses stating that no person shall "be deprived of life, liberty, or property, without due process of law . . . ."[26] This protection of due process came to be understood in the Supreme Court not only in terms of "procedural safeguards, or as applying narrowly to the specific rights protected by the first eight amendments in

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[19] *Id.*

[20] *See generally* Aaron Blake, *The Most Surprising Part About the GOP's Failed 20-Week Abortion Ban: It Was Popular*, WASH. POST (Jan. 22, 2015), http://www.washingtonpost.com/blogs/the-fix/wp/2015/01/22/the-most-surprising-part-about-the-gops-failed-20-week-abortion-ban-push-it-was-popular/ (describing the newly Republican Congress's recent effort to pass a bill banning any abortion past twenty weeks gestational age).

[21] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

[22] Roe v. Wade, 410 U.S. 113, 152 (1973).

[23] *Id.*

[24] Warren & Brandeis, *supra* note 21, at 193 ("[T]here came a recognition of a man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened and now the right to life has come to mean the right to enjoy life,—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to compromise every form of possession—intangible, as well as tangible.").

[25] *Roe*, 410 U.S. at 152.

[26] U.S. CONST. amend. V, § 1; *id.* amend. XIV, § 1.

the Bill of Rights,"[27] but also as a substantive protection, shielding individuals from government invasion into fundamental rights, including the liberty of personhood that has come to be understood as a privacy right under the Fourteenth Amendment.[28]

One early and significant Supreme Court case where contraceptive use and the right to privacy were addressed is *Griswold v. Connecticut*.[29] There, the Supreme Court was presented with a challenge to a Connecticut law mandating that any person using "any drug, medicinal article or instrument" in order to prevent conception would be either fined or imprisoned.[30] The Court struck down the law, concluding for the first time that the Constitution recognizes a general right to privacy, which is a fundamental right, and that married couples using contraception fall within the protection of this right.[31]

The Court, still grappling with where in the Constitution a fundamental right to privacy might lay, did not rest this right on the liberty guaranteed by the Due Process Clause,[32] as later cases did. Instead, the Court rested the right to privacy on the vague and much criticized "penumbra" approach, asserting that, "the First Amendment has a penumbra where privacy is protected from governmental intrusion."[33] In *Griswold*, the right to privacy was located in the conjugal bedroom, which ostensibly police officers would be forced to search in order to find proof of the prohibited contraceptive use under the Connecticut statute at issue in the case.[34]

Later, in *Eisenstadt v. Baird*,[35] the Supreme Court found unconstitutional a Massachusetts statute that made it a felony to provide persons with any "drug, medicine, instrument, or article" for the purpose of preventing contraception unless the provider is a physician or a pharmacist acting under the order of a physician, supplying the contraceptive article to married couples.[36] The statute was held unconstitutional on equal protection grounds because there was no rational reason

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[27] GRETCHEN RITTER, THE CONSTITUTION AS SOCIAL DESIGN: GENDER AND CIVIC MEMBERSHIP IN THE AMERICAN CONSTITUTIONAL ORDER 270 (2006).

[28] *Id.* Ritter states that substantive due process protection involves "[t]radition, history, judgment, and restraint [as] the guides upon which the courts must rely in balancing the interests of individual liberty against the demands of organized society." *Id.*

[29] Griswold v. Connecticut, 381 U.S. 479 (1965).

[30] *Id.* at 480.

[31] *Id.* at 497.

[32] *Id.* at 481-82 ("Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. State of New York*, 198 U.S. 45, 25, S.Ct. 539, 49 L.Ed. 937, should be our guide. But we decline that invitation . . . .").

[33] *Id.* at 483.

[34] *Id.* at 485-86 ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.").

[35] Eisenstadt v. Baird, 405 U.S. 438 (1972).

[36] *Id.* at 438, 455.

to allow married couples, but not unmarried couples, access to contraceptives.[37] Justice Brennan, writing for the Court, reasoned that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[38] Thus, *Eisenstadt* explicitly held that the ability to control reproduction is an individual's fundamental right under the Constitution, and that this right is not limited to married couples.[39]

This sentiment was solidified in *Carey v. Population Services International*,[40] where the Court again considered the distribution of contraceptives. In *Carey*, the Court struck down a New York statute that made it a crime to sell contraceptives to persons under the age of sixteen.[41] For the Court, "[t]he decision whether or not to beget or bear a child is at the very heart of this cluster constitutionally protected choices."[42] A "compelling"[43] governmental interest must be implicated, the Court asserted, in order to justify restricting this fundamental liberty, a test that the government did not pass in this case. Thus, the right to "beget or bear a child" is clearly within the purview of fundamental rights and protected by the Constitution. It is within the context of *Eisenstadt* and *Carey* that the Supreme Court came to establish a woman's right to an abortion under the Constitution.

B. Roe *and* Casey*: The Modern Abortion Debate*

The Supreme Court first examined the decisive issue of abortion in the famous case of *Roe v. Wade*,[44] which involved a challenge to a Texas law that made "it a crime to 'procure an abortion' . . . except . . . 'by medical advice for the purpose of saving the life of the mother.'"[45] In striking down the law, the Court determined that the right to an abortion was a fundamental right, which fell within the protection of privacy rights implicated in the Fourteenth Amendment's Due Process Clause.[46] The Texas law was thus analyzed using strict scrutiny: in

[37] *Id.* at 454.

[38] *Id.* at 453 (emphasis added).

[39] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 837 (4th ed. 2011) ("*Eisenstadt* expands on *Griswold* in recognizing a right to control reproduction as a fundamental right. *Eisenstadt* also is significant in recognizing a right for unmarried, as well as marrieds, and in protecting a right to distribute contraceptives as well as to use them.").

[40] Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

[41] *Id.* at 681.

[42] *Id.* at 685.

[43] *Id.* at 686.

[44] Roe v. Wade, 410 U.S. 113 (1973).

[45] *Id.* at 117-18.

[46] *Id.* at 153 ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the

limiting the right to an abortion, the state must have a compelling interest and any legislative curtailment of this right must be narrowly tailored.[47] The Supreme Court concluded that Texas "does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . [and] it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct."[48]

The *Roe* court divided pregnancy into three stages, or trimesters—an approach that was later overruled in *Casey*[49]—and analyzed the state's competing interests during each stage. The Court determined that during the first trimester the government cannot restrict a woman's access to an abortion because there was no compelling interest in either the health of the mother *or* the life of the fetus—at that point not yet capable of a life outside the womb.[50] During the second trimester, the government has a compelling interest only in the life of the mother, not the fetus, and meaning that the government cannot regulate abortion in this stage to protect fetal life or completely proscribe abortion.[51] It is only in the third and final trimester that the fetus becomes viable, and thus the state has a compelling interest in protecting its life and regulating or proscribing abortion, but still must provide for exceptions where the health of the mother is in jeopardy.[52]

The decision in *Roe* caused great debate, and "[i]mmediately after *Roe* was decided, opponents of safe and legal abortion urged state and federal lawmakers to pass laws stripping away at or banning abortion."[53] By the 1990s, lawmakers and many in the general public were worried that due to a change in the composition of the Supreme Court, *Roe v. Wade* would be overruled.[54] Although this has not yet happened, the *Roe* doctrine has undergone great modifications through subsequent Supreme Court decisions.

pregnant woman by denying this choice altogether is apparent.").

[47] *Id.* at 155-56 ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." (internal citation omitted)).

[48] *Id.* at 162 (emphasis added).

[49] CHEMERINSKY, *supra* note 39, at 846 ("[T] plurality opinion by Justices O'Connor, Kennedy, and Souter overruled the trimester distinctions used in *Roe* and also the use of strict scrutiny for evaluating government regulation of abortions. Instead, the plurality said that government regulation of abortions prior to viability should be allowed unless there is an 'undue burden' on access to abortion.").

[50] *Roe*, 410 U.S. at 163.

[51] *Id.*

[52] *Id.* at 165.

[53] PLANNED PARENTHOOD FED'N OF AMERICA, *ROE V. WADE*: ITS HISTORY AND IMPACT 2 (2014), http://www.plannedparenthood.org/files/3013/9611/5870/Abortion_Roe_History.pdf.

[54] CHEMERINSKY, *supra* note 39, at 846 ("Between 1989, when *Webster* was decided, and 1992, when *Planned Parenthood v. Casey* was before the Court, Justices Brennan and Marshall had resigned and were replaced, respectively, by Justices Souter and Thomas. It was thought that either of them, and particularly Justice Clarence Thomas, might cast the fifth vote to overrule *Roe v. Wade*. Indeed, the United States, through the solicitor general, urged the Court in *Casey* to use it as the occasion for overruling *Roe*.").

The first modification occurred in *Webster v. Reproductive Health Services*[55] where the Court considered a Missouri statute that included a preamble stating that the laws of Missouri were to "be interpreted to provide unborn children with 'all the rights, privileges, and immunities available to other persons, citizens, and residents'" of Missouri—subject to the Federal Constitution and the precedents of the Supreme Court of the United States.[56] The statute prohibited the use of public funds or facilities for: (1) abortions that were not necessary to save the life of the mother, and (2) "encouraging or counseling" abortions when the woman's life was not in danger.[57] The statute also contained provisions guiding doctors to ascertain whether the child is past twenty weeks in gestational age.[58]

The Supreme Court upheld the statute, reasoning that woman still had all the "same choices as if the State had decided not to operate any hospitals at all. The challenged provisions restrict [a woman's] ability to obtain an abortion only to the extent that she chooses to use a physician affiliated with a public hospital."[59] In *Webster*, the Court overruled the trimester framework set out in *Roe*, opening the door for states to have a compelling interest in protecting fetal life, and subsequently to restrict access to abortion, at every stage of pregnancy.[60]

The Court next considered abortion in *Planned Parenthood v. Casey*[61] where it evaluated the constitutionality of a Pennsylvania law that: (1) contained informed consent provisions requiring a woman seeking an abortion to wait twenty-four hours before the procedure and listen to information regarding the procedures; (2) required a minor seeking an abortion to obtain consent by a parent or guardian, or otherwise undergo a judicial bypass proceeding; (3) required married women to obtain consent from their husbands; (4) provided for exceptions in cases of medical emergency, defined as a condition that threatens the life of the mother; and (5) subjected abortion-providing facilities to conform to specific record-keeping requirements.[62]

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[55] Webster v. Reprod. Health Servs., 492 U.S. 490 (1989).

[56] *Id.* at 498 (citing MO. ANN. STAT. § 1.205 (West 1986)).

[57] *Id.*

[58] *Webster*, 492 U.S. at 501.

[59] *Id.* at 491.

[60] *Id.* at 518-19 ("In the first place, the rigid *Roe* framework is hardly consistent with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as ours does. The key elements of the *Roe* framework—trimesters and viability—are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle. Since the bounds of the inquiry are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine. . . . In the second place, we do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability.").

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

[62] *Id.* at 844.

The Court upheld all provisions of the law except for the requirement that a woman should inform her husband of the decision to abort a pregnancy.[63] The Court struck down that particular provision fearing that it might put women experiencing domestic violence or abuse at further risk of harm.[64] While claiming to reaffirm the holding in *Roe*,[65] the *Casey* decision made no explicit mention to abortion as a fundamental right. Instead, the Court held that a state may not place an undue burden on woman seeking an abortion. The Supreme Court ruled that "an undue burden exists, and, therefore, a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability."[66] Thus, states are free to restrict access to abortion as long as the restriction does not place an "undue burden" on a mother. Unfortunately, what constitutes an undue burden in the eyes of the Court did not include a twenty-four hour waiting period, despite the District Court revealing in its fact finding that:

> [T]he practical effect [of the 24 hour waiting period] will often be a delay of much more than a day because the waiting period requires that a woman seeking an abortion make at least two visits to a doctor. This District Court also found that in many instances this will increase the exposure of women seeking abortions to "harassment and hostility of antiabortion protestors demonstrating outside a clinic." . . . As a result, . . . women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be "particularly burdensome."[67]

Thus, the undue burden standard allows states "to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest."[68] The *Casey* decision left a woman's right to an abortion on tenuous grounds. The Court took many steps backward from its decision in *Roe* where Justice Blackmun had succinctly stated that women forced into maternity face

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[63] *Id.* at 891.

[64] *Id.*

[65] *Id.* at 845-46 ("After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed. It must be stated at the outset and with clarity that *Roe's* essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.").

[66] *Id.* at 837.

[67] *Id.* at 885-86 (quoting Planned Parenthood of Se. Pa. v. Casey, 744 F. Supp. 1323, 1352 (E.D. Pa. 1990)).

[68] *Id.* at 886.

many obstacles, including a "distressful life and future."[69] At the same time the Court acknowledged in *Casey* that women's ability "to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[70] As clearly evinced by *Hobby Lobby*, women's right to control their own reproduction is still very much under attack.

II. THE FEDERAL RFRA, STATE RFRAS, AND THE ESTABLISHMENT CLAUSE

The Supreme Court's decision in *Hobby Lobby* greatly differs from the cases considered above. As stated earlier, in *Hobby Lobby*, the Court explicitly extended the contraceptive and abortion debate into the purview of a debate regarding competing religious and secular beliefs, which the Supreme Court previously declined to do. By enabling the federal RFRA statute to provide for a religious exemption to contraceptive coverage under the ACA's employee mandate, the Court not only harmed the compelling interest the government has in aiding women in obtaining healthcare coverage for contraception,[71] it also used RFRA in an unprecedented and harmful way. As Justice Ginsberg wrote in her dissent:

> The Court ultimately acknowledges a critical point: RFRA's application "*must* take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect.[72]

If the federal RFRA can now be used to create religion-based exemptions that are harmful to women, then state RFRAs can and will be used in a similar fashion. This Part explains the history of the federal RFRA statute and introduces two state RFRA laws, one of which is embodied in a state constitution, both enacted subsequent to the federal RFRA.

A. The Federal RFRA: A Brief History

According to the federal RFRA statute, "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, expect as provided in subsection (b) of this section."[73]

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69 Roe v. Wade, 410 U.S. 113, 153 (1973).

70 *Casey*, 505 U.S. at 856.

71 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2800 (2014) (Ginsburg, J., dissenting) ("Perhaps the gravity of the interests at stake has led the Court to assume, for purposes of its RFRA analysis, that the compelling interest criterion is met in these cases. It bears note in this regard that the cost of an IUD is nearly equivalent to a month's full-time pay for workers earning the minimum wage; that almost one-third of women would change their contraceptive method if costs were not a factor; and that only one-fourth of women who request an IUD actually have one inserted after finding out how expensive it would be." (internal citations omitted)).

72 *Id.* at 2801 (internal citations omitted).

73 42 U.S.C. § 2000bb-1 (1993).

Subsection (b) continues, "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[74] This statute followed the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*[75] where religious lobbyists "demanded Congress grant them a new extreme right to religious liberty, and they received it."[76]

Smith involved an Oregon law that banned the consumption of peyote, a hallucinogenic substance.[77] Two employees were fired as a result of using peyote during a religious service, and were subsequently denied unemployment compensation "because they had been discharged for work-related 'misconduct.'"[78] The fired employees challenged the Oregon law as impinging on their free exercise of religion, since their religious ceremonies required the use of peyote. They argued that a law of general applicability, such as the Oregon law, prohibits the free exercise of religion by "requir[ing] (or forbid[ding]) the performance of an act that his religious belief forbids (or requires)."[79] The Court held, consistent with the free exercise clause, that Oregon may deny unemployment compensation to the fired employees in this case,[80] further stating that:

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself," contradicts both constitutional tradition and common sense.[81]

To many, *Smith* represented a dramatic shift in the way the Supreme Court analyzed alleged burdens on religious exercise by establishing a rational basis standard of review.[82] Under Supreme Court's precedents at the time,[83]

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[74] *Id.*

[75] Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

[76] HAMILTON, *supra* note 11, at 18 ("Religious lobbyists have used the 'secularism' and 'discrimination' arguments to cover their voracious and seemingly insatiable demands to obtain rights to act however they choose. They 'need' legislatures to help them, because they are so weak and so discriminated against, or at least that is their shtick. In 1990, the Supreme Court's decision in *Employment Div. v. Smith* unintentionally gave them a moment of political opportunity like none before. They demanded Congress grant them a new extreme right to religious liberty, and they received it.").

[77] *See Smith*, 494 U.S. at 872.

[78] *Id.* at 874.

[79] *Id.* at 878.

[80] *Id.* at 890.

[81] *Id.* at 885 (citing Reynolds v. United States, 98 U.S. 145, 167 (1879)).

[82] *Id.* at 901.

[83] *See* Sherbert v. Verner, 374 U.S. 398 (1963); *see also* H.R. REP. NO. 103-88, at 2 (1993), *as*

"government actions burdening religion would be upheld only if they are necessary to achieve a compelling government purpose"[84]—meaning that they were subject to strict scrutiny. This standard was established by the decisions in *Sherbert v. Verner*[85] and *Wisconsin v. Yoder*.[86] In these cases, the Court applied a balancing test. First, the Court considered whether the challenged governmental action imposed a substantial burden on the exercise of religion. If it did, the Court went on to analyze whether the challenged action was necessary in order to serve a compelling governmental interest.[87] *Smith*, conversely, established a rational basis level of judicial review.

In *Sherbert*, the Court considered whether a South Carolina law denying unemployment compensation to a Seventh-day Adventist who declined to attend work on her Sabbath for religious reasons, is a law that prohibits the free exercise of religion under the First Amendment.[88] After applying what later becomes known as the *Sherbert* balancing test, the Court held that the denial of unemployment compensation in this case burdened the free exercise of religion and did not serve any compelling governmental interest.[89]

In *Yoder*, the Court again applied the "compelling interest" test and found that a Wisconsin law requiring Amish children to stay in school until they are sixteen years old burdened the free exercise of religion, and that the state interest in having Amish children attend school after the eighth grade was not a compelling governmental interest.[90] Thus, the Wisconsin law—both neutral on its face and one of general applicability—was still found to violate the free exercise clause.

reprinted in 1993 U.S.C.C.A.N. 1892, 1903 ("In *Sherbert v. Verner*, the Supreme Court stated the principle that a neutral law that burdens the free exercise of religion may only be upheld if the government can demonstrate that such law is justified by a compelling governmental interest and is the least restrictive means of achieving that interest. For many years and with very few exceptions, the Supreme Court employed the compelling governmental interest test. The *Smith* majority's abandonment of strict scrutiny represented an abrupt, unexpected rejection of longstanding Supreme Court precedent.").

84 CHEMERINSKY, *supra* note 39, at 302.

85 *Sherbert*, 374 U.S. at 410-11.

86 Wisconsin v. Yoder, 406 U.S. 205 (1972).

87 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2760 (2014) (describing the *Sherbert* and *Yoder* precedents).

88 *Sherbert*, 374 U.S. at 410 (Douglas, J., concurring).

89 *Id.* at 410-11 ("Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest. This holding but reaffirms a principle that we announced a decade and a half ago, namely that no State may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." (emphasis added)).

90 *Yoder*, 406 U.S. at 235-36 ("Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others. Beyond this, they have carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its

However, in *Smith*, the Court "changed the law and held that the free exercise clause cannot be used to challenge neutral laws of general applicability."[91] Thus, under *Smith*, there is no First Amendment violation when "prohibiting the exercise of religion . . . is not the object of [governmental regulation] but merely the incidental effect of a generally applicable and otherwise valid provision . . . ."[92] Importantly, even before *Smith*, "[a]ccommodations to religious beliefs or observances, the Court has clarified, must not significantly impinge on the interests of third parties."[93]

The *Smith* decision has been described as "a landmark, summary, and straight explanation of this Court's entire free exercise jurisprudence, in which this Court carefully considered and weighed the various possibilities and the most appropriate balance between history, doctrine, and the Court's experience over 100 years with free exercise cases."[94] Yet, predictably, *Smith* did not sit well with religious lobbyists who immediately mobilized into action by urging Congress to accord them more religious freedom.[95] In 1993, Congress acquiesced to their demands with the passage of the federal RFRA statute.[96]

RFRA explicitly announced its aim to overturn *Smith*, and purported to reinstate the compelling interest test that was in place before the decision.[97] The legislative history of the statute explains such a view:

> In *Sherbert v. Verner*, the Supreme Court stated the principle that a neutral law that burdens the free exercise of religion may only be upheld if the government can demonstrate that such law is justified by a compelling governmental interest and is the least restrictive means of achieving that

program of compulsory high school education. In light of this convincing showing, one that probably few other religious groups or sects could make, and weighing the minimal difference between what the State would require and what the Amish already accept, it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granted exemption to the Amish.").

91 CHEMERINSKY, *supra* note 39, at 302.

92 Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 878 (1990).

93 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2790 (2014). In *Yoder*, the Court addressed the issue of the statute adversely affecting third parties who were not part of the suit by stating that: "Our holding in no way determines the proper resolution of possible competing interest of parents, children, and the State in an appropriate state court proceeding in which the power of the State is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary." *Yoder*, 406 U.S. at 231. In that case, the children were not a party to the suit.

94 Brief of the Freedom from Religion Foundation, et al. as Amici Curiae Supporting Petitioner, at 10, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354) (stating that, "[w]ith a simple majority vote for RFRA, Congress shoved the Court aside and handed believers the most extreme religious liberty regime ever in place in the United States").

95 HAMILTON, *supra* note 11, at 18.

96 Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified principally at 42 U.S.C. §§ 2000bb to 2000bb-4 (Supp. V 1993)).

97 CHEMERINSKY, *supra* note 39, at 302; *see also* H.R. REP. NO. 103-88, at 1 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1903 ("H.R. 1308, the Religious Freedom Restoration Act of 1993, responds to the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith* by creating a statutory right requiring that the compelling governmental interest test be applied in cases in which the free exercise of religion has been burdened by a law of general applicability.").

> interest. For many years and with very few exceptions, the Supreme Court employed the compelling governmental interest test. The *Smith* majority's abandonment of strict scrutiny represented an abrupt, unexpected rejection of longstanding Supreme Court precedent.[98]

Thus, the passage of RFRA was meant to signal a return to the Supreme Court's position before *Smith* by "requir[ing] courts considering free exercise challenges, including to neutral laws of general applicability, to uphold the government's actions only if they are necessary to achieve a compelling purpose."[99] Yet, RFRA does much more than its stated purposes. As Professor Marci Hamilton, one of the United States' leading church and state scholars,[100] writes in her book *God vs. the Gavel*, RFRA "*do*[*es*] *not restore anything*, but rather concoct[s] a new, extreme standard (the burden of showing a compelling interest and the least restrictive means) against the government when it defends neutral, generally applicable laws."[101] Hamilton further describes the federal RFRA as:

> [A] license for believers to assert rights to discriminate against homosexuals, abuse or neglect children, constrain a woman's right to choose, and force huge projects on residential neighborhoods and families . . . . RFRA is evidence of an agenda of one-way accommodation, where the religious believer is the center of the universe and the rest of us are supposed to make way.[102]

As evinced by the Supreme Court's decision in *Hobby Lobby*,[103] RFRA has subsequently been interpreted to give religious believers the right to impose their beliefs on others who do not share their views. Indeed, under the First Amendment of the Constitution and the *Smith* precedent, many argue that the Hobby Lobby group should have lost, because "the Supreme Court's common sense religious liberty doctrine . . . upholds laws that are neutral and generally applicable, which

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98 *See* H.R. REP. NO. 103-88, at 2.

99 CHEMERINSKY, *supra* note 39, at 302; *see also* H.R. REP. NO. 103-88.

100 *See generally Marci A. Hamilton*, BENJAMIN N. CARDOZO SCHOOL OF LAW, http://www.cardozo.yu.edu/directory/marci-hamilton (last visited Nov. 14, 2015).

101 HAMILTON, *supra* note 11, at 20-21 (explaining further that a "'compelling interest' is a state interest of the highest order"). "'The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.' . . . [T]he 'least restrictive means' means that the law must be tailored to this particular believer. As Justice Powell stated in 1980, and it still remains true, 'this "means" test has been virtually impossible to satisfy.'" *Id.* (internal citations omitted).

102 *Id.* at 1.

103 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2787 (2014) (Ginsburg, J., dissenting) ("In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs. *See ante*, at 2767-2785. Compelling governmental interests in uniform compliance with the law, and disadvantages that religion-based opt-outs impose on others, hold no sway, the Court decides, at least when there is a 'less restrictive alternative.' And such an alternative, the Court suggests, there always will be whenever, in lieu of tolling an enterprise claiming a religion-based exemption, the government, *i.e.*, the general public, can pick up the tab." (internal citations omitted)).

the contraception mandate plainly is. The Court even said as much in the *Hobby Lobby* decision."[104] Yet, RFRA does greatly expand the rights of religious believers, leading to Hobby Lobby's victory.

Despite this expansive reading of RFRA, it is important to note that its scope was limited in *City of Boerne v. Flores*,[105] where the Supreme Court held that the federal RFRA statute is not applicable to the states, as this would "be beyond Congress' legislative authority under [section] 5 of the Fourteenth Amendment."[106] However, RFRA binds federal actors and "[n]othing in the majority opinion [in *Boerne*] indicated any limit on state government power to adopt such laws."[107] Hence, since *Boerne*, several states have enacted their own RFRA statutes, or in the case of Alabama, a RFRA state constitutional amendment, in an attempt to give more power to religious actors wishing to impose their views on others.

B. States' Reaction to the Enactment of the Federal RFRA: State RFRAs

Because the federal RFRA statute does not apply to the states, twenty-one states thus far have enacted their own state RFRA statutes.[108] As *Smith* warned, these laws allow religious persons and organizations "to become a law unto [themselves]."[109] This section introduces two state RFRA statutes, those of Missouri and Alabama (Alabama's RFRA is enacted as part of the state constitution).

1. Missouri State RFRA

The Missouri RFRA statute became effective on August 28, 2003.[110] The law, based on—but not identical to—the federal RFRA, asserts that:

> [The government] may not restrict a person's free exercise of religion unless the restriction is pursuant to a rule of general applicability and does not discriminate against religions, or among religions; and . . . the restriction . . . is essential to further a compelling governmental interest, and is not unduly restrictive considering relevant circumstances.[111]

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[104] *See* Marci A. Hamilton, *The Hobby Lobby Solution*, RELIGIOUS FREEDOM RESTORATION ACTS PERILS (Oct. 16, 2014), http://rfraperils.com/professor-marci-a-hamilton-the-hobby-lobby-solution-justia-com/.

[105] City of Boerne v. Flores, 521 U.S. 507 (1997).

[106] KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 1524 (18th ed. 2013).

[107] Erwin Chemerinsky, *Do State Religious Freedom Restoration Acts Violate the Establishment Clause or Separation of Powers?*, 32 U.C. DAVIS L. REV. 645, 647 (1999) (arguing that, "[a]lthough state RFRAs would not undergo the same analysis as the federal law, they could face other constitutional challenges"). "Two particularly important constitutional challenges involve the Establishment Clause and the separation of powers doctrine." *Id.*

[108] *See supra* note 9 and accompanying text.

[109] Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 886 (1990).

[110] MO. ANN. STAT. § 1.302 (West 2009).

[111] *Id.*

The Missouri RFRA defines the "exercise of religion" as "an act or refusal to act that is substantially motivated by religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief."[112]

The federal RFRA statute states that the government may not "substantially burden" the exercise of religion, whereas the Missouri RFRA statute states that the government may not "restrict" the exercise of religion. This creates a lower bar for an individual seeking redress under the Missouri statute than is created under the federal RFRA statute. A bill was recently introduced in the state senate seeking to change the text of the bill to more closely mirror the federal RFRA.[113] Critics believe the purpose of this change is to authorize Missouri business owners to discriminate against gay and lesbian clientele.[114] However, the bill's purpose, as explained by the state senator who introduced it, is to give more protection to corporations like Hobby Lobby, which do not want to engage in contraceptive coverage due to its religious beliefs.[115]

2. Alabama State RFRA Constitutional Amendment

After passing in both houses of the state legislature, Alabama voters approved the Alabama Religious Freedom Amendment ("ARFA") on November 4, 1998, by a vote of 55-45%.[116] The Amendment was a direct legislative response to the Supreme Court's decision in *Boerne*.[117] Bill Pryor, the State Attorney General, feared that as a result of *Boerne*, "the responsibility for protecting religious freedom from state and local laws [had] returned largely to the states themselves,"[118] and thus, following *Boerne*, he immediately began drafting legislation based on the text of the federal RFRA.[119] In an attempt to both shield ARFA from any state constitutional law challenges and to prevent ARFA from being "limited by ordinary legislation,"[120] Alabama sought to pass a constitutional amendment rather than a statute; it ultimately succeeded.

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[112] *Id.*; *see also* MO. ANN. STAT. § 1.307 (3) (West 2003) (providing for certain exemptions, which are stated as follows: "Nothing in section 1.302 to this section shall be construed as allowing any person to cause physical injury to another person, to possess a weapon otherwise prohibited by law, to fail to provide monetary support for a child or to fail to provide health care for a child suffering from a life threatening condition").

[113] *See* S.B. 916, 97th Gen. Assem., 2d Reg. Sess. (2014), http://www.senate.mo.gov/14info/pdf-bill/intro/SB916.pdf.

[114] *See* Danny Wicentowski, *Missouri Bill Would Allow Businesses to Refuse Service If "Substantially Motivated by Religion,"* RIVERFRONT TIMES (Feb. 26, 2014), http://www.riverfronttimes.com/newsblog/2014/02/26/missouri-bill-would-allow-businesses-to-refuse-service-if-substantially-motivated-by-religion.

[115] *Id.*

[116] Thomas C. Berg & Frank Myers, *The Alabama Religious Freedom Amendment: An Interpretative Guide*, 31 CUMB. L. REV. 47, 59 (2000).

[117] City of Boerne v. Flores, 521 U.S. 507 (1997).

[118] Berg & Myers, *supra* note 116, at 55.

[119] *Id.* at 56.

[120] *Id.* at 58.

ARFA asserts that Alabama's "[g]overnment shall not burden a person's freedom of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)." Subsection (b) asserts that the state "[g]overnment may burden a person's freedom of religion only if it demonstrates that application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[121] While the federal RFRA statute asserts that the government may not "substantially burden" the exercise of religion, the ARFA asserts that the government may not "burden" the exercise of religion; "burden" is not modified by "substantial." Thus, any burden on the exercise of religion by government comes within the purview of ARFA. This constitutional amendment greatly expands the rights of religious actors. Even its proponents proudly concede the unequal protection created by ARFA, in that "enactments like ARFA give distinctive protection to religiously motivated conduct, without protecting the same conduct when it is engaged in for non-religious reasons."[122] The ARFA, even more than the federal RFRA, "place[s] religious entities above a vast portion of the law."[123]

III. ALABAMA AND MISSOURI'S RFRAS VIOLATE THE ESTABLISHMENT CLAUSE

Many prominent legal scholars have argued that RFRA itself violates the Establishment Clause.[124] Indeed, even Justice Stevens, in his concurring opinion in *Boerne*, contended that "[i]n my opinion, the Religious Freedom Restoration Act of 1993 (RFRA) is a 'law respecting an establishment of religion' that violates the First Amendment to the Constitution."[125] Justice Stevens believes that the First Amendment prohibits preference by the government for religion, as opposed to irreligion.[126] In arguing that the state RFRAs of Missouri and Alabama are unconstitutional under the Establishment Clause, one must analyze them under the currently prevailing Establishment Clause test articulated in *Lemon v. Kurtzman*.[127] The argument that states' RFRAs violate the Establishment Clause mirrors the argument that the federal RFRA does so.

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121 ALA. CONST. art. 1, § 3.01(c) (2014) ("A person whose religious freedom has been burdened in violation of this section may assert that violation as a claim or defense in a judicial, administrative, or other proceeding and obtain appropriate relief against a government.").

122 Berg & Myers, *supra* note 116, at 66.

123 HAMILTON, *supra* note 11, at 274 (speaking of the federal RFRA statute, Hamilton states that "Congress's action in passing RFRA . . . reopened the door to religious entities that had sought to trump generally applicable, neutral laws").

124 *See generally* Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994).

125 City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (Stevens, J., concurring).

126 *Id.* at 537.

127 Lemon v. Kurtzman, 403 U.S. 602 (1978).

A. The Lemon *Test and the Establishment Clause*

The First Amendment of the United States Constitution instructs that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[128] In *Cantwell v. Connecticut*,[129] the Supreme Court declared, in *obiter dictum*, that, "the rights guaranteed by the [E]stablishment [C]lause are fundamental and are applicable to the states through the [F]ourteenth [A]mendment."[130] This *dictum* became law seven years later in the 1947 decision in *Everson v. Board of Education*[131] where "[t]he Court unanimously agreed that the Fourteenth Amendment incorporated the Establishment Clause."[132] Thus, like much of the Bill of Rights, the Establishment Clause is incorporated against the states.

Thomas Jefferson's original vision of the Establishment Clause, as articulated by the Supreme Court in *Reynolds v. United States*,[133] is an interpretation that still holds true today: the Establishment Clause is meant to build "a wall of separation between church and State."[134] Applying this principle consistently has remained a struggle for the Supreme Court.[135] Thus, there are three main legal tests that the

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128 U.S. CONST. amend. I.

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

130 John Morton Cummings, Jr., Comment, *The State, the Stork, and the Wall: The Establishment Clause and Statutory Abortion Regulation*, 39 CATH. U.L. REV. 1191, 1191 (1990).

131 Everson v. Bd. of Educ., 330 U.S. 1 (1947).

132 LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE, RELIGION AND THE FIRST AMENDMENT 149 (2d rev. ed. 1994) (stating that "[c]onsequently the principle embodied in the First Amendment separated government and religion throughout the land, outlawing government support of religion, or, rather, outlawing laws respecting an establishment of religion"). *See also Everson*, 330 U.S. at 15 (setting out broad guidelines for interpreting the Establishment Clause based on the Framer's intent: "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the worse of Jefferson, the clause against establishment of religion by laws was intended to erect a 'wall of separation between Church and State.'").

133 Reynolds v. United States, 98 U.S. 145 (1878).

134 *Reynolds*, 98 U.S. at 164 ("Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.").

135 *See* Cummings, Jr., *supra* note 130, at 1195 n.38 (comparing Zorach v. Clauson, 343 U.S. 306

Court uses in order to examine whether governmental actions establish religion: the *Lemon* test,[136] the symbolic-endorsement test,[137] and the coercion test.[138] It is "[t]he *Lemon* test [that] has been the Supreme Court's leading approach to the Establishment Clause for nearly four decades."[139]

The *Lemon* test is a three-part test, originating from the Supreme Court case in *Lemon v. Kurtzman*.[140] It requires that, "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[141] If a law fails any prong of this test, it is unconstitutional.

In *Lemon*, the Court considered challenges to Rhode Island and Pennsylvania statutes that "provid[ed] state aid to church-related" elementary and secondary schools.[142] The statutes were challenged as violating the Establishment Clause, Free Exercise Clause, and Due Process Clause of the Fourteenth Amendment. Under the first prong of the *Lemon* test, "the statute must have a secular legislative purpose."[143] In examining this prong, the Court primarily looked to whether there were "any facts tending to undermine the stated legislative intent; absent such a showing, the Court deferred to the stated legislative intent."[144] In *Lemon*, the Court did not find anything that served to subvert the stated purpose of the two acts.[145] Indeed, "[i]n the vast majority of cases, the Court has classified the government's purpose as secular . . . ."[146]

The second prong of the *Lemon* test looks to whether the "principle or primary effect [is] one that neither advances nor inhibits religion."[147] This prong has been articulated most recently as a "symbolic endorsement" test—meaning that "[t]he government's action must not symbolically endorse religion or a particular religion."[148] Under this prong of the *Lemon* test, government actions are condemned if "the *government itself* has advanced religion through its own

(1952) with McCollum v. Bd. of Educ., 333 U.S. 203 (1948)).

136 Lemon v. Kurtzman, 403 U.S. 602 (1971).

137 Lynch v. Donnelly, 465 U.S. 668, 694 (1984).

138 Justin Murray, *Exposing the Underground Establishment Clause in the Supreme Court's Abortion Cases*, 23 REGENT U. L. REV. 1, 11 (2011) (citing County of Allegeny v. ACLU, 492 U.S. 573, 659 (Kennedy, J., concurring in part and dissenting in part) ("[T]his Court's decisions disclose two principles limiting the government's ability to recognize and accommodate religion: It may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion . . . .")).

139 *Id.* at 7.

140 *Lemon*, 403 U.S. 602.

141 *Id.* at 612 (citing Board of Education v. Allen, 392 U.S. 236, 243 (1968)).

142 *Id.* at 620.

143 *Id.* at 612.

144 Cummings, Jr., *supra* note 130, at 1208.

145 *Lemon*, 403 U.S. at 613.

146 Murray, *supra* note 138, at 7.

147 *Lemon*, 403 U.S. at 612.

148 CHEMERINSKY, *supra* note 39, at 1248.

activities and influence"[149] and "it condemns government actions if a reasonable person would perceive those actions as favoring religion, even if the actions are not actually motivated by religious favoritism."[150]

Under the last prong of the *Lemon* test, the government action must not display or cause any excessive entanglement with religion.[151] In examining entanglement, the Court looked to "the character and the purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[152] In *Lemon*, the Pennsylvania and Rhode Island statutes were found to violate the entanglement test because the states would be required to ensure constantly that the schools were not using state funds for sectarian purposes.[153] Additionally, the statutes violated the political divisiveness test, which has been integrated into the entanglement test,[154] because the need for monitoring would likely result in "[p]olitical fragmentation and divisiveness on religious lines . . . ."[155] The Court maintained that, "apart from any specific entanglement of the State in particular religious programs, assistance of the sort here involved carries grave potential for entanglement in the broader sense of continuing political strife over aide to religion."[156] The *Lemon* test remains the central test for evaluating the constitutionality of laws pursuant to an alleged Establishment Clause violation.

B. Alabama and Missouri's RFRA Statutes Violate the Establishment Clause

Alabama and Missouri's RFRAs violate the federal Constitution's Establishment Clause under the *Lemon* test because their legislative purpose is to advance religion.[157] Under these state laws, *any* burden or restriction on religion triggers these States' compelling interest test, and this low threshold

[149] Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337 (1987) [hereinafter Jesus Christ of Latter-Day Saints v. Amos].

[150] Murray, *supra* note 138, at 9.

[151] *Lemon*, 403 U.S. at 613.

[152] *Id.* at 615.

[153] *Id.* at 621-22 (stating that "the very restrictions and surveillance necessary to ensure that teachers play a strictly non-ideological role give rise to entanglements between church and state"). "The Pennsylvania statute, like that of Rhode Island, fosters this kind of relationship. Reimbursement is not only limited to courses offered in the public schools and materials approved by state officials, but the statute excludes 'any subject matter expressing religious teaching, or the morals or forms of worship of any sect.' In addition, schools seeking reimbursement must maintain accounting procedures that require the State to establish the cost of the secular as distinguished from the religious instruction." *Id.*

[154] Cummings, Jr., *supra* note 130, at 1207.

[155] *Lemon*, 403 U.S. at 622-23. The Court in *Lemon* asserted that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Id.*

[156] Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 794 (1973). *See also Lemon*, 403 U.S. at 622 ("Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process." (citing Paul Freund, Comment, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969)).

[157] *Lemon*, 403 U.S. at 612.

unquestionably favors religion. This stands in contrast to the federal RFRA, which states that any *substantial* burden on religion triggers the compelling state interest test. In *Texas Monthly v. Bullock*, the Supreme Court contended that religious exemptions, in the absence of a *significant* burden on the free exercise of religion, unjustifiably reward religious institutions and thus endorse religion in violation of the Establishment Clause.[158] Alabama and Missouri's RFRAs allow religious institutions to exempt themselves from laws of general applicability where no *significant* burden on the exercise of religion exists; only a *restriction* or a *burden* must be present. Creating such a low threshold to trigger the compelling interest test, one might argue, is in violation of the Establishment Clause.

Many legal scholars have argued that RFRA itself violates the Establishment Clause because its purpose is to advance religion.[159] Their argument is only strengthened where state RFRAs allow *any* burden or restriction on religion, as opposed to a substantial burden, to trigger the state's compelling interest test. The Supreme Court has asserted in *oberter dicta* many times that the amount of the burden imposed on religion is to be taken into account when analyzing the Establishment Clause violations.

In *Texas Monthly*, the Court examined whether a Texas sales tax exemption for religious publications violated the Establishment Clause.[160] In holding that the exemption did violate the First Amendment, the Court stated that, "when government directs a subsidy exclusively to religious organizations that . . . cannot reasonably be seen as removing a *significant* state-imposed deterrent to the free exercise of religions"[161] such an action both unjustifiably rewards religious institutions and endorses religion in the eyes of the rest of the community.[162] When analyzing whether governmental exemptions for religious beliefs are valid under the Establishment Clause, the extent of the burden imposed on religion is important. Where there is no significant burden, or merely a restriction of religion, according to *Texas Monthly*, a religious exemption would be in violation of the Constitution.[163]

The Supreme Court reiterated this principle in *Jesus Christ of Latter-Day Saints v. Amos*[164] where the Court considered an Establishment Clause challenge to

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158 Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 15 (1989) (stating that "when government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, as Texas has done, . . . it 'provide[s] unjustifiable awards of assistance to religious organizations' and cannot but 'conve[y] a message of endorsement' to slighted members of the community" (citing Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring))).

159 *See generally* Eisgruber & Sager, *supra* note 124.

160 *Texas Monthly*, 489 U.S. at 15.

161 *Id.* (emphasis added).

162 *Id.*

163 *Texas Monthly*, 489 U.S. 1.

164 Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

the Title VII exemption for religious institutions. The Court in that case contended that "[u]nder the *Lemon* analysis, it is a permissible legislative purpose to alleviate *significant* governmental interference with the ability of religious organizations to define and carry out their religious missions."[165] While ultimately the Court rejected the Establishment Clause challenge in this case, it is of import that the Court both in *Texas Monthly* and in *Amos* explicitly pointed to the extent of the governmental burden on the free exercise of religion. The government may permissibly alleviate *significant* burdens on the exercise of religion, but where the burden is not significant—as in *Texas Monthly*—an impermissible advancement of religion is often found.

The line between a significant burden on the free exercise of religion and a mere burden (or restriction) on the exercise of religion could be viewed as part of the often blurry line demarcating permissible government accommodation of religion from impermissible governmental advancement of religion. Moreover, the Supreme Court's analysis under the *Lemon* test has taken into account burdens on secular commitments resulting from the governmental accommodation of religion.[166] Where governmental accommodations for religious beliefs significantly impede on secular commitments, the Court has found impermissible establishment of religion.[167]

The tension between government accommodation of religion and government advancement of religion was clearly evinced in the case of *Estate of Thorton v. Caldor, Inc.*[168] where the Supreme Court struck down a Connecticut statute that provided Sabbath observers an unqualified right not to work on the Sabbath as violating the Establishment Clause. In *Thorton*, the Court asserted that the statute "commands that . . . religious concerns automatically control over all secular interest at the workplace . . . ."[169] by allowing those who observe the Sabbath to "be relieved of the duty to work on that day, no matter what burden or inconvenience this imposes on the employer or fellow workers."[170] The state RFRAs compelling interest test, triggered by any burden or restriction of religion, allows religious beliefs to receive special accommodation above secular interests, even when secular interests may be significantly burdened by the accommodation.

This precept was reiterated in *Cutter v. Wilkinson*[171] where the Supreme Court stated that when interpreting RFRA "courts must take adequate account of

165 *Id.* at 335 (emphasis added).

166 Eisgruber & Sager, *supra* note 124, at 453 ("The state must not, however, proceed beyond neutrality to favoritism. When purported accommodations have given preference to religious commitments at the expense of comparably serious secular commitments, the Court has been understandably uneasy.").

167 *Id.*

168 Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

169 *Id.* at 709.

170 *Id.* at 708-09.

171 Cutter v. Wilkinson, 544 U.S. 709 (2005).

burdens a requested accommodation may impose on nonbeneficiaries . . . ."[172] Allowing any burden or restriction on religion to trigger a compelling interest test is impermissible religious favoritism on the part of the government; the kind of favoritism explicitly condemned by the Court both in *Thorton* and in *Texas Monthly*.[173]

Finally, Congress in enacting RFRA consciously added the word "substantial" into the statute.[174] Before a clarifying amendment was offered by Senators Kennedy and Hatch, Congress had left the word "substantial" unmodified.[175] "Substantial" was added in order to ensure that RFRA "does not require the Government to justify every action that has some effect on religious exercise. Only action that places a substantial burden on the exercise of religion must meet the compelling State interest . . . ."[176] The standard of "substantial burden" as opposed to just "burden" (as the Congressional report repeatedly states) is consistent with pre-*Smith* case law.[177] As Justice Ginsburg made clear in her *Hobby Lobby* dissent, "Congress no doubt meant the modifier 'substantially' to carry weight."[178]

IV. BURDENSOME INFORMED CONSENT PROCEDURES VIOLATE A WOMAN'S SINCERELY HELD RELIGIOUS BELIEF IN THE RIGHT TO CHOOSE

Allowing any burden on religion to trigger a compelling state interest test is to make the government "justify every action that has some effect on religious exercise."[179] Advocates in Missouri and Alabama could use the lowered threshold provided in these state's RFRA laws to argue that these states' informed consent procedures violate a woman's sincerely held religious belief to have a right to choose whether to have an abortion.

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[172] *Id.* at 721 ("Furthermore, the Act on its face does not founder on shoals our prior decisions have identified: Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries . . . and they must be satisfied that the Act's prescriptions are and will be administered neutrally among different faiths . . . ." (citing *Thorton*, 472 U.S. at 105; Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 114 (1994))).

[173] Eisgruber & Sager, *supra* note 124, at 453-54.

[174] 139 CONG. REC. S14530 (daily ed. Oct. 26, 1993) (statement of Sen. Orrin Hatch). The RFRA "does not require the Government to justify every action that has some effect on religious exercise. Only action that places a substantial burden on the exercise of religion must meet the compelling State interest set forth . . . ." *Id.*

[175] *Id.*

[176] *Id.*

[177] *Id.* (statement of Sen. Edward M. Kennedy) ("[T]his amendment I will offer on behalf of Senator Hatch and myself is intended to make it clear that the compelling interest standards set forth in the act provides only to Government actions to place a substantial burden on the exercise of substantial liberty. Pre-*Smith* case law which makes it clear governmental action places a substantial burden on the exercise of religion and must meet the compelling interest test set out in the act.").

[178] Burwell v. Hobby Lobby Stores, Inc., 134 U.S. 130, 131 (2014) (Ginsburg, J., dissenting).

[179] 139 CONG. REC. S14530.

Indeed, Congress' pro-life members considered the possibility of a pro-choice argument before enacting RFRA.[180] The Senate Judiciary Committee heard extensive testimony about "Why the Religious Freedom Restoration Act Must Expressly Exclude a Right to Abortion" presented by the General Counsel of the National Right to Life Committee, Inc.[181] The group suggested that RFRA should be enacted with an amendment assuring that the Act "does not grant, secure, or guarantee any right to abortion . . . ."[182] Their fear was that without this amendment, pro-choice advocates could successfully argue under RFRA that no compelling state interest in unborn life exists,[183] and, thus, a woman whose sincerely held religious beliefs allow for abortion could prevail by challenging a law that restricts abortion.[184] The testimony regarding this proposed amendment was heard before Congress modified "burden" by "substantial" in the federal RFRA statute.[185]

In Alabama and Missouri, a person need not show that his or her religious beliefs are *substantially* burdened by governmental action, but merely burdened or restricted. A woman in either of these states could argue that her sincerely held religious belief in the right to obtain an abortion is burdened or restricted by the informed consent laws in these states. This Part will outline religious beliefs that advocate a woman's right to choose.

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[180] *The Religious Freedom Restoration Act: Hearing on S. 2969 A Bill to Protect the Free Exercise of Religion Before the S. Comm. on the Judiciary*, 102d Cong. 216 (1992) (statement of James Bopp, Jr., General Counsel, National Right to Life Committee, Inc.), http://www.justice.gov/sites/default/files/jmd/legacy/2014/02/13/hear-j-102-82-1992.pdf [hereinafter Hearing on S. 2969: Statement of James Bopp, Jr.].

[181] *Id.* at 206.

[182] *Id.* at 210.

[183] *Id.* at 231 (stating that, "[t]he deferential jurisprudential philosophy of the current Supreme Court majority would cause them to resolve any doubt on this matter in favor of finding that Congress had not intended to establish a compelling interest in unborn life under the RFRA, because of a variety of factors"). "[A]t the time of passage of the RFRA, the state interest in protecting unborn human life was not legally compelling and that the ACLU and other pro-abortion organizations came out strongly in favor of the RFRA." *Id.*

[184] *Id.* at 210-11 ("An unamended RFRA would make the recognition of a serious free-exercise-of-religion abortion right easier by making it easier for women to have standing to bring law suits asserting a free-exercise claim. It would enlarge the class of women who could make such a claim by (1) requiring only that their exercise of a religious belief is 'burdened' by the governmental restriction and (2) opening the class not just to women whose religion allows abortion to preserve the life of the mother but also for many other reasons. Because abuse of the rights gained by this already enlarged class will be inevitable, the potential exists for a very large class of women to obtain abortions under an unamended RFRA.").

[185] *Id.* at 224 ("Further, the RFRA requires only that a woman shows that her exercise of religion is '*burdened*' by the government. This means that a woman could logically assert that her religion requires her to make a free moral choice between abortion and carrying a pregnancy to term and that a state statute eliminating one of those options burdens her religious practice. This 'burdens' language further broadens the class from those motivated by their religion to seek an abortion." (internal citations omitted)).

A. Religions Favoring a Woman's Right to Choose

1. Judaism

One religion that espouses "pro-choice" values is Judaism. Indeed, "[n]ot only do most Jews favor the 'pro-choice' position; the issue of abortion looms large for their organizations. For example, the National Council of Jewish Women calls reproductive rights one of its top-priorities for advocacy."[186]

According to traditional rabbinic law, where the mother's life is in danger abortion is not only permitted, but also required.[187] Additionally, under Jewish law, fetuses are not considered living human beings; if they were considered living human beings "then abortion under any circumstance would be impermissible—even if the mother's life were in danger—because you cannot destroy one life to save another."[188] This is particularly true for Reform and Reconstructionist sects of Judaism, which "are the least restrictive branches of Judaism when it comes to abortion."[189]

2. The Presbyterian Church

Another religious sect that espouses pro-choice notions is the Presbyterian Church, which holds that the decision of whether to terminate a pregnancy is a personal decision.[190] The Church proclaimed in a report entitled "Problem Pregnancies and Abortion," which was received and approved by their General Assembly, that although there is no specific Biblical mention of abortion, "the Holy Scriptures are filled with messages that advocate respect for the woman and child before the birth . . . ."[191]

When a woman does not have the resources, either economic or spiritual, necessary to bring a child into the world, or the pregnancy poses serious risks such as genetic problems, the Presbyterian Church maintains that "[a]bortion can . . . be

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[186] Alex Luxenberg, *What Judaism Says About Abortion*, LAW AND THEOLOGY 241 (Martin H. Belsky & Joseph Bessler-Northcutt eds., 2005).

[187] *Id.* ("On the other hand, rabbinic law considers abortion impermissible for reasons of convenience. Between these two extremes—threat to life and mere convenience—is a broad, gray area within which rabbinic tradition debates the issue. In all cases, the highest value in rabbinic law is the mother's health, not the mother's right to choose.").

[188] *Id.*

[189] *Id.* at 242.

[190] *See generally Abortion Issues*, PRESBYTERIAN MISSION AGENCY, http://www.presbyterianmission.org/ministries/101/abortion-issues/ (last visited Mar. 14, 2015) ("When an individual woman faces the decision whether to terminate a pregnancy, the issue is intensely personal, and may manifest itself in ways that do not reflect public rhetoric, or do not fit neatly into medical, legal, or policy guidelines. Humans are empowered by the spirit prayerfully to make significant moral choices, including the choice to continue or end pregnancy. Human choices should not be made in a moral vacuum, but must be based on Scripture, faith, and Christian ethics." (quoting the 217th General Assembly of the Presbyterian Church)).

[191] *Theological Principles*, PRESBYTERIAN MISSION AGENCY, http://www.presbyterianmission.org/ministries/phewa/theological-principles-presbyterian-church-us-repr/ (last visited Mar. 14, 2015).

considered a responsible choice within a Christian ethical framework . . . . Elective abortion, when responsibly used, is intervention in the process of pregnancy precisely because of the seriousness with which one regards the covenantal responsibility of parenting."[192]

3. The United Church of Christ

Finally, the United Church of Christ, one of the founding religious groups of the Religious Coalition for Reproductive Choice (which was originally formed in 1973 as the Religious Coalition for Abortion Rights) also firmly believes in a woman's right to choose whether to obtain an abortion.[193] The United Church of Christ believes that public funding should be used towards ensuring that women have access to abortion because "[w]hat is legally available to women must be accessible to all women."[194]

The United Church of Christ specifically takes the view that an embryo in its early stages is *potential* human life, reasoning that during the early stages of pregnancy, many factors besides the fetus's existence should be given "equal or greater weight . . . ."[195] These factors include: "the welfare of the whole family, its economic condition, the age of the parents, their view of the optimum number of children consonant with their resources and the pressures of population, their vocational and social objectives . . . ."[196] Reproductive justice is a central tenet of the faith, which holds that the "social well-being of women and girls . . . will be achieved when women and girls have the economic, social and political power and resources to make healthy decisions about [their] bodies, sexuality and reproduction . . . ."[197]

B. Informed Consent Procedures of Missouri and Alabama Violate a Woman's Sincerely Held Religious Beliefs Under Their State RFRAs

A woman who is part of the Reform branch of Judaism, the Presbyterian Church or the United Church of Christ has a sincerely held religious belief that favors her right to make an unrestricted and unburdened moral choice as to whether undergo an abortion. Judaism goes one step farther in that it does not deem fetuses

192 *Id.*

193 *Reproductive Health and Justice: Why the UCC is a Leader in this Area*, UNITED CHURCH OF CHRIST, http://d3n8a8pro7vhmx.cloudfront.net/unitedchurchofchrist/legacy_url/455/reproductive-health-and-justice.pdf?1418423872 (last visited Mar. 15, 2015).

194 *Id.*

195 *United Church of Christ: General Synod Statements and Resolutions Regarding Freedom of Choice*, UNITED CHURCH OF CHRIST (June 29, 1971), http://d3n8a8pro7vhmx.cloudfront.net/unitedchurchofchrist/legacy_url/2038/GS-Resolutions-Freedon-of-Choice.pdf?1418425637.

196 *Id.*

197 *Pro-Choice: Why? What Is Reproductive Juice*, UNITED CHURCH OF CHRIST, http://d3n8a8pro7vhmx.cloudfront.net/unitedchurchofchrist/legacy_url/2022/NYE-workshop-handout.pdf?1418425590 (last visited Oct. 8, 2015).

to have the "same status as a living human being."[198] Ostensibly, a woman belonging to any of these three religious beliefs would have her religious faith burdened or restricted by undergoing informed consent procedures requiring her to learn, for example, about the ability of a fetus to feel pain—"information that is generally irrelevant to [her] situation and, in most cases, is not supported by scientific research."[199] The informed consent procedure is not grounded in science or medical necessity. Rather these informed consent procedures are grounded in a belief that women should be dissuaded from undergoing an abortion prior to receiving one. This is antithetical to the religious beliefs of women belonging to any one of these three faiths.

1. Missouri's Informed Consent Law

Missouri's extensive informed consent law requires that a woman who is planning to undergo an abortion must be provided with information regarding: (1) the immediate and long lasting medical risks of abortion, including harm to subsequent pregnancies and fertility, and any possible adverse psychological side effects; (2) alternatives to abortion, including providing the woman with materials that further describe these alternatives; (3) the gestational age of the fetus at the time that the abortion is to be performed; and (4) the "anatomical and physiological characteristics" of the fetus at the time of the procedure.[200] The physician must present the woman with printed materials describing "the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from conception to full term, including color photographs or images of the developing unborn child . . . ."[201] These materials are to display conspicuously the statement: "The life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being."[202] The physician must also provide her with the opportunity to undergo an ultrasound and hear the heartbeat of the unborn child. All information is to be provided seventy-two hours before the procedure.[203]

When an abortion is to be performed on a fetus of twenty-two weeks gestational age or older, the woman is to be given information regarding the "possibility of the abortion causing pain to the unborn child" including a description of the steps in the procedure that could cause the fetus pain.[204] The doctor, who is to perform the abortion, must give the woman printed materials

198 Luxenberg, *supra* note 186, at 241.

199 Rachel Benson Gold & Elizabeth Nash, *State Abortion Policies and the Fundamental Principles of Informed Consent*, 10 GUTTMACHER INST. 6, 12 (2007), https://www.guttmacher.org/pubs/gpr/10/4/gpr100406.pdf.

200 MO. ANN. STAT. § 188.027 (West 2014).

201 *Id.* § 188.027.1(g)(2).

202 *Id.*

203 *Id.* § 188.027.1(g)(4).

204 *Id.* § 188.027.1(g)(5).

describing agencies that will assist her in carrying the child to term; these materials are to "prominently" show the statement:

> There are public and private agencies willing and able to help you carry your child to term, and to assist you and your child after your child is born, whether you choose to keep your child or place him or her for adoption. The State of Missouri encourages you to contact those agencies before making a final decision about abortion. State law requires that your physician or a qualified professional give you the opportunity to call agencies like these before you undergo an abortion.[205]

The physician must also provide the woman with printed material stating that the father is liable to assist in childcare and that "information concerning paternity establishment and child support services and enforcement may be obtained by calling the family support division within the Missouri department of social services . . . ."[206]

2. Alabama's Informed Consent Law

Alabama's informed consent law, The Woman's Right to Know Act,[207] is similar to the informed consent law of Missouri, although not quite as extensive. The law requires that forty-eight hours before the procedure can be performed, the woman must be provided with printed materials regarding: (1) services available to assist women throughout pregnancy and after childbirth; (2) adoption agencies and laws that allow adoptive parents to pay for prenatal care; (3) color photographs of a fetus at two-week gestational increments, that include possibility of the fetus's survival at that time and information regarding its development; and (4) risks of abortion procedures and risks of carrying a child to term.[208] In addition, doctors are required to perform an ultrasound which women have the option of viewing. A woman must sign a form stating that she either viewed the ultrasound or was offered the opportunity to view it and declined. She also will be informed of the "probable anatomical and physiological characteristics of the unborn child at the time the abortion is to be performed."[209]

If the fetus is "viable or has reached a gestational age of more than 19 weeks,"[210] the woman must be told that the child might be able to survive outside the womb. She has the "right to request the physician to use the method of abortion that is most likely to preserve the life of the unborn child . . . ."[211] Finally, "[i]f the

205 *Id.* § 188.027.1(6)(d).
206 *Id.* § 188.027.1(7).
207 ALA. CODE § 26-23A-4 (2002).
208 *Id.*
209 *Id.* § 26-23A-4(b)(3).
210 *Id.*
211 *Id.* § 26-23A-4(b)(3)(b).

unborn child is alive, the attending physician has the legal obligation to take all reasonable steps necessary to maintain the life and health of the child."[212]

C. The Informed Consent Laws Burden a Woman's Religious Beliefs

A woman who belongs to the Jewish faith, the Presbyterian Church or the United Church of Christ has a religious belief that favors a woman's right to make an unrestricted and unburdened moral decision as to whether undergo an abortion.[213] Women of all three of these faiths are "religiously compelled to make up their own minds about whether they should have an abortion."[214] The informed consent laws of both Missouri and Alabama are designed to inform the moral choice behind undergoing an abortion insofar as they provide information that is "not part of [the doctor's] duty to disclose medically relevant information."[215]

Missouri's informed consent statute mandates that women undergo counseling about fetal pain.[216] According to Vandewalker, this information is misleading because of medical controversy[217] surrounding whether fetuses actually have the ability to feel pain. This informed consent law only displays one side of the controversy in an attempt to dissuade women from choosing abortion. Further, the law states that women must receive information regarding the psychological consequences of abortion where as "[t]he best scientific evidence shows that there is no causal relationship between abortion and psychological problems."[218] The premise of Missouri's informed consent laws is not truly to inform a woman of the possible medical consequences of abortion, but to dissuade her from receiving an abortion.

Alabama's informed consent statute requires that women receive color photographs of a fetus at different stages of gestational development.[219] Yet, "[i]nformed consent disclosures are intended to convey medical risks and benefits. Pictures and descriptions of embryos and fetuses are included in counseling materials because they are assumed to have emotional or moral content."[220] Again, a woman, whose religious beliefs dictate that she has the ability to make a personal and free moral choice as to whether undergo an abortion, has her religion burdened

[212] *Id.* § 26-23A-4(b)(3)(c).

[213] *See supra* Part IV.A.

[214] Hearing on S. 2969: Statement of James Bopp, Jr., *supra* note 180, at 216.

[215] Vandewalker, *supra* note 14, at 26.

[216] MO. ANN. STAT. § 188.027 (West 2014).

[217] Vandewalker, *supra* note 14, at 23 ("There is scientific evidence that the neural pathways that are necessary for pain perception form as early as the twentieth week of gestation, although other studies place this development later, between twenty-three and thirty weeks. But even if the structures are in place at twenty weeks, that does not necessarily mean that they are function at that time; lungs, for example, are physically formed before they function . . . . Furthermore, there is data suggesting that fetuses are in a constant sleep-like state and unable to experience pain, and that biochemical in the in utero environment may sedate and anesthetize the fetus.").

[218] *Id.* at 16.

[219] ALA. CODE § 26-23A-4 (2002).

[220] Vandewalker, *supra* note 14, at 20-21.

by informed consent procedures that are rather an attempt to dictate the moral underpinnings of her choice. These laws are, thus, "designed to make women's choices regarding ending their pregnancies less well-informed and less voluntary"[221] in an attempt to dissuade women from choosing abortion.

D. Missouri and Alabama's Informed Consent Laws Analyzed Under the State RFRAs

Under *Smith*'s precedent, Missouri and Alabama's informed consent laws would only have to undergo a rational-basis level of review in order to be upheld.[222] That is, as long as the informed consent law is rationally related to a legitimate governmental interest, the burden on religion would be permissible. Under these state RFRAs—as the federal RFRA does not apply to the states[223]—the informed consent law must pass muster under a very stringent test—the compelling state interest test. Very few laws survive such scrutiny. Under *Casey*, while the Supreme Court both reaffirmed its holding in *Roe*, it declined to refer to the state's interest in protecting fetal life as a compelling interest, using instead an undue burden test on restrictions on abortion.[224] Thus, the state's interest in protecting fetal life does not necessarily rise to the level of compelling, especially in the case of a pre-viability abortion.

Even if Missouri and Alabama courts determine that the state's interest in protecting unborn life does rise to the level of a compelling state interest, providing information that is not grounded in medical science would not be the least restrictive means[225] of furthering this interest. The information is unduly restrictive[226] and burdens certain women's rights to practice their religion. Missouri and Alabama have a number of other routes that they could take in order to further the state interest in protecting fetal life; routes that do not impinge on these women's practice of religion. For example, these states could pass laws simplifying adoption procedures, which make adoption a more tenable option for potential mothers. In addition, states could provide more state-funded assistance for single mothers and low-income families with children.[227] Neither of these options would impose on a woman's sincerely held religious belief in the right to exercise a free moral choice to undergoing an abortion, and both would further the state compelling interest in protecting fetal life. Thus, women could argue under Alabama or Missouri's RFRAs that their religious beliefs are burdened or restricted by these states' informed consent laws.

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221 *Id.* at 70.
222 Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).
223 City of Boerne v. Flores, 521 U.S. 507 (1997).
224 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).
225 ALA. CONST. art. 1, § 3.01(c) (2014).
226 MO. ANN. STAT. § 1.302 (West 2009).
227 Hearing on S. 2969: Statement of James Bopp, Jr., *supra* note 180, at 234.

CONCLUSION

While abortion remains a legally, politically, and religiously salient issue in America, ensuring women's continued access to reproductive care is imperative. Women have fought for decades to have their reproductive autonomy and privacy honored under the law, greatly expanding the circumstances under which women can receive safe, legal abortions.[228] Now is not the time to begin rewinding women's social equality by allowing the systemic dismantling of women's right to access to contraceptive care, yet that is the course that this Nation is taking.

Society must continue to fight to protect their constitutional right to an abortion. A large part of this battle involves dismantling the state and federal RFRAs that are allowing religious actors to place their beliefs proscribing reproductive care above the law. As Katha Pollitt, a feminist critic, contended, in a July 2014 article in *The Nation*:

> The Religious Freedom Restoration Act needs to be repealed, but it is hard to see where the political will is going to come from. Somehow the separation of church and state has come to mean blocking the state from protecting the civil rights of citizens and forcing it to support—and pay for—sectarianism, bigotry, superstition and bullying. I doubt this is what Thomas Jefferson had in mind.[229]

Unraveling the harm that purported religious freedom is creating in regards to women's access to abortion and contraception is a fight that is just beginning.

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[228] *See generally A History of Key Abortion Rulings of the U.S. Supreme Court*, PEW RESEARCH CTR. (Jan. 16, 2013), http://www.pewforum.org/2013/01/16/a-history-of-key-abortion-rulings-of-the-us-supreme-court/ ("In 1967, Colorado became the first state to greatly broaden the circumstances under which a woman could legally receive an abortion. By 1970, 11 additional states had made similar changes to their abortion laws and four other states—New York, Washington, Hawaii and Alaska—had completely decriminalized abortion during the early stages of pregnancy.").

[229] Pollitt, *supra* note 17.