"The Silent Overturning of *Roe v. Wade*: A Historical Analysis of State Anti-Abortion Laws and Supreme Court Decisions"

An essay submitted in partial fulfillment of

the requirements for graduation from the

Honors College at the College of Charleston

with a Bachelor of Arts in

Biology and Women's and Gender Studies

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May 2014

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Introduction

Just twelve hours before her scheduled procedure, Texas woman Marni Evans received a call from her doctor's office saying that the appointment for her abortion was suddenly cancelled. Due to a 5th Circuit Court of Appeals ruling that allowed a new abortion law to be implemented, Marni's doctor was no longer qualified to provide abortion services. The restrictive abortion law, also known as House Bill 2, requires all physicians to have admitting privileges at a hospital within 30 miles of the clinic where they are providing abortion services. On November 1, 2013, one-third of the health clinics across the state to closed as a result of the law, leaving hundreds of women like Marni with nowhere to turn.

Abortion restrictions have always made it difficult for women in Texas to obtain an abortion, but the new law has made it even harder for women to exercise their right to choose. Three years ago, approximately 2,000 women in the state of Texas were forced to travel over 100 miles or more to access a reproductive health clinic, now more than three times this number will have to travel the same distance in 2014. The impacts that Texas's newest abortion restriction is having for women across the state are significant. Although the Texas law does not completely ban abortion procedures, it makes the fundamental right to an abortion recognized in *Roe v. Wade* seem unattainable.

The monumental Supreme Court ruling in *Roe v. Wade* granted women the right to an abortion under the Due Process Clause of the Fourteenth Amendment; however, the original holding has almost entirely been altered by subsequent Supreme Court cases. From *Planned Parenthood v. Casey* (1992) to *Gonzalez v. Carhart* (2007), the Supreme Court has slowly chipped away at the core of *Roe*, allowing state legislatures to gain more power over abortion policy. Since *Roe v. Wade*, states have shown resistance to the ruling by implementing restrictive

abortion legislation; however, it seems as though creating abortion restrictions has become the main concern of many state legislatures in recent years. In 2011, anti-abortion legislation reached an all-time high; more anti-abortion restrictions were enacted from 2011 to 2013 than in the entire previous decade combined (Guttmacher Institute). With the record number of abortion restrictions in effect today, it is hard to understand how states are able to implement and enforce such restrictive abortion laws without backlash from judiciaries, especially the Supreme Court.

Previous research that examines the relationship between state legislatures and the Supreme Court suggests that states take Supreme Court decisions into account when creating laws, and oftentimes, the Supreme Court directly influences policymaking in the states. In this paper, I examine the dynamic between the Supreme Court and the state legislatures, specifically concerning abortion legislation in three policy areas: parental consent, public funding, and partial-birth abortion. Using an event history analysis of restrictive abortion laws passed by state legislatures before and after major Supreme Court decisions (beginning with *Roe v. Wade*, 1973). I hypothesize that states have been creating restrictive abortion laws in response to the Supreme Court's decisions, and as a consequence, the Supreme Court has allowed state legislatures to guide abortion rights; the Supreme Court is allowing the states to overturn *Roe v. Wade* so that they do not have to.

This work will add important information to the existing literature concerning the relationship between the states and the Supreme Court as well as the implementation of restrictive abortion laws by showing the changes and trends in state abortion restrictions and Supreme Court rulings since *Roe v. Wade*. This research is crucial to feminist studies because it will not only analyze the history of state abortion restrictions and Supreme Court decisions, but also how future restrictions could further infringe on women's health and what this may mean

for women's rights as a whole. Through this research, I hope to broaden the understanding of the relationship between the Supreme Court and state legislatures and the future of *Roe v. Wade*.

The History of Abortion Legislation and Reform in the United States

While many believe that the decision made in *Roe v. Wade* began the public abortion debate in the United States, there were conversations about abortion's morality and meaning far before 1973. Beginning in 1821, Connecticut enacted the first restrictive abortion statute in the United States which restricted abortion procedures in response to physicians' concerns about the risks and dangers of poisonous abortifacients and surgical abortions in a "nonantiseptic age" (Segers 2). By 1900, all fifty states had enacted extremely restrictive abortion laws, and although abortion was illegal across the country, abortion procedures were still being sought out by women. Wealthy women could find private physicians who would broadly interpret legal exceptions to discreetly perform safe abortion procedures while poor women were faced with more risky "back alley" alternatives (Segers 2). These illegal and unsafe abortions had significant impacts on women's health, and physicians and social workers who personally witnessed the negative effects of these abortion procedures began to advocate for the reformation of restrictive abortion laws (Segers 2).

The abortion reform movement, which began in the 1930s, did not gather much momentum until the early 1960s when a series of events influenced reformers to act. In 1962, a woman named Sherri Finkbine took the drug thalidomide at the beginning of her pregnancy, and later learned that the drug could cause birth defects. Because she lived in Arizona, a state that did not allow abortions for fetal defects, Finkbine flew to Sweden to have an abortion. This case quickly gained national attention and started the shift in public opinion about restrictive abortion

laws towards reformation. In 1962, the American Law Institute took the first steps to reforming anti-abortion legislation by proposing a model statute that would allow for women to have abortions in cases of rape; in cases where a child would be born with a "grave physical or mental defect"; and in cases to protect the woman's life (Greenhouse 2037). Along with these exceptions, the proposed statute also required two doctors to certify in writing their justifications for performing the abortion. By 1966, a majority of Americans supported reforming outdated abortion laws, and by 1970, four states (Hawaii, New York, Alaska, and Washington) had passed bills to legalize abortion as an elective procedure (Segers 4).

Roe v. Wade

By 1973, the country had various state-level restrictions and regulations having to do with abortion: four states allowed elective abortion procedures; fourteen states had moderately permissive abortion laws; and thirty-two states had highly restrictive statutes that only allowed abortion in cases to save the life of the pregnant woman. Additionally, twenty-three states required women seeking abortions to go out of the state for the procedure (Segers 5). Variations in access to abortion services across the United States ultimately set the stage for the Supreme Court case, *Roe v. Wade* (1973).

Roe v. Wade dealt with an 1857 Texas abortion statute that criminalized abortion procedures, except in cases to save the pregnant woman's life. The plaintiff in the case, "Jane Roe," was a single woman residing in Dallas, Texas, who wished to have her third, unwanted pregnancy terminated; however, under Texas's strict criminal abortion law, she was unable to obtain a legal abortion. The plaintiff's lawyers, Sarah Weddington and Linda Coffee, took the case because they were looking for a woman who wanted to have an abortion but did not have

the ability to obtain one; they needed a woman who did not have the money to travel outside of the state for an abortion. The factors surround Roe's case led the attorneys to believe that her case had a strong potential to reach the Supreme Court. The strategic move to take "Jane Roe" as their client ultimately led to Roe filing federal action against the Dallas County District Attorney, Henry Wade, claiming that the Texas criminal abortion statutes "abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments" (*Roe* 1973). The Federal District Court agreed that the "fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth Amendment," and that the Texas statutes were too unconstitutionally vague in regulating abortion (*Roe* 1973). However, the District Court refused to issue an injunction, and Roe appealed to the Supreme Court.

On January 22, 1973, the Supreme Court ruled in a 7-2 majority that the Texas abortion statutes were illegal. Writing for the majority, Justice Harry Blackmun declared that the right to an abortion was protected by the right to privacy which was grounded under the Due Process Clause of the Fourteenth Amendment because it was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy" (*Roe* 1973). Although the Court ruled that a woman had a fundamental right to choose an abortion, this right was not absolute; the state interest in maternal health and potential human life. As part of this decision, the Supreme Court constructed a trimester system that provided a guide for state abortion laws: during the first trimester, the abortion decision must be left to the pregnant woman and her physician; during the second trimester, the State "in promoting its interest in the health of the mother," may regulate the abortion procedure only in ways that are reasonably related to maternal health; and in the

third trimester, the State may regulate and even forbid abortion except where it is necessary to protect the life of the pregnant woman (*Roe* 1973).

The Court's decision in *Roe v. Wade* defined abortion as a medical decision made by a pregnant woman and her physician until the second trimester while also allowing states to place increasing restrictions on abortion as the period of pregnancy lengthens as long as the restrictions are "tailored to the recognized state interests" (*Roe* 1973). Although the country was moving towards abortion reform before the Court's decision, the holding in *Roe* had a significant impact across the country and invalidated forty-six state abortion laws (Segers 5). The decision made in *Roe v. Wade* marked the beginning of state legislative backlash against the abortion reform movement.

State Legislatures and the Supreme Court

The Supreme Court's decision in *Roe v. Wade* shifted the primary focus of abortion politics to the federal government, namely the Supreme Court and Congress (Segers 6). Because of this, state governments became reactive and began enacting restrictive measures to test the limits of the Supreme Court's decision in *Roe*. After 1973, state abortion restrictions increased in both number and intensity, and the majority of the laws attempted to curb the effect of *Roe* to the greatest possible degree (Halva-Neubauer 168). State legislators knew that they could not enact complete abortion bans, but since the guidelines set in *Roe* were somewhat vague, the states were willing to enact laws that interpreted the Court's decision narrowly. These narrow interpretations of the decision in *Roe* ultimately led to various types of restrictive laws such as parental consent requirements and public funding restrictions (Halva-Neubauer 169).

After the decision made in *Roe,* states were actively creating abortion legislation, but there were variations amongst the states in the approaches to abortion policy. In Glen Halva-Neubauer's research (1990) on state abortion policy in the post-*Roe* period, he categorizes states as either challengers, codifiers, acquiescers, or supporters based on their policy-making approaches and the number of abortion restrictions passed between 1973 and 1989. Challenger states demonstrated the most hostility towards *Roe*, while codifiers passed restrictions after the policies were deemed constitutional by the Supreme Court. Acquiescer states, for the most part, ignored abortion restriction issues, and supporter states embraced the decision in *Roe v. Wade*. Based on the number of restrictive abortion policies passed between 1973-1989, 15 states qualified as challengers, 12 as codifiers, 14 as acquiscers, and 9 as supporters. Ultimately, Halva-Neubauer found that when the Supreme Court struck down abortion restrictions, challenger states would respond by enacting new statutes or altering previous regulations in attempts to push the ruling as far as possible. As the years progressed, state efforts to overturn *Roe v. Wade* were centered on challenger states, and state legislatures played significant roles in driving abortion policy in the United States.

While states have been successful in their efforts to restrict abortion access, state legislatures create policies with Supreme Court preferences in mind (Hoekstra 2009). Previous research has shown that states are more likely to create and pass policies if the Supreme Court has indicated a willingness to uphold the legislation (Hoekstra 2009). If one were to apply this research to state abortion policies, state legislatures should only pass restrictive abortion laws when the Supreme Court indicates a willingness to uphold the policy.

Although states are more likely to pass policies after the Supreme Court has upheld a particular policy, states are also more likely to adopt abortion policies prior to Supreme Court

involvement in policy issues (Patton 2007). In Dana Patton's 2007 research on the analysis of abortion policy in the light of constitutional context, Patton found that states adopted numerous pieces of legislation while a certain abortion policy was under review by the Supreme Court. The policymaking behavior of the states indicates that Supreme Court decisions directly affect the adoption of state abortion policies. The research done by both Hoekstra and Patton shows that state legislatures are willing to push the boundaries of legislation until the Supreme Court is forced to make a decision about the policy, and after the policy has been ruled on, states will create or amend their laws to meet the new holding.

Supreme Court preference and involvement is considered by state legislatures when creating policy; however, states may also change their already existing policies both before and after a permissive Supreme Court decision (Glick 1994). Research on states' right to die policies in the context of the Supreme Court's decision in *Cruzan v. Director* (1990) showed that states already regulating the right to die with policies that exceeded the Supreme Court decision tended to ignore the new policy, and states that had a right to die policy but did not exceed the Supreme Court's decision altered their policies to meet the Supreme Court's decision (Glick 1994). The research also revealed that states that previously had no applicable right to die policies would follow the main policy innovations chosen by their counterpart states following a permissible Supreme Court decision (Glick 1994). This information is particularly interesting, especially when applied to abortion legislation, because it suggests that both the Supreme Court and other states influence the creation and implementation of restrictive abortion laws.

The Supreme Court's influence on state policymaking is both complicated and restrictive. The Supreme Court sets precedent, and states create new policies based on the Supreme Court's decisions. While the Supreme Court doesn't seem to be directly involved with the creation of

state policies, it is a major factor in influencing the policymaking process. Because the states look to the Supreme Court for direction in creating policies, it is extremely problematic that the Court has been uninvolved with the abortion debate since 2007. The states have had seven years of unguided policymaking, and because of this, the creation of anti-abortion legislation has hit an all-time high, women's access to abortion is at its most vulnerable.

The Chipping Away of Roe v. Wade

The decision made in *Roe v. Wade* marked the beginning of states' interests in abortion legislation which ultimately led to more and more states creating abortion restrictions. As the states continued to enact restrictive abortion laws, the Supreme Court had to decide which policies were constitutional and which policies were not. In the years following *Roe*, the Supreme Court has modified the original holding in *Roe v. Wade*. In 1989, *Webster v. Reproductive Health Services* was the first major case that began the transformation of *Roe v. Wade* into what it is today. The case dealt with a Missouri law that attempted to: require physicians to conduct testing to determine whether the fetus is viable before performing abortions on women who were at least 20 weeks pregnant; prohibit public employees and facilities from performing abortions except when necessary to save the life of the mother; prohibit the use of state funds to encourage or counsel a woman to have a non-lifesaving abortion; and defined human life as beginning at conception. In a 5-4 decision, the Supreme Court upheld the viability testing requirement, the restriction of public employees, funds, and facilities, and the state's definition of life. As for public funding, the Court noted that there was no inherent right to any form of government funding, and upheld the Missouri law, referencing the decision in *Roe v. Wade* (1973). In the majority opinion concerning the viability requirement,

Chief Justice Rehnquist refused to use the trimester framework set up by *Roe v. Wade* (1973) and concluded that the testing requirement furthered Missouri's interest in human life. In a concurring opinion, Justice Scalia upheld the viability testing decision and said that the Court's reasoning in *Webster* (1989) overruled *Roe* and should have done so on the spot. The Court's decision in *Webster* (1989) sent a clear message to the states that the central holding in *Roe v. Wade* was vulnerable. Although the case of *Webster v. Reproductive Health Services* did not completely alter the core of *Roe,* it started the clear shift away from the original holding in *Roe v. Wade* by beginning to value fetal life over the life and choices of the pregnant woman.

In 1992, the Supreme Court heard the case of *Planned Parenthood v. Casey* dealing with the constitutionality of Pennsylvania's "Pennsylvania Abortion Control Act of 1982." The Pennsylvania act required a pregnant woman's informed consent; required a 24 hour waiting period prior to the procedure; required a married woman seeking an abortion to indicate that she had notified her husband of her intention to abort the fetus; required either the consent of one parent or judicial approval in the case of a minor; and required that abortion clinics file various information reports. Ultimately, the Supreme Court upheld all but one provision in the Pennsylvania law, and for the first time, the justices imposed a new standard to determine the validity of laws restricting abortions. A three-justice plurality (O'Connor, Kennedy, and Souter) rejected *Roe*'s trimester framework but reaffirmed *Roe*'s "essential holding": the right of a woman to choose an abortion before viability without interference by the state; a state's authority to restrict post-viability abortions for health; a state's interest in both the health of the woman and the fetus throughout pregnancy. The new standard asked whether a state abortion regulation has the purpose or effect of imposing an "undue burden," which is defined as a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability" (*Casey*

1992). Under this standard, the only provision in the Pennsylvania law to fail the undue-burden test was the husband notification requirement.

Although the case of *Planned Parenthood v. Casey* upheld the central holding of *Roe,* the Supreme Court made it easier for states to create new, restrictive abortion laws that could deny a woman access to an abortion if it did not impose an "undue burden." In *Roe v. Wade*, the Court determined that states could not be involved in a pregnant woman's decision to choose abortion until after viability, but after the decision in *Casey*, states were able to regulate abortion before the point of viability if the abortion restrictions did not impose an undue burden. The Supreme Court's decision in *Planned Parenthood v. Casey* ultimately weakened *Roe* and allowed states to enact more extensive abortion legislation.

State Legislatures, State Laws, and The Supreme Court

After the Supreme Court's decision in *Roe v. Wade*, the states took it upon themselves to create their own abortion restrictions within the Supreme Court's new trimester system. As the states created more abortion restrictions, the Supreme Court was forced to grapple with the constitutionality of various abortion laws. The states continued to push the limits of the Supreme Court until the original holding of *Roe v. Wade* was altered in subsequent Court cases. Although the core of *Roe* has not been abandoned by the Supreme Court, the record number of abortion restrictions in effect today seem to hint that the Court might be on its way to abandoning the fundamental right for a woman to seek an abortion as found in *Roe*.

In order to examine the relationship between state abortion laws and Supreme Court decisions, I have conducted an event history content analysis of laws passed by state legislatures and major Supreme Court decisions related to abortion. I have analyzed the rhetoric used in both

the Supreme Court cases and the corresponding state abortion policies to see whether Court decisions have been driven by state policies or if the creation of restrictive state policies have been driven by Supreme Court decisions. From this data, I expect to see trends in certain words and phrases that could indicate the type of relationship between the states and the Supreme Court.

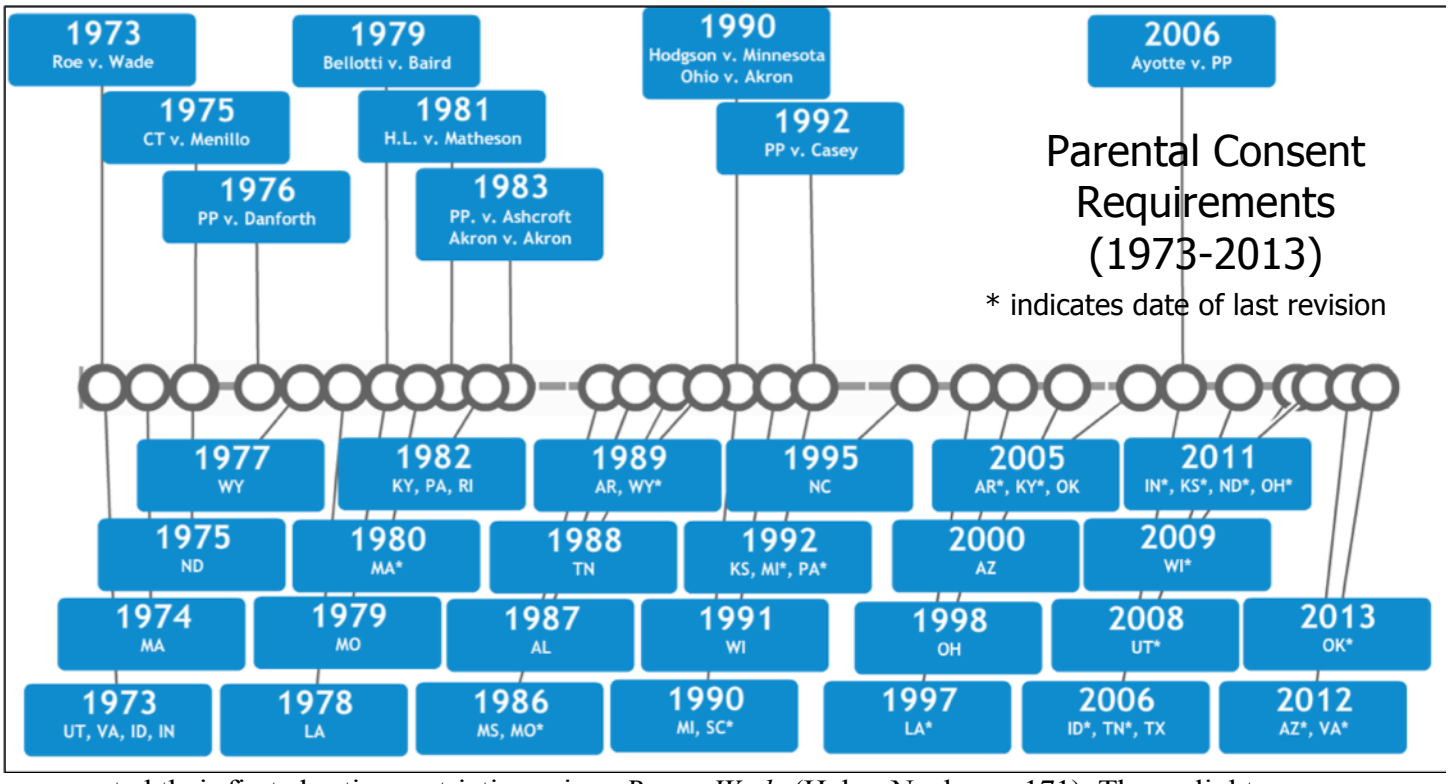
While there are many different kinds of abortion restrictions, I have chosen to analyze three types of anti-abortion legislation since 1973: parental consent requirements, public funding restrictions, and late-term abortion bans. I have chosen to examine parental consent requirements and public funding restrictions because states have been enacting both of these types of restrictions since the Supreme Court made the ruling in *Roe v. Wade* in 1973. I have also chosen to examine parental consent requirements and public funding restrictions because these two types of restrictions target very specific populations of women: minor women and low-income women. The third type of restriction I have chosen to analyze is the ban on late-term abortions because these restrictions are relatively new. By analyzing older abortion restrictions as well as newer ones, I hope to find similar trends in the way the states are reacting to Supreme Court decisions about abortion legislation.

In addition to tracing state abortion restrictions, I will also be analyzing the Supreme Court's action in cases regarding state abortion legislation beginning with *Roe v. Wade* (1973) and ending with *Gonzalez v. Carhart* (2007). Tracing state abortion restrictions and Supreme Court decisions chronologically will enable me to analyze whether state policies are influencing Supreme Court decisions or if the Supreme Court is driving the creation of restrictive abortion legislation in the states. Based on the findings of previous studies, I hypothesize that the

Supreme Court is allowing the states to overturn *Roe v. Wade* by allowing state legislatures to seize opportunities to create restrictive abortion laws.

Parental Consent Requirements

After the Supreme Court's decision in *Roe v. Wade*, anti-abortion lobbyists focused on parental consent laws requiring minors to obtain consent from their parents prior to procuring an abortion. These bills were overwhelmingly supported in public opinion polls, and by 1983, the Supreme Court upheld the first parental consent law requirement (*Ashcroft* 1983). Anti-abortion supporters framed parental consent restrictions as being "parental rights legislation" rather than "abortion legislation," and by the mid-1980s, a few states, including Mississippi and Alabama,



enacted their first abortion restrictions since *Roe v. Wade* (Halva-Neubauer 171). These slight

gains for the anti-abortion agenda were enough to fuel the creation of abortion restrictions in the states.

The history of parental consent requirements in the states as well as the subsequent Supreme Court rulings is shown in the figure above. The first case concerning parental consent requirements was in 1976 when a lawsuit was filed against the Attorney General of Missouri, John Danforth, concerning the constitutionality of a Missouri abortion statute. The Missouri law in question enacted many abortion restrictions, and it was the first state law that required the written consent of a parent for a minor. The case was appealed to the Supreme Court in *Planned Parenthood of Central Missouri v. Danforth*, and the Court struck down the parental consent requirement in a vote of 5-4. The case of *Roe v. Wade* established the state's limits on restricting the decision of the patient and her physician regarding abortion during the first trimester of pregnancy, and the Court decided the Missouri statute requiring parental consent was unconstitutional because it would potentially allow a third party to make a decision for a woman and her physician. This case is significant because the Court acknowledges a woman's fundamental right to make a decision about her health and body without interference from an outside party; the Court acknowledges the importance and the power of the pregnant woman in making the abortion decision.

The same year as *Danforth*, the Supreme Court heard another case that dealt with parental consent requirements in *Bellotti v. Baird*. The lawsuit was in regards to a Massachusetts abortion statute governing the type of consent required before an abortion may be performed on an unmarried minor; this law was the first of its kind to reference the marital status of a pregnant minor and began the shift away from a pregnant woman having the power to make her own choices independently. Unless the minor was married, the Massachusetts law required a

physician to obtain either written consent from both parents of the minor or written authorization from a judge before performing an abortion. The District Court declared the statute to be unconstitutional under the Due Process Clause of the Fourteenth Amendment. The case was appealed to the Supreme Court, and in a unanimous decision, the Court reversed the judgment of the District Court. The Court dismissed the case and decided the law should first be reviewed by a Massachusetts state court. After dismissal by the Supreme Court, the Massachusetts abortion statute was once again declared unconstitutional by the Federal District Court, and three years later, the case was brought back to the Supreme Court on appeal. The Court decided in an 8-1 majority that the Massachusetts statute was unconstitutional because it unduly burdened a minor's ability to seek an abortion and also left the minor's choice to be ultimately decided by a third-party in every situation (either a parent or a judge). Ultimately, the Court struck down Massachusetts's parental consent requirement and the judicial bypass procedure for minors.

In 1981, the Supreme Court heard the case of *H.L. v. Matheson*. The case involved a pregnant 15-year-old girl living with her parents, and her physician advised her that an abortion would be her best medical option. The physician, despite suggesting the girl undergo an abortion procedure, refused to perform the abortion without first notifying her parents because of a Utah state statute that required a physician to notify the parents or guardian of a minor before an abortion procedure is performed. The girl did not want to notify her parents, and she instead sought an injunction against the enforcement of the statute that she claimed to be unconstitutional. The trial court upheld the Utah statute, and the Utah Supreme Court unanimously upheld the trial court's judgment. The case was then appealed to the Supreme Court, and in a 6-3 decision, the Court upheld the constitutionality of the Utah statute and the judgment of the Utah Supreme Court. In the majority opinion by Chief Justice Burger, the Utah

statute was upheld because it did not give veto power over a minor's abortion decision to the minor's parents or to a judge. The opinion also stated that the Utah statute mandated parental notice, not necessarily consent, and was therefore not violating any constitutional rights of an immature, dependent minor.

In 1982, Rhode Island enacted a state law that required an unmarried pregnant woman under eighteen years old to obtain written consent from at least one parent before undergoing an abortion procedure. The Rhode Island statute also mentions that if a pregnant minor does not wish to seek the consent of either her parents or guardians, a judge is able to authorize a physician to perform an abortion after determining that the woman is mature and capable of giving informed consent. The Rhode Island law was the first parental consent requirement that mentions the maturity of the pregnant minor when seeking authorization from a judge, and this likely stems from the Supreme Court's decision in *H.L. v. Matheson* in the previous year.

In 1983, the Supreme Court reviewed a restrictive abortion law passed by the Missouri General Assembly that required minors to secure parental or judicial consent before an abortion procedure in *Planned Parenthood of Kansas City, MO v. Ashcroft*. In a 5-4 vote, the Court upheld the Missouri parental consent requirement. On the same day as *Ashcroft*, the Supreme Court reviewed an Ohio city abortion law in *City of Akron v. Akron Center for Reproductive Health*. The abortion regulations in the ordinance required a physician must not perform an abortion on an unmarried minor under the age of 15 unless there is consent from a parent or a court order. The District Court struck down the parental consent requirement, and the plaintiffs appealed. The court of appeals upheld the parental notice requirement, but struck down the parental consent requirement. Both the plaintiffs and defendants appealed to the United States Supreme Court, and after reviewing the case, the Court struck down the parental consent

requirement. The Court struck down the parental consent requirement based on the decisions made in both *Planned Parenthood v. Danforth* (1976) and *Bellotti v. Baird* (1979). *Danforth* held that, "the State may not impose a blanket provision…requiring the consent of a parent…as a condition for abortion of an unmarried minor," and *Bellotti* recognized that "a State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial" (Danforth 1976; Bellotti 1979).

In the years following *Ashcroft* and *Akron v. Akron,* two states implemented parental consent requirements and two states updated their parental consent laws. Mississippi enacted a parental consent requirement in 1986, and the law requires the written consent of at least one parent or guardian before an abortion is performed on a minor. The Mississippi statute also mentions that in cases of incest, where the "minor's pregnancy was caused by intercourse with the minor's father, adoptive father, or stepfather," the written consent of the minor's mother "shall be sufficient" (MS 41-41-53). The Mississippi statute was the first parental consent requirement to mention cases of incest. In 1987, Alabama enacted a parental consent requirement that mentions the state's compelling interest of "protecting minors against their own immaturity" and "protecting the rights of parents to rear children" (AL 26-21-1). The language used in the Alabama law likely comes from the Supreme Court's decision in *H.L. v. Matheson* that upheld parental notice in cases of immature minors. The anti-abortion supporters at the time framed the issue of "parental consent" as being a "parental right," and this is also likely where this part of the Alabama statute comes from.

In 1989, Wyoming revised their parental involvement law to include both notification of the minor's parents 48 hours before the abortion and the written consent of at least one parent; however, the law includes an alternative judicial bypass procedure for the pregnant minor. In

1990, the Supreme Court reviewed a Minnesota parental notice law that was an amendment to the "Minor's Consent to Health Services Act" in the case *Hodgson v. Minnesota*. The act prohibited any abortions be performed on a woman under 18 years old until at least 48 hours after both of her patents have been notified of her decision, without judicial bypass. In a 5-4 vote, the Supreme Court struck down the two-parent notice requirement, and in another vote of 5-4, upheld the constitutionality of a two-parent notice requirement as long as there is an option for judicial bypass. While the option of judicial bypass seemed like a woman-friendly option, the process of seeking judicial bypass is discrediting a woman's ability to make a decision for herself; it is ultimately putting the fate of her future in the hands of a judge who may or may not grant her permission to exercise her fundamental right to procure an abortion. In the majority opinion which struck down the two-parent notice, the Court decided that the requirement of both parents did not "reasonably further any legitimate interest" and "disserves the state interest with respect to dysfunctional families" (*Hodgson* 1990).

The Supreme Court decided another case in 1990 under the name of *Ohio v. Akron.* The case dealt with a bill that was enacted by the Ohio state legislature which prohibited abortions for unmarried and unemancipated minors under 18 years old. The statutes stated that a physician may perform an abortion if the physician personally notifies one of the minor's parents at least 24 hours before the procedure; a physician may perform an abortion on a minor if one parent or guardian consents to the procedure in writing; and a physician may perform an abortion on a minor if judicial bypass is granted. The Akron Center for Reproductive Health filed a lawsuit in federal district court stating that the law was unconstitutional. The district court agreed that the law was unconstitutional, the court of appeals affirmed the decision, and the Supreme Court granted review. In the case of *Ohio v. Akron* (1990), the Supreme Court upheld the Ohio law and

reversed the judgment of the court of appeals in a vote of 6-3. Ultimately, the Court upheld a one-parent notice requirement with judicial bypass, and in Justice Kennedy's opinion, he cites the opinion in *Bellotti* (1979) which set the criteria that a bypass procedure must satisfy and notes that **"**the Court has not yet decided whether parental notice statutes must contain judicial bypass procedures" (*Ohio* 1990).

In 1992, the issue of parental involvement was brought back to the Supreme Court in *Planned Parenthood v. Casey.* The case dealt with the constitutionality of Pennsylvania's "Pennsylvania Abortion Control Act of 1982," which, among many things, required either the consent of one parent or judicial approval in the case of a minor. Ultimately, the Supreme Court upheld all but one provision in the Pennsylvania law, and for the first time, the justices imposed a new standard to determine the validity of laws restricting abortions**.** A three-justice plurality (O'Connor, Kennedy, Souter) rejected *Roe*'s trimester framework and reaffirmed *Roe's* "essential holding": the right of a woman to choose an abortion before viability without interference by the state; a state's authority to restrict post-viability abortions for health; a state's interest in both the health of the woman and the fetus throughout pregnancy. The new standard asked whether a state abortion regulation has the purpose or effect of imposing an "undue burden," which is defined as a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability" (*Casey* 1992). In the case of parental consent, the Court upheld the statute's requirement of informed parental consent because the law included a judicial bypass mechanism. Although the Supreme Court ultimately upheld the decision in *Roe v. Wade,* they made it easier for states to create new, restrictive abortion laws that could deny a woman the right to an abortion if it did not impose an "undue burden."

In the years after *Casey*, six states either revised or implemented parental involvement laws which are still in effect today. The states that revised their parental involvement statutes in the 1990s all use the same basic rhetoric and included judicial bypass mechanisms which suggests that the states were following one another in creating policy. In 2003, New Hampshire enacted the "Parental Notification Prior to Abortion Act" which prohibited physicians from performing an abortion on a pregnant minor until 48 hours after written notice of the abortion was delivered to her parent or guardian. The act was challenged because it contained no health exception and failed to adequately protect the confidentiality of the judicial bypass procedure, and the federal district court agreed, declaring the law unconstitutional. The case was appealed, and ultimately, the Supreme Court granted review. In the case of *Ayotte v. Planned Parenthood* (2006), the Court unanimously ruled that it was unnecessary to completely strike down the law because there were only few instances where the statute would be unconstitutional, and the Court sent the case back to the lower courts. In Justice O'Connor's opinion, she says "States unquestionably have the right to require parental involvement when a minor considers terminating her pregnancy, because of their "strong and legitimate interest in the welfare of their young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely" (*Ayotte* 2006). After the Supreme Court's ruling of *Ayotte v. Planned Parenthood* in 2006, twelve states have revised or amended their parental consent policies that are currently in effect.

Analysis of Parental Consent Laws

After the Court's holdings in both *Planned Parenthood v. Danforth* and *Bellotti v. Baird*, states began implementing and revising state codes based on what the Supreme Court deemed

constitutional. In 1990, after the Court's decision in *Hodgson v. Minnesota,* states began including judicial bypass mechanisms in their parental consent laws. Following the Supreme Court's ruling in *Ayotte v. Planned Parenthood* in 2006, twelve states revised or amended their parental consent policies to align with the Supreme Court's decision. Based on the evidence presented, the analysis demonstrates that state implementation of parental consent requirements are driven by Supreme Court decisions. Similarly to previous studies that found states were more likely to enact legislation after the Supreme Court approved of a specific type of policy (Patton 2007; Glick 1994), I found that states were more likely to enact parental consent laws after the Supreme Court deemed the legislation in question constitutional. I also found that states that had parental consent requirements prior to the Supreme Court's decision altered their statute to meet the Supreme Court's newest holding. These findings are significant because the Supreme Court clearly has an influence on the types of policies being made by the states, and if the Supreme Court is allowing states to create more and more restrictive laws, abortion rights in the United States could soon become nonexistent.

Since the Court's first ruling in *Danforth* (1976), there has been a transition away from a woman of any age having the right to choose an abortion, and parental consent laws have had a significant impact on the ability of minor women to access abortion. The implementation of parental consent laws are significant because they affect a large population of women who likely did not plan to get pregnant in the first place—teenagers. State parental consent laws suggest that women under the age of eighteen are incapable of making the decision to choose an abortion without first having permission from her parents or guardians, or in some cases, having a spouse.

There are currently 25 states that have parental consent requirements in effect, and the effects that these laws are having for minors in these states are important. Although minors can

still obtain an abortion through a judicial bypass procedure, many teenagers are unaware of this option (Guttmacher 2009). Because some minors are unwilling to tell their parents about their decisions, many may opt to travel outside of their state in order to have an abortion. While this may seem like a feasible option for some minors, there are pregnant teenagers do not have the ability to access necessary transportation to travel outside of the state or have enough money to pay for the procedure on their own. Restrictive parental consent laws are having real impacts on pregnant minors and their abilities to access abortion which, in some ways, is removing the fundamental right granted to them in *Roe v. Wade*.

Although state parental consent requirements have not entirely removed the right for minors to have abortions, the restrictions put a significant barrier in the way of pregnant minors to obtain abortion procedures. According to the Guttmacher Institute, 82% of teen pregnancies are unplanned, and teens account for about one-fifth of all unintended pregnancies annually. Although the number of unplanned teen pregnancies is high, the abortion rate for this group of women is surprisingly low: 26% of all teen pregnancies end in abortion. Teen abortions account for about 7% of all abortion procedures nationwide (Guttmacher 2013). Based on these statistics alone, it seems as though parental consent requirements are having impacts on the number of pregnant teens who are able to access abortion. According to New (2008), the number of abortions performed on minors decreased by about 14% from 1985 to 1999 because of the implementation of restrictive parental involvement laws. The results from New's study suggests that when a state implements a parental involvement law, the abortion rate for minors falls significantly. New found that while parental consent laws result in an 18.7% decline in minor abortion rates, parental notification laws only result in about a 5% decrease in minor abortion rates (2008). These numbers are significant because parental consent requirements are having

much more of an impact on a minor's ability to access abortion than notification requirements, and states are realizing the effectiveness of their restrictive policies to inhibit abortion procedures.

Whether or not a minor is married is significant when it comes to state parental consent laws. The term "unmarried minor" was first used in the Massachusetts abortion statute that was brought before the Supreme Court in *Bellotti v. Baird* (1979), and since then, multiple states have included this terminology in their abortion restrictions. While there is clearly a trend in the way states are adopting language from both the Court and each other, there are significant messages and implications that these terms are having on minors seeking abortion procedures. The use of the term "unmarried minor" suggests that a pregnant woman cannot make a decision about her own body without first having a spouse. From a feminist perspective, this terminology takes away all autonomy from a woman and places her ability to make choices for herself in the hands of a man. The requirements for a minor to be married before making the abortion decision indicates that, in the states' eyes, unmarried minors are incapable of making choices on their own without first consulting their male guardian.

While the term "unmarried minor" is problematic because it removes the minor woman's ability to independently make decisions about her own body, the use of the term "immature" has also proved to be significant. The first time an "immature" minor was referenced by the Supreme Court was in the case *H.L. v. Matheson* (1981), and since then, multiple states have picked up on this terminology. In the 2006 case *Ayotte v. Planned Parenthood*, Justice O'Connor makes the statement: "States unquestionably have the right to require parental involvement when a minor considers terminating her pregnancy, because of their 'strong and legitimate interest in the welfare of their young citizens, whose immaturity, inexperience, and lack of judgment may

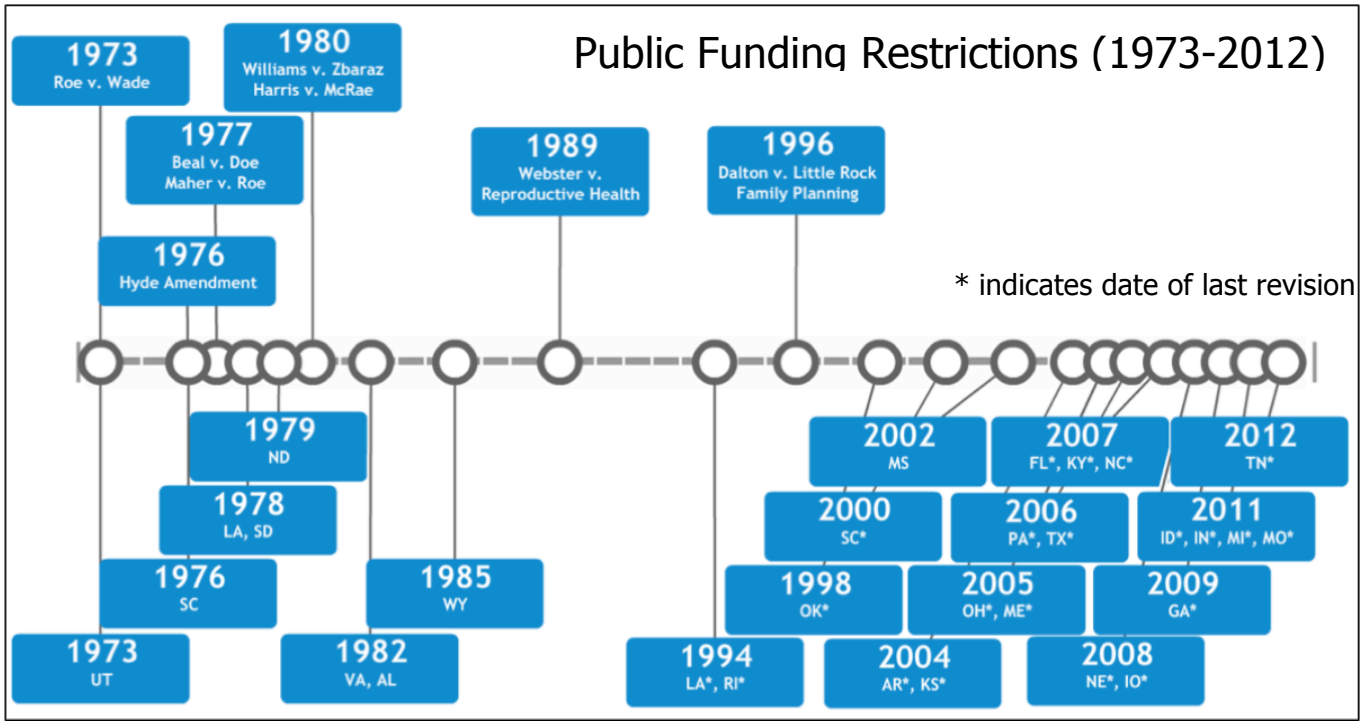
sometimes impair their ability to exercise their rights wisely" (*Ayotte* 2006). Justice O'Connors statement suggests that pregnant minors are incapable of making informed, rational decisions simply because of age, but they do not seem to be too concerned about how these "immature minors" will be as parents. Both the Supreme Court and the states' use of the phrase "immature minor" suggests that pregnant minors are mature enough to raise a child but not mature enough to choose to have an abortion.

Parental consent laws have infringed on the rights of an entire group of women who are left powerless simply because of age. Although minors can still have an abortion after receiving parental consent or by using the judicial bypass procedure, the extra steps that are included for this group of women seems unnecessary and arbitrary and further highlights the ways in which the states are slowly chipping away at a women's fundamental right to choose abortion.

Public Funding Restrictions

In response to the Supreme Court's decision in *Roe v. Wade*, Congress passed the Hyde Amendment in 1976 which prohibited the use of federal Medicaid funding for abortion except in cases to protect the life of a pregnant woman. One year after the passage of the Hyde Amendment, two cases concerning the use of public funds for abortion were brought to the Supreme Court. In both cases, the Court ultimately held that states participating in the Medicaid program were not required to fund nontherapeutic abortions (*Beal v. Doe; Maher v. Roe)*. The passage of the federal Hyde Amendment in combination with the Supreme Court decisions in *Beal* (1977) and *Maher* (1977) initiated yet another round of attacks on *Roe,* and between 1977 and 1983, states began focusing on creating restrictive legislation on public funding. The Hyde

Amendment, which is still in effect today, currently forbids the use of federal funds for abortions except in cases of life endangerment, rape or incest.



In the United States, there are 32 states with restrictive policies currently in effect regarding the public funding of abortion, 13 of which are active state statutes. The passage of the federal Hyde Amendment, states have looked at restricting public funding of abortions as a way to limit the Supreme Court's decision in *Roe v. Wade*. The figure above displays the history of state public funding restrictions as well as the subsequent Supreme Court rulings to show where the number of restrictions are focused in relation to Supreme Court cases.

One of the first states to implement a funding restriction was Pennsylvania, which prohibited the use of Medicaid funds to pay for abortions unless certified by a physician to be medically necessary. The law was challenged in court by a group of Medicaid-eligible women who desired to receive abortion procedures, claiming that Title XIX of the Social Security Act required coverage for all abortions. The women also argued that public funding of other medical

procedures, excluding abortion, violated the Equal Protection Clause of the Fourteenth Amendment. Ultimately, the case of *Beal v. Doe* (1977) was appealed to the Supreme Court. In a review of the case, the Court ruled in a 6-3 vote that Title XIX does not require States participating in the Medicaid program to pay for the cost of all abortions that are permissible under state law. The Court references the decision made in *Roe v. Wade* that acknowledges the State's concern in protecting human life, and holds that requiring payment of unnecessary abortions would undermine Pennsylvania's strong interest in encouraging childbirth over abortion. The case of *Beal v. Doe* was the first Supreme Court case dealing with the issue of public funding of abortions and marked the beginning of many state funding restrictions for abortion procedures.

In the same year as *Beal v. Doe*, the case of *Maher v. Roe* was brought before the Supreme Court. The suit, similar to *Beal*, targeted a Connecticut regulation that limited state Medicaid benefits for first trimester abortions to those that were "medically necessary" (*Maher* 1977). In a majority opinion, the Supreme Court ruled that Connecticut's refusal to fund abortion placed no restriction on the right to choose abortion as was decided in *Roe v. Wade*. The Court also held that Connecticut was free to favor childbirth over abortion through the allocation of public funds in reference to State's interests mentioned *Roe*: "a State's strong interest in protecting the potential life of the fetus," and the State's "strong and legitimate interest in encouraging normal childbirth" as referenced in *Beal v. Doe* (1977). The Court concluded the opinion by emphasizing that their decision in this case does not "proscribe government funding of nontherapeutic abortions," however, this court case set the stage for states to begin regulating and limiting funds for abortion procedures (*Maher* 1977).

The Supreme Court decisions in *Beal* (1977) and *Maher* (1977) placed a further emphasis on "states interests" in encouraging childbirth and paved the way for more states to begin creating restrictive public funding laws for abortions. In 1978, South Dakota and Wisconsin enacted similarly worded funding restrictions which prohibited the use of public funds for abortions unless to save the life of the pregnant woman; however, Wisconsin's funding restriction included the first exception for cases of rape and incest. The exceptions for both rape and incest required that the crimes be reported to law enforcement and documented before the abortion could be performed. Following in the footsteps of its nearby neighbors, North Dakota enacted a restriction on abortion funding in 1979. The North Dakota statute prohibited the use of both state and federal funds for abortion procedures and for promoting the performance of abortion procedures, except in cases of life endangerment for the woman. North Dakota's public funding statute was the first law to mention the encouragement of "normal childbirth," which was also referenced in both *Beal v. Doe* (1977) and *Maher v. Roe* (1977). North Dakota's use of the phrase "normal childbirth" as used by the Supreme Court suggests that the Supreme Court had somewhat of an influence on the state to enact a public funding restriction for abortion procedures.

In 1980, the third case concerning public funding for abortion was brought before the Supreme Court in *Harris v. McRae*. In a 5-4 decision, the Supreme Court ruled that the Medicaid funding restrictions for abortion by the Hyde Amendment do not violate the Fourteenth Amendment, and states are not obligated to fund abortions which are not medically necessary to save the life of the pregnant woman. In the majority opinion, Justice Stewart states that the government has the right to regulate funding for abortion but not other medical procedures because, "no other procedure involves the purposeful termination of a potential life" (*Harris*

1980). The Court mentions that the decision made in *Roe v. Wade* limited only the ability of government to interfere with abortion, but the limiting of government funds for abortions is not a direct interference. In a dissenting opinion, Justice Brennan, Justice Marshall, Justice Stevens, and Justice Blackmun agreed that, "the State's interest in protecting the potential life of the fetus cannot justify the exclusion of financially and medically needy women from the benefits to which they would otherwise be entitled" (*Harris* 1980). Justice Brennan states in his dissent that by denying federal funding for abortions through the Hyde Amendment, poor women are being discouraged from exercising their right to seek an abortion as found in *Roe v. Wade*. Justice Brennan continues by saying the Hyde Amendment inhibits a woman's freedom to choose abortion over childbirth. In Justice Marshall's dissent, he mentions that he feared the Court's decision in *Maher v. Roe* would "be an invitation to public officials, already under extraordinary pressure from well-financed and carefully orchestrated lobbying campaigns, to approve more such restrictions on governmental funding for abortion," and he says, "that fear has proved justified" (*Maher* 1977; *Harris* 1980). In a similar case to *Harris v. McRae*, the Supreme Court's decision in *Williams v. Zbaraz* (1980) also upheld the Hyde Amendment and ruled that states were required to use federal funds to pay for lifesaving abortions but not medically necessary abortions.

After the four major Supreme Court cases in 1977 and 1980, states began slowing down in creating restrictive public funding laws. Between 1980 and 1990, only two states enacted public funding restrictions: Virginia and Wyoming. Virginia enacted a public funding restriction in 1982 that prohibited the use of state funds for abortions except in cases of rape or incest, or if the fetus will be born with a "gross and totally incapacitating physical deformity or…mental deficiency" (VA Code 32.1-92.2). Virginia was the first state to include fetal deformity as part of

an exception to a public funding statute. In 1985, Wyoming enacted a public funding restriction on abortion except in cases of life endangerment, incest, and sexual assault. In cases of sexual assault, the statute required that the woman report the assault to a law enforcement agency within five days of the incident. The Wyoming statute was the first public funding law that had specific guidelines for reporting sexual assault and incest for abortions.

From 1981 to 1993, the only exception to the Hyde Amendment was in cases to save the life of the pregnant woman; however, in 1993, the Hyde Amendment was expanded to include cases of rape and incest. In 1994, following the expansion of the Hyde Amendment, Louisiana and Rhode Island enacted new public funding restrictions. Louisiana amended their state statute to include exceptions for cases of rape and incest, and similar to the Wyoming law from 1985, it also includes specific written requirements for cases of rape or incest. Rhode Island updated its Code of Rules for Medical Assistance in 1994 to include exceptions for cases of rape and incest.

In 1996, the Supreme Court heard another case on the issue of public funding of abortions in *Dalton v. Little Rock Family Planning Services*. The case dealt with a 1988 amendment to the Arkansas state constitution which prohibited state funding of abortions except to save the life of the mother. The plaintiffs' argued that the Arkansas law conflicted with the current version of the Hyde Amendment, and they sought an injunction to prevent the law's enforcement. A federal district court ruled the law unconstitutional and issued an injunction, and the case was appealed. Upon review, the Supreme Court reversed the lower court's decision, stating that the funding restriction could still apply to state programs that did not use Medicaid funds. The Court noted that the amendment was invalid to the extent that it conflicted with the federal law, but also noted that the scope of the Hyde Amendment could change in the future since it was not permanent legislation. Since the Supreme Court decision in *Dalton v. Little Rock*

Family Planning Services, 24 states have updated either their state codes or their Medicaid Providers Manuals to match the federal standard for Medicaid funding in cases of life endangerment, incest, and rape.

Analysis of Public Funding Restrictions

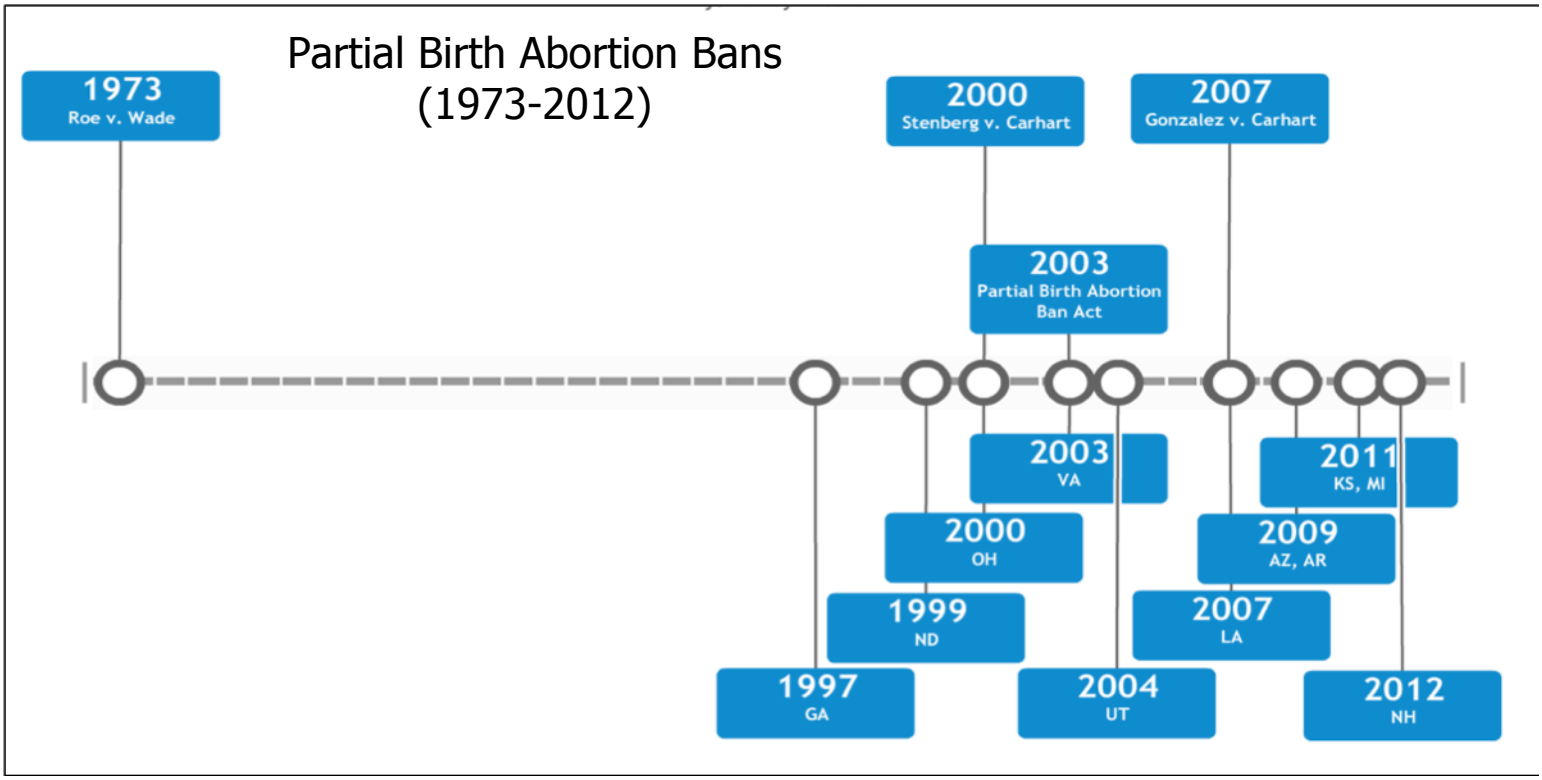
After the federal Hyde Amendment was passed by Congress in 1976, states began creating their own public funding restrictions for abortion. In 1977, after the Supreme Court's decisions in *Beal v. Doe* and *Maher v. Roe*, states started to model their public funding laws after the Supreme Court's rulings. A few states included exceptions in their public funding laws, but most states followed the federal guidelines. In 1993, when the Hyde Amendment was expanded to include cases of rape and incest, states also expanded their statutes to include rape and incest. Based on my analysis of public funding for abortion, the states seem to be driven by Supreme Court decisions; states enacted public funding restrictions when the Supreme Court was most likely to uphold the legislation. Similarly to Patton's 2007 research that found that states were more likely to adopt certain policies after the Supreme Court deemed them constitutional, I found that states were more likely to adopt public funding restrictions after the Supreme Court had found these restrictions to be constitutional. Before a Supreme Court decision, if states that had public funding restrictions that did not exceed the Supreme Court's holding, states would alter their statute to meet the Supreme Court's opinion. Because a majority of the states follow the federal guidelines for public funding restrictions, I found that the federal laws seemed to play a major role in the creation of state public funding restrictions as well.

The implementation of public funding restrictions for abortion at both the state and federal level has had significant impacts for thousands of women across the country who cannot afford an abortion procedure. The federal Hyde Amendment, which was enacted three years after *Roe v. Wade* (1973), was the first attempt to begin chipping away at women's access to abortion. Laws such as the Hyde Amendment and state statutes that restrict the use of public funds for abortion disproportionately affect the ability for low income and minority women to access abortion. Women who rely on Medicaid for their healthcare cannot afford to pay the full price for an abortion procedure, and while saving the money for an abortion could be an option, the amount of time it takes to save the money necessary for an abortion procedure could leave the woman too late into her pregnancy. According to the Guttmacher Institute, 18-37% of pregnancies that could have been terminated by Medicaid-funded abortions were instead carried to term (2009). These numbers are significant because public funding restrictions have a disproportionate effect on low-income women. Restricting the use of public funds for abortions causes low-income women to wait even longer to have an abortion procedure than the average woman because of the need to save money for the procedure, and sometimes, it ends up being too late. By not funding abortions through Medicaid, the government is expecting women who are already struggling financially to either find the money for an abortion or carry out a pregnancy for 9 months and support a child. According to the Guttmacher Institute, "the public cost for prenatal care, delivery services, and welfare is 4 to 5 times more than the cost of using Medicaid to pay for abortion procedures" (2009). Based on these statistics, it seems illogical from an economic standpoint to restrict Medicaid funding of abortions; however, the desire to restrict abortions is apparently much more important to the federal government and to the states.

Public funding restrictions are having significant impacts on low-income and minority women's abilities to access abortion, and restricting funds for abortion procedures has essentially immobilized low-income women's options to choose abortion as found in *Roe v. Wade*. The Court's holding in *Roe* recognized abortion as a fundamental right for all women; however, with laws such as the Hyde Amendment, this fundamental right is only recognized for women who are privileged enough to afford it. While public funding restrictions do not directly challenge *Roe*, these restrictions are subtle ways for the states to continue to chip away at the accessibility of abortion for women. The restriction of public funding for abortions is leaving a huge percentage of women without options to access abortion, and it is marginalizing low income women and their abilities to choose abortion. In addition to the federal Hyde Amendment, there are currently 32 states that have public funding restrictions for abortion procedures in effect. For the women living in these states who cannot afford to have an abortion, the impacts are significant. The inability to access abortion because of the cost of health care is a significant issue, especially for women living in poverty, because these women will probably fall even deeper into poverty after the arrival of a new, unwanted child.

Late-Term Abortion Bans

In comparison to parental consent laws and public funding restrictions which date back to the 1970s, the creation of "partial-birth" abortion bans are relatively new. By definition, a partial-birth abortion is "a late term abortion procedure that is typically performed when the life of the mother is at risk, or the fetus is determined to have severe abnormalities…done using the



dilation and extraction procedure" (Palmer 428). Since the 1990s, over 32 states have implemented bans on late-term abortions, however, only 12 states currently have partial-birth abortion policies in effect today ("Bans on "Partial-Birth Abortion"). The figure above displays the history of partial-birth abortion bans in the states as well as the subsequent Supreme Court rulings to show where the number of restrictions are focused in relation to Supreme Court cases.

In 1997, Georgia was one of the first states to implement a partial-birth abortion ban in the United States. The Georgia Statute, which is still in effect today, defines a partial-birth abortion as "an abortion in which the person performing the abortion partially vaginally delivers a living human fetus before ending the life of the fetus and completing the delivery" (GA § 16-

12-144**)**. Two years later, North Dakota enacted a-partial birth abortion ban similar to the Georgia law, but defined "partially born" as any case where "the living intact fetus's body, with the entire head attached…is delivered past the mother's vaginal opening; or…past the mother's abdominal wall" (ND § 14-02.6-01). By the end of the 1990s, states were beginning to create their own late-term abortion bans with varying definitions and procedures.

In 2000, the United States Supreme Court heard the first case concerning late-term abortion bans in *Stenberg v. Carhart.* The case dealt with a Nebraska law that criminalized the practice of partial-birth abortions in the state of Nebraska. The statute in question defined "partial-birth abortion" as a procedure in which a doctor "partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery," and defined the latter phrase to mean "intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the [abortionist] knows will kill the unborn child and does kill the unborn child" (NE Code § 28-328). The Supreme Court ultimately struck down the law because it lacked a health exception and "imposed an undue burden," as cited in *Casey* (1992); the partial-birth abortion statute would have applied to dilation and evacuation procedures and therefore would have created an undue burden on the pregnant woman. The Court concluded that dilation and evacuation abortions are common procedures, so the ban must be struck down. The Court quoted *Roe v. Wade* (1973) in discussion of the health exception, and noted that the Nebraska law did not promote the state's interest because even under the law, unborn children could be killed by alternative methods of abortion: "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary in appropriate medical judgment, for the preservation of the life or health of the mother" (*Stenberg* 2000). In

concurring opinions, Justice Stevens and Justice Ginsburg agreed that the state has no legitimate interest in prohibiting a physician from doing what is best for the pregnant woman. Justice O'Connor also wrote a concurring opinion and said that a ban that clearly applied to only partial-birth abortions and not dilation and evacuation abortions would be constitutional, however, the ban must have a health exception.

The same year that the Supreme Court struck down Nebraska's partial-birth abortion ban in *Stenberg v. Carhart*, Ohio implemented their first criminal ban on partial-birth abortions. The Ohio statute was the most extensive and restrictive partial-birth abortion ban until this point, however, it did not prohibit against the dilation and evacuation abortion procedure which was deemed an undue burden in *Stenberg* (2000). Because of this exception, Ohio was able to pass and implement one of the most restrictive partial-birth abortion bans in the country. Following the Ohio ban, Virginia implemented a partial-birth abortion ban in 2003 that also did not include certain types of abortion procedures such as dilation and evacuation abortions. Because both statutes mention dilation and evacuation procedures, it is clear that both the Ohio and Virginia partial-birth abortion bans stemmed directly from the Supreme Court's decision in *Stenberg v. Carhart* (2000).

In 2003, shortly after the Supreme Court's decision in *Stenberg v. Carhart*, the first federal ban on abortion, the Partial-Birth Abortion Ban Act, was passed by the United States Congress and signed by President Bush. The Act, which was in response to the Supreme Court decision in *Stenberg,* defined "partial-birth abortion" as "an abortion in which the person performing the abortion deliberately and intentionally vaginally delivers a living fetus until…the entire fetal head is outside the body of the mother, or…any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person

knows will kill the partially delivered living fetus; and…performs the overt act, other than completion of delivery, that kills the partially delivered fetus" (18 U.S.C.A. § 1531). The Act, which was challenged in two federal courts and found unconstitutional, was eventually appealed to the Supreme Court under the case name *Gonzalez v. Carhart* (2007).

In April 2007, the case of *Gonzales v. Carhart* brought the issue of "partial-birth abortion" back to the Supreme Court for a second time. The Supreme Court ultimately upheld the federal ban on partial-birth abortion because it did not propose an "undue burden" on the right of a woman as found in *Stenberg* (2000). The Court decided to uphold the Act because, unlike the previous Nebraska law in question, it was specific enough in outlining the particular abortion procedure that was banned. The Supreme Court also upheld the federal abortion ban because it furthers the government's legitimate interest in promoting human life, even though it does not have an exception for situations necessary to protect the life of the pregnant woman. Justice Ginsburg, in her dissent, says that the decision made in *Gonzalez* is "alarming," and the Court's defense of the federal abortion ban "cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court" (*Gonzalez* 2007). For the first time since *Roe v. Wade*, the Court upheld an abortion ban that did not have a health exception, which set major precedent for the years to follow.

In the years following *Gonzalez v. Carhart*, six states have implemented late-term abortion bans which are currently in effect today. Most of the state laws use the same general language as the federal partial-birth abortion ban; however, unlike the federal ban, three of the state laws include exceptions in cases necessary to save the life of the pregnant woman.

Analysis of Partial-Birth Abortion Bans

Although the states started the discussion about partial-birth abortion bans in the 1990s, the Supreme Court ultimately determined the constitutionality of partial-birth abortion in *Stenberg v. Carhart* (2000). After the Supreme Court's decision in *Stenberg,* the states had guidelines for creating late-term abortion bans, and not surprisingly, Ohio and Virginia both created "partial-birth" abortion bans to meet the Supreme Court's holding. Along with the states, the federal government also enacted a late-term abortion ban in response to the Supreme Court's decision in *Stenberg* (2000). When the constitutionality of the federal ban was in question, the Supreme Court ultimately upheld the federal ban on late-term abortions because it did not propose an "undue burden" on the right of a woman as found in *Stenberg* (2000). After the Court's decision in *Gonzalez v. Carhart* (2007), six states implemented late-term abortion bans, three of which adopted the same general language as the federal ban. The other three states that implemented late-term abortion bans included exceptions for cases to save the life of the pregnant woman, unlike the federal ban.

By comparing the states' laws and the Supreme Court's actions concerning late-term abortion, it seems as though the Supreme Court has had the most significant impact on the implementation of these state abortion bans. Similarly to the results in Patton's 2007 article, I found that the Supreme Court's decisions on late-term abortions influenced the policy-making environment in state legislatures; states were more likely to implement late-term abortion bans after the Supreme Court had upheld the policy.

The ban on late-term, or "partial-birth," abortions is really a ban on the procedure known as intact dilation and extraction. The term "partial-birth" was first coined by the National Right to Life Committee in 1995 in response to the newly introduced dilation and extraction procedure

to perform an abortion, and since then, the term has become a highly charged political tool for pro-life activists. According to the Guttmacher Institute, only 2,200 abortion procedures performed in the year 2000 were late-term abortion procedures, which is about 0.2% of the 1.3 million abortions that were performed that year. The amount of attention that late-term abortions are receiving is not warranted given the statistics, so why have so many states created bans, and why did the federal government decide to become involved with the issue? The federal ban on late-term abortions and the Court's decision to uphold it is alarming because the ban seems like a potential stepping stone to banning all abortion procedures.

The laws banning late-term abortions remove the ability for a woman to have a safe option if an abortion is needed late in the pregnancy. The implementation of late-term abortion bans highlights a clear shift from the importance of the woman and to the importance of the fetus. While late-term abortion bans aren't removing options for whole demographics of women such as parental consent requirements and public funding restrictions, these bans are removing options for women who may need to have the procedure for health reasons or fetal abnormalities in late pregnancy. By removing the dilation and extraction procedure as an option, the ability to protect a woman's health during an abortion is no longer up to her doctor, but is left up to the lawmakers.

As stated previously, late-term abortion procedures made up approximately 0.2% of all abortions performed in 2000; however, the states and the federal government still felt the need to regulate this abortion procedure. The federal ban on late-term abortions is particularly concerning because it was the first federal restriction on an abortion procedure, and the Supreme Court upheld the ban. According to New (2008), late-term abortion bans have not had as significant of an impact on abortion rates as compared to parental consent requirements and

public funding restrictions, but the Supreme Court's decision in *Gonzalez* (2007) is still an area of concern for the future of abortion rights in the United States

Discussion and Conclusion

Since abortion was deemed a constitutional right by the Supreme Court in *Roe v. Wade*, the states have taken it upon themselves to create restrictive laws in order to inhibit women from obtaining safe and legal abortions. The states and the Supreme Court have determined the fate of abortion since 1973, and it is important to acknowledge the potential implications that these laws and decisions may have for the future of abortion rights and *Roe v. Wade*

The Future of Roe v. Wade

While there have been a significant number of abortion restrictions introduced and implemented in the states since 1973, the most recent trend in abortion restrictions is the most alarming yet. In 2011, states enacted 92 laws restricting abortion, which is nearly triple the previous record of 34 restrictions in 2005 (Guttmacher 2012). Since 2011, the states have mainly been focused on creating restrictions that protect the life of the fetus, which in some states, makes abortion illegal as early as six weeks into pregnancy. For example, in 2011, an anti-abortion amendment titled "Initiative 26," was proposed to be added to the Mississippi Constitution. The measure, also called the "Life Begins at the Moment of Fertilization Amendment," was intended to amend article 3 of the state constitution. The amendment stated: "The term 'person' or 'persons' shall include every human being from the moment of fertilization, cloning, or the functional equivalent thereof." The amendment, if passed, would have made abortion and some forms of birth control in the state of Mississippi illegal, and it would have also

outlawed stem cell research and in vitro fertilization. If it would have passed, women in the state of Mississippi would have been left without access to abortion and even some types of contraception. While this bill threatened the fundamental right to an abortion as found in *Roe v. Wade*, it also started a national trend in creating "personhood" bills. These new types of abortion restrictions have begun shifting the abortion debate away from women's rights and towards fetal rights.

2012 saw the second highest annual number of new abortion restrictions in history and more proposals of fetal protection laws (Guttmacher 2012). In March 2012, the Georgia General Assembly approved new restrictions on late-term abortions in a proposed law referred to as the "fetal pain bill." The fetal pain bill would have restricted medical exemptions for terminating pregnancies in Georgia and would require any abortion performed after 20 weeks to deliver the fetus alive. The new law would also make no exception for abortion in cases of rape or incest. The bill stated that a fetus can feel pain at 20 weeks, and therefore the state has a legitimate interest in protecting the life of the unborn. Before the bill was passed, there were many protests by multiple women's groups and Democratic women, but ultimately the bill passed only after a compromise was made to add an exemption to give doctors the option of performing an abortion after the 20 week mark if the fetus has a congenital or chromosomal defect. The bill was signed into law by governor Nathan Deal on May 1, 2012.

By the middle of 2013, state legislators had already enacted 43 different provisions to restrict a woman's access to abortion, which was the same number of abortion restrictions enacted by the end of 2012 alone. Most of the anti-abortion legislation seemed to be focused at the beginning of 2013, with Arkansas and North Dakota enacting two of the most restrictive abortion bans in early pregnancy (Guttmacher State Policy 2013). In March 2013, Arkansas

proposed the "Human Heartbeat Protection Act" that aimed to ban all abortions occurring more than 12 weeks after a woman's last menstrual period. Although the governor of Arkansas, Mike Beebe, vetoed the passing of this bill, the State Congress voted to override his veto. Later in March, North Dakota enacted a "Fetal Heartbeat Law" that banned all abortions after six weeks or when a fetal heartbeat is detected and would not allow abortion in cases of rape or incest. North Dakota also passed a second measure that banned abortions sought because of genetic abnormalities or gender selection.

There are currently nine states that have enacted laws that prohibit abortions at 20 weeks or earlier and are intended to protect the fetus from experiencing pain during an abortion procedure. These laws are completely in conflict with the Supreme Court's rulings in both *Roe* and *Casey* that stated abortions may be banned beginning at the point of fetal viability, and the laws also threaten the core holding of *Roe* by making it nearly impossible for women to access abortion in some states. This new trend in state abortion legislation aimed at protecting the fetus rather than the rights of the woman marks a huge shift in abortion restrictions.

While the increases in abortion legislation seems to be focused solely on the states, previous research concerning the relationship between the Supreme Court and the states shows that Supreme Court has had a major influence in the creation of abortion legislation as well. The last Supreme Court decision concerning abortion was *Gonzalez v. Carhart* (2007) which upheld the federal ban on late-term abortion procedures. Since *Gonzalez*, nearly 7 years have passed which marks the longest period of time the Supreme Court has ever gone without taking a case concerning abortion. This is extremely significant because if the Court is not taking any new cases on abortion legislation, the states are getting the signal that it is okay to create and implement new, restrictive abortion laws until the Court either upholds or rejects these policies.

Based on previous research and on the results of my study, the Supreme Court drives states' actions in the creation of abortion legislation, and I believe that the Supreme Court's absence from the issue is driving state policymaking. Because the Court has refrained from taking up a case on abortion since 2007, the Court has essentially been allowing the states to guide abortion legislation and ultimately decide the fate of *Roe.* The states are also influencing each other in policymaking areas, similarly to what was seen before concerning parental consent requirements, public funding restrictions, and late-term abortion procedures. This alarming trend among the states along with the record-breaking number of abortion restrictions that have been created within the last three years signals that there has never been a better time for an affirmation of *Roe v. Wade.*

While my research was limited to only three types of abortion restrictions, the information as a whole exposes the broader significant impacts these restrictions have on abortion rights since 1973. Because I looked at state laws that were currently in effect, this altered my ability to track how the language used by the states and the Court has changed over the years, but I was still able to find distinct phrases and terms that were being used repeatedly. Although this study shows a distinct relationship between the Court and the states, there are still questions surrounding the creation of abortion restrictions such as: how does the makeup of state legislatures play a part in the creation of anti-abortion legislation? How do public opinions in the states influence policymaking for abortion restrictions? Are there other factors such as religiosity that are influencing state abortion legislation? In order to answer these questions, a further, more comprehensive study in the area of state policymaking and abortion restrictions needs to be examined. Overall, my study shows an important trend in the way the Supreme Court and the

states create and influence abortion legislation and also shows the impacts that these restrictions are having on women across the country.

Although state abortion restrictions date back to before the Supreme Court's decision in *Roe v. Wade*, states began rapidly enacting abortion restrictions after 1973 with the Supreme Court guiding the way. While on the surface it seems as though states are influencing the Supreme Court's decisions, states are creating abortion legislation in response to the Supreme Court's decisions. By historically analyzing state trends in parental consent requirements, public funding restrictions, and late-term abortion bans along side of Supreme Court decisions, I found that states are more likely to adopt these restrictive abortion policies prior to Supreme Court involvement and after the Supreme Court has deemed a particular policy constitutional. Because the states are primarily being driven to create abortion restrictions based on Supreme Court decisions, it is important to focus on the Supreme Court's actions to determine what might happen to *Roe v. Wade.*

Because of the complicated dynamic between the Court and the states, the future of abortion rights and women's reproductive freedoms are essentially in the hands of the states. With the record number of abortion restrictions passed within the last three years, the future of *Roe v. Wade* is especially concerning. The latest trend in "fetal pain bills" and "personhood laws" shows how far removed women's rights and women's lives are in the minds of state legislators and the Supreme Court, and as abortion restrictions continue to be created in favor of the fetus and not the woman, the farther away we step from the holding in *Roe*. The Supreme Court's lack of involvement in the issue tacitly states that they don't want to have to overturn *Roe*, so they are letting the states do it for them.

Although it is a bold claim to say that the Supreme Court is allowing the states to overturn *Roe v. Wade*, my research demonstrates that the Supreme Court guides the states in policymaking. Without guidance from the Court, states are free to create any and all restrictive abortion policies. Some might argue that the Supreme Court has simply not taken a case on abortion since *Gonzalez v. Carhart* (2007) because the Court feels as though the precedent has already been well-establish and it wouldn't be in the best interest to continually reaffirm abortion cases; however, the Court has taken cases on abortion every five years or less since 1973, and it seems convenient to begin ignoring some of the most restrictive abortion legislation at a time when the laws are being created and passed at record numbers.

When considering the fundamental right to an abortion as found in *Roe*, the Supreme Court's lack of involvement in reviewing state abortion legislation is directly signaling to the states that their restrictive abortion laws are acceptable. In November 2013, the Supreme Court refused to stop Texas from implementing House Bill 2, which ultimately left the state of Texas with less than one-third of its original abortion providers. If the Supreme Court does not interfere soon, millions of women across the country could potentially be stuck in states like Texas that have shut down nearly all abortion providers in the state. Since the Court's decision in *Gonzalez*, the essential holding of *Roe* has been more vulnerable than ever, and with the record number of abortion restrictions in effect today, it is essential that the Court reaffirms *Roe* before the action in the states gets too far out of hand. Because the Supreme Court has not taken a case on abortion in the last seven years, the Court has created a wide-open opportunity for states to create more and more restrictive legislation, and *Roe* has never been more vulnerable.

References

Ayotte v. Planned Parenthood of Northern New England. 546 U.S. 320. Supreme Court of the United States. 2006. *LexisNexis Academic*. Web. 27 October 2013.

"Bans on Partial-Birth Abortion." *Guttmacher.org*. Guttmacher Institute, 1 Mar. 2014. Web. 8 Mar. 2014.

Beal v. Doe. 432 U.S. 438. Supreme Court of the United States. 1977. *LexisNexis Academic*. Web. 27 October 2013.

Bellotti v. Baird. 428 U.S. 132. Supreme Court of the United States. 1976. *LexisNexis Academic.* Web. 27 October 2013.

Bellotti v. Baird. 443 U.S. 622. Supreme Court of the United States. 1979. *LexisNexis Academic.* Web. 27 October 2013.

City of Akron v. Akron Center for Reproductive Health Inc. 462 U.S. 416. Supreme Court of the United States. 1983. *LexisNexis Academic.* Web. 27 October 2013.

Dalton v. Little Rock Family Planning Services. 516 U.S. 474. Supreme Court of the United States. 1996. *LexisNexis Academic.* Web. 27 October 2013.

Glick, Henry R. "The Impact of Permissive Judicial Policies: The U.S. Supreme Court and the Right to Die." *Political Research Quarterly*. 47.1 (1994): 207-222.

Gonzalez v. Carhart. 550 U.S. 124. Supreme Court of the United States. 2007. *LexisNexis Academic.* Web. 27 October 2013.

Greenhouse, Linda, and Reva B. Siegel. *Before Roe v. Wade: Voices That Shaped the Abortion Debate before the Supreme Court's Ruling*. New York: Kaplan Publishing, 2010.

Greenhouse, Linda, and Reva B. Siegel, "Before (and After) *Roe v. Wade*: New Questions About Backlash. *The Yale Law Journal* 120.8 (2011): 2028-2087.

Halva-Neubauer, Glen. “Abortion Policy in the Post-Webster Age.” *Publius*. 20.3 (1990): 27-44.

Halva-Neubauer, Glen. "The States After *Roe*: No “*Paper Tigers*”" *Understanding the New Politics of Abortion*. Newbury Park, CA: SAGE Publications, 1993. 167-89. Print.

H.L. v. Matheson. 450 U.S. 398. Supreme Court of the United States. 1981. *LexisNexis Academic.* Web. 27 October 2013.

Harris v. McRae. 448 U.S. 297. Supreme Court of the United States. 1980. *LexisNexis Academic.* Web. 27 October 2013.

Hodgson v. Minnesota. 497 U.S. 417. Supreme Court of the United States. 1990. *LexisNexis Academic.* Web. 27 October 2013.

Hoekstra, Valerie. “The Pendulum of Precedent: U.S. State Legislative Response to Supreme Court Decisions on Minimum Wage Legislation for Women.” *State Politics & Policy Quarterly*. 9.3 (2009): 257-283.

“Laws Affecting Reproductive Health and Rights: 2011 State Policy Review.” *Guttmacher.org*. Guttmacher Institute. Web.

“Laws Affecting Reproductive Health and Rights: 2012 State Policy Review.” *Guttmacher.org*. Guttmacher Institute. Web.

“Laws Affecting Reproductive Health and Rights: State Trends at Midyear, 2013.” *Guttmacher.org*. Guttmacher Institute. Web.

Maher v. Roe. 432 U.S. 464. Supreme Court of the United States. 1977. *LexisNexis Academic.* Web. 27 October 2013.

New, Michael J. “Analyzing the Impact of State Level Anti-Abortion Legislation in the Post-Casey Era.” *State Politics & Policy Quarterly*. 11.1 (2011): 28-47.

Ohio v. Akron Center for Reproductive Health. 497 U.S. 502. Supreme Court of the United States. 1990. *LexisNexis Academic.* Web. 27 October 2013.

Palmer, Louis J., and Xueyan Z. Palmer. *Encyclopedia of Abortion in the United States: 2nd edition*. Jefferson, NC: McFarland & Company Inc., 2009. Print.

Patton, Dana. "The Supreme Court and Morality Policy Adoption in the American States: The Impact of Constitutional Context." *Political Research Quarterly*. 60.3 (2007): 468-488.

Planned Parenthood of Central Missouri v. Danforth. 428 U.S. 52. Supreme Court of the United States. 1976. *LexisNexis Academic.* Web. 27 October 2013.

Planned Parenthood of Southeastern Pennsylvania v. Casey. 505 U.S. 833. Supreme Court of the United States. 1992. *LexisNexis Academic.* Web. 27 October 2013.

"Restrictions on Medicaid Funding for Abortions: A Literature Review." *Guttmacher.org*. Guttmacher Institute. June 2009. Web.

Roe v. Wade. 410 U.S. 113. Supreme Court of the United States. 1973. *LexisNexis Academic*. Web. 27 October 2013.

Segers, Mary C., and Timothy A. Byrnes. *Abortion Politics in American States*. Armonk, NY: M.E. Sharpe, 1995. Print.

Stenberg v. Carhart. 530 U.S. 914. Supreme Court of the United States. 2000. *LexisNexis Academic.* Web. 27 October 2013.

"The Impact of Laws Requiring Parental Involvement for Abortion: A Literature Review." *Guttmacher.org*. Guttmacher Institute, March 2009. Web.

Webster v. Reproductive Health Services. 492 U.S. 490. Supreme Court of the United States. 1989. *LexisNexis Academic.* Web. 27 October 2013.

Williams v. Zbaraz. 442 U.S. 1309. Supreme Court of the United States. 1979. *LexisNexis Academic.* Web. 27 October 2013.