Dennis M. Papp *Legislative Service Commission*

Am. Sub. H.B. 351

123rd General Assembly
(As Passed by the House)

Reps. Luebbers, Jerse, Jordan, Gardner, Hartnett, Buehrer, Calvert, Callender, Jacobson, Tiberi, Myers, Roman, Winkler, Krupinski, Clancy, Krebs, Netzley, Householder, Carey, Metzger, Harris, Maier, Cates, Mottley, Grendell, Flannery, Logan, Brading, Taylor, Willamowski, Hoops, Trakas, Buchy, Verich, Young, Schuler, Van Vyven, Amstutz, Hood, Sulzer, Evans, DePiero, Jolivette, Williams, Padgett, Haines, Stapleton, Coughlin, Schuring, Bateman, Austria, Conway Kilbane, E. Core, Schuck, Womer Benjamin, A. Core, Vesper, Distel, Perry, O'Brien, Aslanides

BILL SUMMARY

- Creates the offense of partial birth feticide.
- Creates a civil cause of action against a person who commits the offense of partial birth feticide.
- Repeals the offense of performing an unlawful abortion procedure and the cause of action against a person who commits the offense of performing an unlawful abortion procedure, which were enacted in Sub. H.B. 135 of the 121st General Assembly and were held to be unconstitutional in *Women's Medical Professional Corp. v. Voinovich* (S.D. Ohio 1995), 911 F. Supp. 1951 (*aff'd* (6th Cir. 1997), 130 F.3d 187, and *cert. denied* (1998), 118 S. Ct. 1357).

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CONTENT AND OPERATION

Partial birth feticide

The bill enacts two new prohibitions related to certain specified medical procedures, and designates a violation of either of the prohibitions as the offense of "partial birth feticide" (R.C. 2919.151).

Prohibitions and penalty

When the fetus that is the subject of the procedure is "viable," the bill prohibits a person from knowingly performing a "partial birth procedure" on a pregnant woman when the procedure is not necessary, in reasonable medical judgment, to preserve the life or health of the mother as a result of the mother's life or health being endangered by a "serious risk of the substantial and irreversible impairment of a major bodily function" or as a result of the mother's life or health being endangered by a "serious risk of the substantial and irreversible impairment of a major bodily function" that arises during an abortion or delivery (see "***Definitions***," below, for the meaning of the terms and phrases in quotation marks).

When the fetus that is the subject of the procedure is not viable, the bill prohibits a person from knowingly performing a partial birth procedure on a pregnant woman when the procedure is not necessary, in reasonable medical judgment, to preserve the life or health of the mother as a result of the mother's life or health being endangered by a serious risk of the substantial and irreversible impairment of a major bodily function or as a result of the mother's life or health being endangered by a serious risk of the substantial and irreversible impairment of a major bodily function that arises during an abortion or delivery.

A person who violates either prohibition is guilty of partial birth feticide, a felony of the second degree. (R.C. 2919.151(B), (C), and (D).)

Exceptions to the prohibitions

A pregnant woman upon whom a partial birth procedure is performed in violation of either prohibition is not guilty of committing, attempting to commit, complicity in the commission of, or conspiracy in the commission of the violation.

The bill provides that the new partial birth feticide provisions do not prohibit suction curettage, suction aspiration, or dilation and evacuation. These provisions also do not apply to any person who performs or attempts to perform a legal abortion if the act that causes the death of the fetus is performed prior to the fetus being "partially born" (see "***Definitions***," below) even though the death of the fetus occurs after it is partially born. (R.C. 2919.151(E), (F), and (G).)

Definitions

As used in the section creating the offense of partial birth feticide:

"From the body of the mother" means that the portion of the fetus' body in question is beyond the mother's vaginal introitus in a vaginal delivery (R.C. 2919.151(A)(1)).

"Partial birth procedure" means the medical procedure that includes all of the following elements in sequence (R.C. 2919.151(A)(2)):

(1) Deliberate dilation of the cervix of a pregnant woman, usually over a sequence of days;

(2) In a breech presentation, deliberate extraction of at least the lower torso to the navel, but not the entire body, of an intact fetus "from the body of the mother" (see above), or in a cephalic presentation, deliberate extraction of at least the complete head, but not the entire body, of an intact fetus from the body of the mother;

(3) Partial evacuation of the intracranial contents of the fetus, which procedure the person performing the procedure knows will cause the death of the fetus, compression of the head of the fetus, which procedure the person performing the procedure knows will cause the death of the fetus, or performance of another deliberate act that the person performing the procedure knows will cause the death of the fetus;

(4) Completion of the vaginal delivery of the fetus.

"Partially born" means that the portion of the body of an intact fetus described in paragraph (2) of the definition of "partial birth procedure," above, has been deliberately extracted from the body of the mother (R.C. 2919.151(A)(3)).

"Serious risk of the substantial and irreversible impairment of a major bodily function" means any medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function (R.C. 2919.151(A)(4)).

"Viable" means the stage of development of a human fetus at which there is a realistic possibility of maintaining and nourishing of a life outside the womb with or without temporary artificial life-sustaining support (R.C. 2919.151(A)(5), by reference to R.C. 2901.01).

Civil action

Under the bill, a woman upon whom a partial birth procedure is performed in violation of the bill's prohibitions against partial birth feticide, the father of the child if the child was not conceived by rape, or the parent of the woman if the woman is not 18 years of age or older at the time of the violation has and may commence a civil action for compensatory damages, punitive or exemplary damages if authorized by the Punitive and Exemplary Damages Law (see **COMMENT** 1a), and court costs and reasonable attorney's fees against the person who committed the violation. The action must be brought within one year after the violation of the bill's prohibition against partial birth feticide.

If a judgment is rendered in favor of the defendant in the civil action and the court finds, upon the filing of a motion under the Frivolous Conduct Law (see **COMMENT** 1b), that the commencement of the civil action constitutes frivolous conduct and that the defendant was adversely affected by the frivolous conduct, the court must award to the defendant reasonable attorney's fees in accordance with that Law. (R.C. 2305.114 and 2307.53.)

Purpose clause

The bill contains a purpose clause that states that the General Assembly declares all of the following (Section 3 of the bill):

(1) In enacting R.C. 2307.53 (the civil action) and 2919.151 (partial birth feticide), its intent is to prevent the unnecessary death of fetuses when they are substantially outside the body of the mother.

(2) This intent is based in part on a state interest in maintaining a strong public policy against infanticide, regardless of the life expectancy or stage of development of the child.

(3) The right to abortion established in *Roe v. Wade* (1973), 410 U.S. 113, was never intended to legitimize infanticide or to deprive the state of all ability to protect fetuses who are substantially outside the body of the mother.

(4) The act also furthers the state interest in preventing unnecessary cruelty. This interest is not necessarily based solely on the ability of the fetus or child to experience pain. The indignity of being partly delivered before being deliberately killed is also a form of cruelty that should not be unnecessarily inflicted upon any being of human origin. Therefore, there are legitimate reasons for deterring the unnecessary use of the partial-birth procedure, even though other abortion procedures that may cause pain remain available. (See **COMMENT** 2.)

"Person" under the Criminal Code and unlawful termination of another's pregnancy in the Criminal Code

Existing law

Generally, in any section of the Criminal Code that sets forth a criminal offense, "person" includes an individual, corporation, business trust, estate, trust, partnership, and association and an unborn human who is viable.[1] Notwithstanding this definition, in no case is the portion of the definition of the term "person" that includes an unborn human who is viable to be applied or construed in any criminal prohibition in the Criminal Code in any of the following manners (R.C. 2901.01(B)):

(1) Generally, in a manner so that the offense prohibits or is construed as prohibiting any pregnant woman or her physician from performing an abortion with the consent of the pregnant woman, with the consent of the pregnant woman implied by law in a medical emergency, or with the approval of one otherwise authorized by law to consent to medical treatment on behalf of the pregnant

[1] *"Unborn human" means an individual organism of the species homo sapiens from fertilization until live birth. "Viable" means the stage of development of a human fetus at which there is a realistic possibility of maintaining and nourishing of a life outside the womb with or without temporary artificial life-sustaining support. (R.C. 2901.01(B)(1)(c).)*

woman.[2] An abortion that violates the conditions described in the immediately preceding sentence may be punished as any of a list of specified homicide, assault, and menacing offenses, as applicable. An abortion that does not violate the conditions described in the second immediately preceding sentence but that does constitute any of a list of specified abortion-related offenses may be punished as a commission of the applicable offense.

(2) In a manner so that the offense is applied or is construed as applying to a woman based on an act or omission of the woman that occurs while she is or was pregnant and that results in any of the following: (a) her delivery of a stillborn baby, (b) her causing, in any other manner, the death in utero of a viable, unborn human that she is carrying, (c) her causing the death of her child who is born alive but who dies from one or more injuries that are sustained while the child is a viable, unborn human, (d) her causing her child who is born alive to sustain one or more injuries while the child is a viable, unborn human, or (e) her causing, threatening to cause, or attempting to cause, in any other manner, an injury, illness, or other physiological impairment, regardless of its duration or gravity, or a mental illness or condition, regardless of its duration or gravity, to a viable, unborn human that she is carrying.

Existing law contains comparable provisions regarding the definition of "unlawful termination of another's pregnancy," which is used in certain homicide, assault, and menacing offenses (R.C. 2903.09).[3]

Operation of the bill

The bill provides that an abortion that is partial birth infanticide may be punished as a violation of the applicable offense even if the abortion does not violate the conditions described in the first sentence of paragraph (1), above (R.C. 2901.01(B)(2)(a) and 2903.09(C)(1)).

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[2] *Consent is sufficient under this provision if it is of the type otherwise adequate to permit medical treatment to the pregnant woman, even if it does not comply with the requirements in the offense of unlawful abortion (R.C. 2901.01(B)(2)(a)).*

[3] *"Unlawful termination of another's pregnancy" means causing the death of an unborn member of the species homo sapiens, who is or was carried in the womb of another, as a result of injuries inflicted during the period that begins with fertilization and that continues unless and until live birth occurs (R.C. 2903.09(A)).*

Sub. H.B. 135 of the 121st General Assembly and its prohibition against abortions using the dilation and extraction procedure

Overview and operation of the bill

Sub. H.B. 135 of the 121st General Assembly enacted prohibitions against performing an abortion using the "dilation and extraction procedure" and performing post-viability abortions. Sub. H.B. 135 also authorized specified persons to bring a civil action against a person who performed one of the prohibited abortions. The act was declared unconstitutional in *Women's Medical Professional Corp. v. Voinovich* (S.D. Ohio 1995), 911 F. Supp. 1951 (*aff'd* (6th Cir. 1997), 130 F.3d 187, and *cert. denied* (1998), 118 S. Ct. 1357).

The bill repeals the prohibition against using the dilation and extraction procedure (R.C. 2919.15) and the authorization to bring a civil suit against a person who violates that prohibition (R.C. 2307.51) and repeals existing references to those provisions. (Section 2 of the bill and conforming amendments in R.C. 2901.01(B)(2)(a) and 2903.09(C)(1).) (See **COMMENT** 4.)

Performing an unlawful abortion procedure

Section 2919.15 prohibits a person from knowingly performing or attempting to perform a dilation and extraction procedure upon a pregnant woman. A person who violates this prohibition is guilty of performing an unlawful abortion procedure, a felony of the fourth degree. For the purpose of this prohibition, "dilation and extraction procedure" means the termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain. "Dilation and extraction procedure" does not include either the suction curettage procedure of abortion or the suction aspiration procedure of abortion.

It is an affirmative defense to a charge of performing an unlawful abortion procedure that all other available abortion procedures would pose a greater risk to the health of the pregnant woman than the risk posed by the dilation and extraction procedure. If a person charged with performing an unlawful abortion procedure presents prima facie evidence relative to this affirmative defense, the prosecution, in addition to proving all elements of the violation by proof beyond a reasonable doubt, has the burden of proving by proof beyond a reasonable doubt that at least one other available abortion procedure would not pose a greater risk to the health

of the pregnant woman than the risk posed by the dilation and extraction procedure performed or attempted to be performed by the person charged with the violation.[4]

A pregnant woman upon whom a dilation and extraction procedure is performed or attempted to be performed in violation of the prohibition is not guilty of an attempt to commit, complicity in the commission of, or conspiracy in the commission of performing an unlawful abortion procedure. (R.C. 2919.15.)

Civil action

Sub. H.B. 135 also provided that a woman upon whom a dilation and extraction procedure is attempted or performed in violation of the prohibition against that procedure has and may commence a civil action for compensatory damages, punitive or exemplary damages if authorized by the Punitive and Exemplary Damages Law, and court costs and reasonable attorney's fees against the person who attempted to perform or who performed the dilation and extraction procedure.

A person subject to such a civil action has an affirmative defense: that all other available abortion procedures would pose a greater risk to the health of the woman upon whom the dilation and extraction procedure was performed or attempted to be performed than the risk posed by the dilation and extraction procedure that was performed or attempted to be performed.

If a judgment is rendered in favor of the defendant in the civil action and the court finds, upon the filing of a motion under the Frivolous Conduct Law, that the commencement of the civil action constitutes frivolous conduct and that the defendant was adversely affected by the frivolous conduct, the court must award to the defendant reasonable attorney's fees. (R.C. 2307.51.)

Purpose clause

Sub. H.B. 135 also contained a purpose clause that stated that the General Assembly declared its intent in enacting the prohibition against performing the dilation and extraction procedure was to prevent the unnecessary use of a specific procedure used in performing an abortion. The intent is based on a state interest in preventing unnecessary cruelty to a human fetus. (Section 3 of Sub. H.B. 135 of the 121st General Assembly.)

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[4] *Normally under criminal law, the burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused (R.C. 2901.05--not in the bill).*

Women's Medical Professional Corp. v. Voinovich

In *Women's Medical Professional Corp. v. Voinovich* (S.D. Ohio 1995), 911 F. Supp. 1951, the federal Southern District Court of Ohio declared Sub. H.B. 135 unconstitutional and temporarily enjoined the State of Ohio from enforcing any of its provisions. This temporary injunction subsequently was converted to a permanent injunction. The District Court's decision was affirmed by the Sixth Circuit Court of Appeals in *Women's Medical Professional Corp. v. Voinovich* (6th Cir. 1997), 130 F.3d 187. The United States Supreme Court denied a petition for a writ of certiori in *Voinovich v. Women's Medical Professional Corp.* (1998), 118 S. Ct. 1357.

District Court opinion. The District Court concluded that the definition of the dilation and extraction procedure could be construed to include the more widespread dilation and evacuation procedure. As a result, the Court found that the definition was unconstitutionally vague, as it did not provide physicians with fair warning as to what conduct is permitted and as to what conduct will expose them to criminal and civil liability. (*Voinovich*, 911 F. Supp. at 1063-1067.)

Citing *Planned Parenthood of Missouri v. Danforth* (1976), 428 U.S. 52 (see **COMMENT** 4), the District Court concluded that a state may prohibit a specific method of abortion if there are safe and available alternatives. The Court also stated that, under *Planned Parenthood v. Casey* (1992), 112 S. Ct. 2791 (see **COMMENT** 5), if the ban places a substantial obstacle in the path of a woman seeking a pre-viability abortion, the ban is an unconstitutional undue burden on the right to an abortion. The Court concluded that because the dilation and extraction procedure appears to be the safest method of terminating a pregnancy in the late second trimester and because the dilation and extraction procedure is more available than induction methods, the District Court held that the plaintiff demonstrated a substantial likelihood of success of showing that the ban on the dilation and extraction procedure is unconstitutional. As a result, the temporary injunction was warranted. (*Voinovich*, 911 F. Supp. at 1067-1071.)

The District Court agreed, to a limited extent, with the State's declared interest in preventing unnecessary cruelty to a fetus. It noted that while *Casey* specifically delineated a few interests that justify state abortion regulation, that list was not exhaustive. The District Court stated that it would be contrary to all logic and common sense to hold that a state has no interest in preventing unnecessary cruelty to fetuses. Nonetheless, the District Court held that, regardless of how legitimate or compelling the state's interest is, the state may not place an undue burden on a woman's right to seek a pre-viability abortion. The District Court also appeared unconvinced that the dilation and extraction procedure was more cruel than other methods of abortion. As a result, the Court was not convinced that the

ban on the dilation and extraction abortion procedure served the stated purpose of preventing cruelty to fetuses. (*Voinovich*, 911 F. Supp. at 1072-1075.)

Court of Appeals opinion. A majority of the Sixth Circuit Court of Appeals affirmed the District Court's decision. The Court of Appeals concluded that Sub. H.B. 135's definition of the dilation and extraction procedure was broad enough to include both the dilation and extraction procedure and the dilation and evacuation procedure. Applying *Casey's* "undue burden" test and relying on the United States Supreme Court's analysis in *Danforth*, the Court of Appeals found that, with respect to pre-viability abortions, Sub. H.B. 135 placed an unconstitutional undue burden on the right to an abortion. With respect to post-viability abortions, the Court of Appeals declined to make any holding regarding the dilation and extraction procedure under the "undue burden" test. Rather, it found that the ban as it applied to post-viability abortions could not be severed so as to preserve their potential constitutional application. The Court of Appeals commented that it would have to rewrite the act to create a provision that could stand by itself. Because it could not do this, it struck down the ban on dilation and extraction abortions as it applied to post-viability abortions as well. (*Voinovich*, 130 F.3d at 201-202.)

COMMENT

1 (a). The existing Punitive and Exemplary Damages Law, not in the bill, is contained in R.C. 2315.21. That Law specifies when punitive or exemplary damages may be recoverable in tort actions and provides criteria and procedures for determining if such damages are recoverable and for awarding them when they are recoverable. It specifies that, except as described below, punitive or exemplary damages are not recoverable from a defendant in a tort action unless both of the following apply: (i) the actions or omissions of that defendant demonstrate malice, aggravated or egregious fraud, or insult, or that defendant as principal or master authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate, and (ii) the trier of fact has returned a verdict or has made a determination pursuant to specified provisions of that Law of the total compensatory damages recoverable by the plaintiff from that defendant.

The provisions of that Law do not apply to tort actions against the state in the Court of Claims, including, but not limited to, specified tort actions against a state university or college, to tort actions against political subdivisions commenced under or subject to R.C. Chapter 2744., or to the extent that another Revised Code section expressly provides any of the following: (i) punitive or exemplary damages are recoverable from a defendant in a tort action on a basis other than that the actions or omissions of that defendant demonstrate malice, aggravated or egregious fraud, or insult, or on a basis other than that the defendant as principal

or master authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate, (ii) punitive or exemplary damages are recoverable from a defendant in a tort action irrespective of whether the plaintiff has been determined by the trier of fact to be entitled to recover compensatory damages for the injury or loss to person or property from a defendant, (iii) the burden of proof upon a plaintiff to recover punitive or exemplary damages from a defendant in a tort action is one other than clear and convincing evidence, (iv) punitive or exemplary damages are not recoverable from a defendant in a tort action, or (v) punitive or exemplary damages recoverable from a defendant may exceed an amount described in a specified provision of that Law, may be in another specified amount, or are not subject to any limitation on amount.

(b). The existing Frivolous Conduct Law, not in the bill, is contained in R.C. 2323.51. That Law permits a court, in any civil action or in specified types of appeals by inmates, to award court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal to a party to the civil action or appeal who was adversely affected by frivolous conduct. It provides criteria and procedures for determining when such costs, fees, and expenses should be awarded and for making such an award.

For purposes of that Law, "conduct" means, in relevant part, the filing of a civil action, the assertion of a claim, defense, or other position in connection with a civil action, filing a pleading, motion, or other paper in a civil action, including, but not limited to, a motion or paper filed for discovery purposes, or the taking of any other action in connection with a civil action (the term also includes certain specified actions by inmates, not relevant to the bill). For purposes of that Law, "frivolous conduct" means, in relevant part, conduct of a party to a civil action, or of the party's counsel of record that satisfies any of the following: (i) it obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation, (ii) it is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law, (iii) allegations or other factual contentions have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery, or (iv) denials or factual contentions are not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief. The term also includes certain specified actions by inmates, not relevant to the bill.

2. This bill, like any that prohibits abortion procedures, raises a number of constitutional questions. It is uncertain whether a court would find that the

prohibition against partial birth feticide on pre-viable fetuses would place an unconstitutional undue burden on the right to an abortion. Similarly, it is uncertain whether the medical emergency exception proposed by the bill takes into account the psychological and emotional health of the mother. The medical emergency exception to Sub. H.B. 135's prohibition against post-viability abortions was found inadequate for this reason (*Women's Medical Professional Corp. v. Voinovich* (6th Cir. 1997), 130 F.3d 187, at 203-209).

3. The conforming amendments regarding the repeal of sections 2307.51 and 2919.15 are incomplete. References to these sections remain in section 2305.11(C). Section 2305.11 was most recently amended by Am. Sub. H.B. 350 of the 121st General Assembly, which was declared unconstitutional by the Ohio Supreme Court in *State ex rel. OATL v. Sheward* (1999), 86 Ohio St.3d 451. The Court found the entire bill to unconstitutionally violate the Ohio Constitution's one subject rule and also found specific provisions to be substantively unconstitutional. Section 2305.11 contains both substantively unconstitutional provisions and provisions that were unconstitutional only on one-subject rule grounds. Including section 2305.11 in this bill possibly could give effect to the H.B. 350 provisions in the section but could raise one subject rule issues with this bill.

4. In *Planned Parenthood v. Danforth* (1976), 428 U.S. 52, the Supreme Court struck down a Missouri law that prohibited after the first 12 weeks of pregnancy the use of the abortion procedure of saline amniocentesis. The Court found that the law would prohibit the most commonly used abortion procedure, that saline amniocentesis abortions are safer with respect to maternal mortality than carrying the pregnancy to term, that the prohibition would force the use of abortion methods less safe to the health of the pregnant woman than saline amniocentesis, and that another safe technique of abortion was not available. Consequently, the law failed as a reasonable protection of maternal health, and the court held it to be an unconstitutional arbitrary regulation designed to prevent the vast majority of abortions after the first 12 weeks. (*Danforth*, at 75-79.)

5. The current standard for analyzing abortion regulations is unclear. In *Planned Parenthood v. Casey* (1992), 112 S. Ct. 2791, Justices O'Connor, Kennedy, and Souter stated that the central holding of *Roe v. Wade*, that women have the right to an abortion, should be affirmed on the basis of *stare decisis*, but that the trimester standard adopted by *Roe v. Wade* should be replaced with an undue burden standard. An undue burden exists and a provision of law is invalid if the provision's purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability. Subsequent to viability, the plurality of the Court affirmed the holding in *Roe v. Wade*: 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 the health of the mother. (*Casey*, at 2821.) Justice Stevens appears to have preferred a complete affirmation of *Roe v. Wade* and the cases following *Roe v. Wade* (*Casey*, at 2839-2841). Justice Blackmun also concluded that *Roe v. Wade* should be affirmed and that abortion regulations should be subjected to strict judicial scrutiny: a regulation is constitutional only if the governmental entity imposing the restriction can demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest (*Casey*, at 2846-2847). Chief Justice Rehnquist and Justices White, Scalia, and Thomas concluded that *Roe v. Wade* was wrongly decided and should be overruled and that the Constitution does not require states to permit abortion on demand, although the states may permit abortion on demand if they choose to do so (*Casey*, at 2855 and 2873). A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest (*Casey*, at 2867).

HISTORY

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