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## NOTE

# The Forced Choice of Dignified Disposal: Government Mandate of Interment or Cremation of Fetal Remains

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## INTRODUCTION

It no longer rings true that one in three women in the United States will have an abortion during her lifetime.<sup>1</sup> In fact, the reported rate of abortion among U.S. women has plummeted to an unprecedented low in recent years.<sup>2</sup> To account for this significant decline, political adversaries posit wildly different explanations.<sup>3</sup> Pro-choice advocates credit increased access to contraceptives and the consequent fact that women are experiencing fewer unintended pregnancies.<sup>4</sup> At the other end of the spectrum, the pro-life movement applauds a shift in public opinion, indicated by a higher percentage of pregnant mothers “choosing life, rather than death, for their babies.”<sup>5</sup> From this seemingly irreconcilable discord, one thing appears to be certain: abortion remains a highly politicized and divisive issue for most Americans.<sup>6</sup>

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<sup>1</sup> See W. Gardner Selby, *A Flawed Wendy Davis Claim: 1 in 3 Women Has an Abortion in Her Lifetime*, POLITIFACT TEX. (Jan. 19, 2016, 11:55 AM), <http://www.politifact.com/texas/statements/2016/jan/19/wendy-davis/flawed-wendy-davis-claim-1-3-women-has-had-abortio/>; Michelle Ye Hee Lee, *The Stale Claim That ‘One in Three’ Women Will Have an Abortion by Age 45*, WASH. POST (Sept. 30, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/09/30/the-stale-claim-that-one-in-three-women-will-have-an-abortion-by-age-45/>.

<sup>2</sup> See Rachel K. Jones & Jenna Jerman, *Abortion Incidence and Service Availability in the United States, 2011*, 46 PERSP. ON SEXUAL & REPROD. HEALTH 3, 5-6 (2014); *Induced Abortion in the United States*, GUTTMACHER INST. 1 (Sept. 2016), [https://www.guttmacher.org/sites/default/files/factsheet/lb\\_induced\\_abortion\\_3.pdf](https://www.guttmacher.org/sites/default/files/factsheet/lb_induced_abortion_3.pdf) (reporting that in 2011, the U.S. abortion rate reached its lowest level since 1973).

<sup>3</sup> See Emma Green, *Why Are Fewer American Women Getting Abortions?*, ATLANTIC (June 17, 2015), <http://www.theatlantic.com/politics/archive/2015/06/american-abortion-rate-decline/395960/>.

<sup>4</sup> See Joerg Dreweke, *New Clarity for the U.S. Abortion Debate: A Steep Drop in Unintended Pregnancy Is Driving Recent Abortion Declines*, 19 GUTTMACHER POLY REV. 16, 18-19 (2016); Becca Andrews, *Abortion Rates Are Falling, but Conservatives Won’t Like the Reason Why*, MOTHER JONES (Mar. 2, 2016, 10:02 PM), <http://www.motherjones.com/politics/2016/03/abortion-decline-better-contraception/>; Katelyn Harrop, *Abortion Rates Dropped Sharply. What Caused It?*, THINKPROGRESS (June 9, 2015, 3:46 PM), <https://thinkprogress.org/abortion-rates-dropped-sharply-what-caused-it-c522e2e8c4f2#.uj01ubjrw>.

<sup>5</sup> *Abortion Statistics: United States Data & Trends*, NAT’L RIGHT TO LIFE NEWS TODAY (Jan. 28, 2016), <http://www.nationalrighttolifenews.org/news/2016/01/abortion-statistics-united-states-data-trends/#.WZHZZcm1uu4>.

<sup>6</sup> See *Abortion*, GALLUP, <http://www.gallup.com/poll/1576/abortion.aspx> (last visited Jan. 2, 2017); see also Carole Joffe, *Roe v. Wade and Beyond: Forty Years of Legal Abortion in the United States*, DISSENT MAG. (2013), <https://www.dissentmagazine.org/article/roe-v-wade-and-beyond-forty-years-of-legal-abortion-in-the-united-states>; Michael Lipka & John Gramlich, *5 Facts About Abortion*, PEW RES. CTR. (Jan. 26, 2017), <http://www.pewresearch.org/fact-tank/2016/06/27/5-facts-about-abortion/>.

Recognizing that the constitutional right to privacy encompasses the right to an abortion,<sup>7</sup> *Roe v. Wade* affirmed that states have the power to regulate when and under what circumstances abortions are performed.<sup>8</sup> In the forty years following *Roe*, state lawmakers have enacted hundreds of abortion regulations under the guise of maternal protectionism and fetal preservation.<sup>9</sup> These laws limit a woman's right to terminate an unwanted pregnancy by discouraging women from utilizing abortion services as well as by erecting practical barriers to abortion access.<sup>10</sup>

Looking to the future, there is little evidence to suggest that this regulatory barrage on reproductive health services will slow.<sup>11</sup> In 2015, state legislatures proposed 514 provisions concerning abortion services.<sup>12</sup> Of those measures passed, fifty-seven imposed restrictions on access to reproductive healthcare.<sup>13</sup> In July of 2016, the Supreme Court of the United States affirmed that laws that restrict access to

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<sup>7</sup> *Roe v. Wade*, 410 U.S. 113, 153 (1973).

<sup>8</sup> *See id.* at 163 (“[A] State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.”); *see also* Jessica Arden Ettinger, Note, *Seeking Common Ground in the Abortion Regulation Debate*, 90 NOTRE DAME L. REV. 875, 878 (2014).

<sup>9</sup> *See* CTR. FOR REPROD. RIGHTS, *ROE V. WADE IN THE STATES 1* (2007), [https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/pubs\\_fs\\_Overview\\_of\\_Types\\_of\\_Abortion\\_Restrictions\\_in\\_the\\_States\\_2007.pdf](https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/pubs_fs_Overview_of_Types_of_Abortion_Restrictions_in_the_States_2007.pdf); *An Overview of Abortion Laws*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws> (last updated July 1, 2017); *Last Five Years Account for More than One-Quarter of All Abortion Restrictions Enacted Since Roe*, GUTTMACHER INST. (Jan. 13, 2016), <https://www.guttmacher.org/article/2016/01/last-five-years-account-more-one-quarter-all-abortion-restrictions-enacted-roe>.

<sup>10</sup> *See, e.g.*, Ana Grahovac, *Abortion Access in the US: Is It a Fading Reality? A Mixed Methods Approach 2* (2015) (unpublished M.A. thesis, University of Illinois at Urbana-Champaign), <https://pdfs.semanticscholar.org/c3d5/e597420b47c29e53f5acc778db8d797e047c.pdf> (detailing the geographic barriers to abortion access); *Forced Ultrasound*, REWIRE, <https://rewire.news/legislative-tracker/law-topic/forced-ultrasound/> (last updated Apr. 20, 2017) (describing how forced ultrasounds are a legislative attempt to dissuade women from undergoing abortion).

<sup>11</sup> *See* Sabrina Tavernise & Sheryl Gay Stolberg, *Abortion Foes, Emboldened by Trump, Promise ‘Onslaught’ of Tough Restrictions*, N.Y. TIMES (Dec. 11, 2016), [http://www.nytimes.com/2016/12/11/us/abortion-foes-donald-trump-restrictions-politics.html?\\_r=0](http://www.nytimes.com/2016/12/11/us/abortion-foes-donald-trump-restrictions-politics.html?_r=0); Reid Wilson, *Abortion Foes Plot Wave of Legislation in the States*, HILL (Nov. 29, 2016, 1:15 PM), <http://thehill.com/policy/healthcare/307879-abortion-foes-plot-wave-of-legislation-in-the-states>.

<sup>12</sup> Elizabeth Nash et al., *Laws Affecting Reproductive Health and Rights: 2015 State Policy Review*, GUTTMACHER INST., <https://www.guttmacher.org/laws-affecting-reproductive-health-and-rights-2015-state-policy-review> (last visited Jan. 2, 2017).

<sup>13</sup> *Id.*

abortion services must actually promote the government's interest in promoting health and safety.<sup>14</sup> It appears unlikely, however, that the Court's decision in *Whole Woman's Health v. Hellerstedt* will deter legislative efforts to regulate abortion moving forward.<sup>15</sup> Just last year, eighteen states enacted fifty new abortion restrictions, raising the total number of abortion regulations passed since 2010 to 338.<sup>16</sup>

Joining the entanglement of measures limiting access to reproductive healthcare in 2016 was a new and unusual mandate: fetal remains resulting from abortions and miscarriages must be interred or cremated to avoid criminal sanctions.<sup>17</sup> Indeed, fetal tissue has been a strong point of contention in the abortion debate ever since the discovery of its efficacy in medical research.<sup>18</sup> Yet, in 2015, the Center for Medical Progress released a series of sensationalized videos accusing Planned Parenthood of "selling baby body parts" and revived the controversy anew.<sup>19</sup> In subsequent months, eleven states

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<sup>14</sup> *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2311, 2315-18 (2016).

<sup>15</sup> See Michael J. New, *Pro-Life Optimism After Whole Woman's Health v. Hellerstedt*, NAT'L REV. (June 28, 2016, 3:05 PM), <http://www.nationalreview.com/corner/437259/abortion-pro-life-optimism-after-supreme-courts-whole-womens-health-v-hellerstedt> ("[H]istory shows that pro-life policymakers can revise legislation so that it receives subsequent judicial approval."); see also Danielle Paquette, *Planned Parenthood Announces It Will Fight Abortion Laws in Eight States After Supreme Court Ruling*, WASH. POST (June 30, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/06/30/planned-parenthood-announces-it-will-fight-abortion-laws-in-eight-states-after-supreme-court-ruling/> (explaining how the National Right to Life Committee aims to push through legislation that "safeguards the fetus" during the next legislative session); Tavernise & Stolberg, *supra* note 11.

<sup>16</sup> This constitutes thirty percent of the total number of abortion regulations enacted since *Roe v. Wade* in 1973. Elizabeth Nash et al., *Policy Trends in the States: 2016*, GUTTMACHER INST. (Jan. 3, 2017), <https://www.guttmacher.org/article/2017/01/policy-trends-states-2016>.

<sup>17</sup> See Emma Green, *State-Mandated Mourning for Aborted Fetuses*, ATLANTIC (May 14, 2016), <http://www.theatlantic.com/politics/archive/2016/05/state-mandated-mourning-for-aborted-fetuses/482688/>; Alex Zielinski, *GOP States Have Found a New Way to Shame Women for Getting an Abortion*, THINKPROGRESS (Apr. 13, 2016, 3:49 PM), <https://thinkprogress.org/gop-states-have-found-a-new-way-to-shame-women-for-getting-an-abortion-4c8b4f53e776#.fi9wr5ssi>.

<sup>18</sup> See James F. Childress, *Deliberations of the Human Fetal Tissue Transplantation Research Panel*, in BIOMEDICAL POLITICS 215, 220-21 (Kathi E. Hanna ed., 1991); see also Gregory Gelfand & Toby R. Levin, *Fetal Tissue Research: Legal Regulation of Human Fetal Tissue Transplantation*, 50 WASH. & LEE L. REV. 647, 648 (1993); Christie A. Seifert, Comment, *Fetal Tissue Research: State Regulation of the Donation of Aborted Fetuses Without Consent of the "Mother,"* 31 J. MARSHALL L. REV. 277, 281-84 (1997).

<sup>19</sup> See Jeremy Brenningstall et al., *How Anti-Abortion Activists Used Undercover Planned Parenthood Videos to Further a Political Cause*, L.A. TIMES (Mar. 30, 2016), <http://graphics.latimes.com/planned-parenthood-videos/>; *Investigative Footage*, CTR.

scrutinized Planned Parenthood's handling of aborted fetal matter, each coming up short of substantive evidence of wrongdoing but provoking public outcry for defunding nonetheless.<sup>20</sup>

Consequently, numerous states imposed stringent limitations on the use of fetal tissue during the 2016 legislative session.<sup>21</sup> Fetal disposal laws were especially prevalent, with eleven states proposing laws concerning the final resting place of the unborn.<sup>22</sup> Joining Arkansas and Georgia, which have restrictive fetal disposal laws on the books,<sup>23</sup> Indiana, Louisiana, and Texas implemented the mandate of interment or cremation in 2016.<sup>24</sup> Abortion providers and pro-choice advocates responded by challenging the constitutionality of these provisions in

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MED. PROGRESS, <http://www.centerformedicalprogress.org/cmp/investigative-footage/> (last visited Dec. 26, 2016).

<sup>20</sup> See Danielle Kurtzleben, *Planned Parenthood Investigations Find No Fetal Tissue Sales*, NPR (Jan. 28, 2016, 12:47 PM), <http://www.npr.org/2016/01/28/464594826/in-wake-of-videos-planned-parenthood-investigations-find-no-fetal-tissue-sales>; Nathan Pemberton, *Missouri Joins Growing List of States Unable to Pin Anything on Planned Parenthood*, N.Y. MAG. (Sept. 29, 2015, 8:00 AM), <http://nymag.com/daily/intelligencer/2015/09/state-has-found-proof-of-fetal-tissue-sales.html>.

<sup>21</sup> For example, Alabama and Idaho made it illegal to buy, sell, donate, or experiment on fetal tissue. H.B. 45, 2016 Leg., Reg. Sess. (Ala. 2016); S.B. 1404, 63rd Leg., 2d Reg. Sess. (Idaho 2016). Arizona made it illegal for abortion providers to donate fetal tissue for research. S.B. 1474, 52nd Leg., 2d Reg. Sess. (Ariz. 2016). Louisiana made it illegal to sell, receive, or transport fetal tissue. S.B. 33, 2016 Leg., Reg. Sess. (La. 2016). South Dakota made it illegal to use fetal tissue in animal or human research. S.B. 24, 2016 Leg., 91st Sess. (S.D. 2016). Tennessee made it illegal to sell fetal tissue. S.B. 2568, 109th Gen. Assemb., Reg. Sess. (Tenn. 2016). See also Nash et al., *supra* note 16.

<sup>22</sup> Indiana, Louisiana, Mississippi, Missouri, Nebraska, Ohio, South Carolina, Tennessee, Texas, Virginia, and Wisconsin considered fetal disposal laws in 2016. See H. Enrolled B. 1337, 119th Gen. Assemb., 2nd Reg. Sess. (Ind. 2016); H.B. 618, 2016 Leg., Reg. Sess. (La. 2016); S.B. 2115, 2016 Leg., Reg. Sess. (Miss. 2016); H.B. 147, 99th Gen. Assemb., 1st Reg. Sess. (Mo. 2016); Legis. B. 990, 104th Leg., 2d Sess. (Neb. 2016); H.B. 417, 131st Gen. Assemb., Reg. Sess. (Ohio 2016); H.B. 4759, 121st Leg., Reg. Sess. (S.C. 2016); H.B. 2577, 109th Leg., Gen. Sess. (Tenn. 2016); 41 Tex. Reg. 7659, 7664 (Sept. 30, 2016); H.B. 970, 2016 Leg., Gen. Sess. (Va. 2016); S.B. 260, 2016 Leg., Gen. Sess. (Wis. 2015).

<sup>23</sup> See ARK. CODE ANN. §§ 20-17-801, 20-17-802 (2017); GA. CODE ANN. § 16-12-141.1 (2017).

<sup>24</sup> See H. Enrolled B. 1337, 119th Gen. Assemb., 2nd Reg. Sess. (Ind. 2016); H.B. 815, 2016 Leg., Reg. Sess. (La. 2016); 41 Tex. Reg. 7659, 7664 (Sept. 30, 2016).

federal court.<sup>25</sup> Thus far, no fetal disposal provision enacted in 2016 has been enforced due to pending litigation.<sup>26</sup>

This Note analyzes the constitutionality of government mandate of interment or cremation of fetal remains. Part I explores the regulatory landscape governing the disposal of medical waste and fetal matter. Part II presents three distinct ways in which the dignified disposal mandates enacted in 2016 violate the Due Process Clause of the Fourteenth Amendment. Part III concludes that current fetal disposal laws must be struck down, but proposes the undertaking of sensitive disposal guidelines through which states can respect the controversial nature of fetal disposal. This Note concludes by looking to the future, anticipating the extent to which the Trump Administration will affect the constitutionality of fetal disposal laws.

## I. DISPOSAL OF MEDICAL WASTE

### A. *Origin and Modern Landscape*

A series of environmental disasters is largely responsible for the statutory scheme governing medical waste disposal today.<sup>27</sup> In an event known as the Syringe Tide, medical debris washed ashore in New Jersey, forming a mile-long “garbage slick” during the summer of 1988.<sup>28</sup> Shortly thereafter, the unmanageable public health threat looming in the accumulation of medical waste forced ocean beaches on both coasts to close.<sup>29</sup> Public outcry, namely a formidable fear of

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<sup>25</sup> See Complaint at 1-3, *Whole Woman’s Health v. Hellerstedt*, 231 F. Supp. 3d 218 (W.D. Tex. 2016) (No. 1:16-cv-01300); Complaint at 2, *June Med. Servs. v. Gee*, No. 3:16-cv-00444 (M.D. La. July 1, 2016); Complaint at 1-2, *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r*, 194 F. Supp. 3d 818 (S.D. Ind. 2016) (No. 1:16-cv-00763).

<sup>26</sup> See, e.g., *Whole Woman’s Health v. Hellerstedt*, 231 F. Supp. 3d 218, 221-23 (W.D. Tex. 2017) (enjoining proposed amendments to the Texas administrative code); *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r*, 194 F. Supp. 3d 818, 822-23 (S.D. Ind. 2016) (enjoining fetal tissue disposition provisions pending resolution of litigation).

<sup>27</sup> See Kathryn D. Wagner, *Medical Wastes and the Beach Washups of 1988*, in PROCEEDINGS OF THE SECOND INTERNATIONAL CONFERENCE ON MARINE DEBRIS 811, 811 (1989); Larry Gilman, *Medical Waste*, ENCYCLOPEDIA.COM, <http://www.encyclopedia.com/environment/energy-government-and-defense-magazines/medical-waste> (last visited Aug. 14, 2017); *Medical Waste*, EPA, <https://www.epa.gov/rcra/medical-waste> (last visited June 20, 2017); Sally Squires, *Needles on the Beach*, WASH. POST (Aug. 23, 1988), [https://www.washingtonpost.com/archive/lifestyle/wellness/1988/08/23/needles-on-the-beach/809288a7-ae56-44fa-8bfc-027479613f27/?utm\\_term=.ea8995a2c8c8](https://www.washingtonpost.com/archive/lifestyle/wellness/1988/08/23/needles-on-the-beach/809288a7-ae56-44fa-8bfc-027479613f27/?utm_term=.ea8995a2c8c8).

<sup>28</sup> Wagner, *supra* note 27, at 811.

<sup>29</sup> See Howard J. Young, *Medical Waste Regulation: Recommendations for Cleaning up the Mess*, 42 DUKE ENVTL. L. & POL’Y F. 77, 78-80 (1992).

infectious disease, prompted federal regulation.<sup>30</sup> Subsequently, Congress passed the Medical Waste Tracking Act (“MWTA”), thereby establishing a two-year program to study medical waste and determine the necessary contours of federal regulation.<sup>31</sup> Additionally, the MWTA provided an expansive definition of medical waste and mandated its tracking from cradle to grave.<sup>32</sup> Upon its expiration in 1992, however, the MWTA had largely proved ineffective in regulating medical waste.<sup>33</sup> Nevertheless, federal regulation spurred states to implement their own regulatory frameworks for treatment and disposal of medical waste.<sup>34</sup> Although numerous federal agencies have limited regulatory authority over medical waste today, the primary level of regulation remains among the states.<sup>35</sup>

No uniform definition exists as to what constitutes medical waste.<sup>36</sup> Several states adopted the MWTA’s definition of medical waste as “any solid waste which is generated in the diagnosis, treatment, or immunization of human beings or animals, [or] in research pertaining thereto.”<sup>37</sup> Other states’ definitions differ greatly from this language and from each other.<sup>38</sup> On a rudimentary level, medical waste is

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<sup>30</sup> See Medical Waste Tracking Act of 1988, 42 U.S.C. § 6992 (2012); Young, *supra* note 29, at 79-80.

<sup>31</sup> See Lisa A. Jensen, *Medical Waste Regulation in the United States*, 9 NAT. RESOURCES & ENV’T 21, 21-22 (1994).

<sup>32</sup> See *id.*

<sup>33</sup> See Cheryl L. Coon & Howard L. Gilberg, *The New Regulatory Horizon: Regulation of Medical Waste*, 45 SW. L.J. 1099, 1108-10 (1991); Leo H. Carney, *Medical Waste Law Draws Criticism*, N.Y. TIMES (June 2, 1991), <http://www.nytimes.com/1991/06/02/nyregion/medical-waste-law-draws-criticism.html?pagewanted=all>.

<sup>34</sup> See Coon & Gilberg, *supra* note 33, at 1110, 1114 (explaining that many states had enacted their own regulatory frameworks, and that state programs are an “indirect benefit[] of the MWTA demonstration program”); Gilman, *supra* note 27 (“[T]he MWTA resulted in stricter laws and regulations for the disposal of medical wastes in state and local governments.”).

<sup>35</sup> See EPA, *supra* note 27; *Regulated Medical Waste — Overview*, HEALTHCARE ENVTL. RESOURCE CTR., <http://www.hercenter.org/rmw/rmwoverview.cfm> (last visited Jan. 4, 2017).

<sup>36</sup> See Chryssa V. Deliganis & Steve P. Calandrillo, *Syringes in the Sea: Why Federal Regulation of Medical Waste Is Long Overdue*, 41 GA. L. REV. 169, 173 (2006); Margaret M. Menicucci & Cheryl L. Coon, *Environmental Regulation of Health Care Facilities: A Prescription for Compliance*, 47 SMU L. REV. 537, 543 (1994); Young, *supra* note 29, at 81-83.

<sup>37</sup> 42 U.S.C. § 6903(40) (2012); see Jensen, *supra* note 31, at 22; see, e.g., N.Y. COMP. CODES R. & REGS. tit. 10 § 70-1.2 (2017) (“‘Regulated medical waste’ shall mean waste generated in diagnosis, treatment or immunization of humans or animals in research pertaining thereto . . .”).

<sup>38</sup> Compare 6 COLO. CODE REGS. § 1007-2:1-1.2 (2017) (defining medical waste as



potentially infectious waste material generated by healthcare facilities, including but not limited to: bloodied bandages, discarded surgical gloves, removed body organs, discarded needles, and cultures of infectious agents.<sup>39</sup> Pathological waste, a subset of medical waste, consists of recognizable human or animal body parts.<sup>40</sup> It is this wide variation in statutory definition that makes providing an estimate of the amount of medical waste generated annually in the United States nearly impossible.<sup>41</sup>

Medical waste generators utilize several methods to dispense with hazardous material safely.<sup>42</sup> Medical waste can be incinerated, converting the discarded material into ash, flue gas, and heat.<sup>43</sup> Incineration is valued because it decreases the volume of medical waste deposited into landfills considerably.<sup>44</sup> Autoclaving, in comparison, uses pressurized steam to eliminate the biohazard presented by medical waste, rendering it suitable for disposal in a landfill.<sup>45</sup> Under certain circumstances, medical waste may even be discarded into sanitary landfills directly or discharged into the sewer system.<sup>46</sup> Until the 1990s, incineration was a prevalent method of medical waste disposal.<sup>47</sup> With rising public awareness of toxic

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“any infectious, pharmaceutical or trace chemotherapy waste”), with ALASKA ADMIN. CODE tit. 18, § 60.990(78) (2017) (defining medical waste as “laboratory waste . . . pathological wastes . . . selected isolation waste”).

<sup>39</sup> See INT’L COMM. RED CROSS, MEDICAL WASTE MANAGEMENT 13 (Nov. 2011), <https://www.icrc.org/eng/assets/files/publications/icrc-002-4032.pdf>; EPA, *supra* note 27; *What Is Medical Waste?*, GRP, <http://www.sharpsdisposal.com/what-is-medical-waste/> (last visited Dec. 26, 2016).

<sup>40</sup> See *Pathology Waste Management*, LAWRENCE BERKELEY NAT’L LAB., [http://www2.lbl.gov/ehs/waste/wm\\_pub\\_3095\\_ch4.shtml](http://www2.lbl.gov/ehs/waste/wm_pub_3095_ch4.shtml) (last updated Oct. 23, 2012).

<sup>41</sup> See Deliganis & Calandrillo, *supra* note 36, at 173; Young, *supra* note 29, at 86.

<sup>42</sup> This paragraph outlines only the most prevalent methods utilized by medical healthcare facilities. See generally WORLD HEALTH ORG., SAFE MANAGEMENT OF WASTES FROM HEALTH-CARE ACTIVITIES 105-34 (Yves Chartier et al. eds., 2d ed. 2014) (describing the available treatment technologies for medical waste).

<sup>43</sup> See Samwel Victor Manyele & Ignatio Simon Kagonji, *Analysis of Medical Waste Incinerator Performance Based on Fuel Consumption and Cycle Times*, 4 ENGINEERING 625, 625 (2012); Young, *supra* note 29, at 93-96.

<sup>44</sup> Manyele & Kagonji, *supra* note 43, at 625-26.

<sup>45</sup> Neal Lorenzi, *Treating Medical Waste*, HEALTH FACILITIES MGMT. (July 2, 2014), <http://www.hfmmagazine.com/articles/1324-treating-medical-waste>.

<sup>46</sup> See Young, *supra* note 29, at 99; Christina Louise Martini, Comment, *Medical Waste Regulation in the United States: A Dire Need for Recognition and Reform*, 14 NW. J. INT’L L. & BUS. 206, 209-13 (1993); *Treatment of Medical Waste*, BASURA MED. WASTE, <http://www.wastemed.com/treatment.htm> (last visited July 15, 2017).

<sup>47</sup> See ENVTL. PROT. AGENCY, MEDICAL WASTE INCINERATORS – BACKGROUND INFORMATION FOR PROPOSED STANDARDS AND GUIDELINES 53 (1994), <https://nepis.epa>

emissions, however, most healthcare facilities now use alternative methods of disposal or send medical waste to centralized private incinerators.<sup>48</sup>

### B. Final Disposition of Fetal Remains

Abortions produce a significant amount of discarded biological matter. In 2011, U.S. healthcare providers performed an estimated 1.06 million abortions.<sup>49</sup> The U.S. Centers for Disease Control and Prevention estimates that ninety-one percent of these abortions occurred within the first thirteen weeks of gestation, during which the embryo develops into a 0.81 ounce fetus nearly three inches in length.<sup>50</sup> When a woman in the twelfth week of gestation undergoes an abortion, the abortion provider removes an average of sixty milliliters of fetal tissue, approximately the size of a 5-hour ENERGY Shot.<sup>51</sup> Following the removal of the fetal matter, the abortion provider then transfers the tissue to third party researchers or disposes of it pursuant to state law.<sup>52</sup>

While the regulatory frameworks governing fetal tissue disposal vary, many jurisdictions understand fetal tissue to be categorically the same as other forms of medical waste.<sup>53</sup> Typically, healthcare facilities

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gov/Exe/ZyPDF.cgi/00002XC5.PDF?Dockey=00002XC5.PDF; *Incinerators*, HEALTHCARE ENVTL. RESOURCE CTR. (2015), <http://www.hercenter.org/facilitiesandgrounds/incinerators.cfm>.

<sup>48</sup> See EPA, *supra* note 27.

<sup>49</sup> GUTTMACHER INST., *supra* note 2, at 1.

<sup>50</sup> See *Average Fetal Length and Weight Chart*, Babycenter, <http://www.babycenter.com/my/a1004000/average-fetal-length-and-weight-chart> (last visited July 15, 2017); Karen Pazol et al., *Abortion Surveillance — United States, 2011*, 63 MMRW Surveillance Summaries, no. 11, Nov. 28, 2014, at 1, <https://www.cdc.gov/mmwr/pdf/ss/ss6311.pdf> (“In 2011, most (64.5%) abortions were performed by ≤8 weeks’ gestation, and nearly all (91.4%) were performed by ≤13 weeks’ gestation.”).

<sup>51</sup> See C. Felding et al., *First-Trimester Legally Induced Abortions. The Amount of Aspirated Tissue in Relation to Gestational Age*, 249 ARCHIVES GYNECOLOGY & OBSTETRICS 149, 149-51 (1991).

<sup>52</sup> See *How Fetal Tissue Is Used in Medical Research*, WEEK (Oct. 24, 2015), <http://theweek.com/articles/584576/how-fetal-tissue-used-medical-research>.

<sup>53</sup> See Rick Callahan, *Indiana Fetal Remains Bill Puts Spotlight on Fetal Disposal*, WISH-TV (Feb. 21, 2016, 3:45 PM), <http://wishtv.com/2016/02/21/indiana-fetal-remains-bill-puts-spotlight-on-fetal-disposal/>; Emily Crockett, *The Bizarre New Allegations About Planned Parenthood and Landfills, Explained*, VOX (Dec. 15, 2015, 1:20 PM), <http://www.vox.com/2015/12/15/10220438/planned-parenthood-ohio-landfills>; S.E. Smith, *Fetal Remains Laws Will Be the Pro-Choice Battle of 2016*, BUSTLE (Jan. 22, 2016), <https://www.bustle.com/articles/136652-fetal-remains-laws-will-be-the-pro-choice-battle-of-2016>.

contract with private medical waste services to dispose of discarded fetal matter.<sup>54</sup> These services then treat the fetal tissue alongside other types of pathological waste in accordance with state law.<sup>55</sup> For instance, prior to the passage of the new agency rule in 2016, Texas permitted fetal remains and other medical waste to be: (1) incinerated followed by deposition of the residue in a sanitary landfill; (2) grinded and discharged into a sanitary sewer system; (3) interred; (4) disinfected with steam followed by interment; (5) disinfected with moist heat followed by deposition in a sanitary landfill; (6) disinfected with chlorine, macerated, and deposited in a sanitary landfill; or (7) disposed by an approved alternate treatment process.<sup>56</sup> This Texas provision, by no means representative of how all states regulate fetal tissue, demonstrates a broad range of permitted disposal practices.

In contrast, the majority of states regulate fetal tissue disposal more narrowly. For example, some states allow for cremation, interment, or incineration of fetal material.<sup>57</sup> Others merely permit interment or incineration.<sup>58</sup> Only three states, however, mandate the forced choice

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<sup>54</sup> See, e.g., Complaint at 6, *Planned Parenthood Sw. Ohio Region v. Hodges*, No. 2:15-cv-3079 (S.D. Ohio Dec. 13, 2015) (“Plaintiffs have contracted with approved certified medical waste company which was obligated to dispose of the material in a manner consistent with all state and federal laws.”); see also Alan Johnson et al., *No Abortion Clinics Cited over Disposal of Fetuses*, COLUMBUS DISPATCH (Dec. 19, 2015, 12:01 AM), <http://www.dispatch.com/content/stories/local/2015/12/19/no-clinics-cited-over-disposal-of-fetuses.html>; Ann Sanner, *A Look at Ohio’s Rules for Fetal Tissue Disposal*, NEWS-HERALD (Dec. 22, 2015, 10:34 AM), <http://www.news-herald.com/article/HR/20151222/NEWS/151229895>.

<sup>55</sup> See Samantha Allen, *GOP Won’t Quit Making Abortion Cremation Laws*, DAILY BEAST (July 22, 2016, 1:01 AM), <http://www.thedailybeast.com/gop-wont-quit-making-abortion-cremation-laws>; Sanner, *supra* note 54.

<sup>56</sup> 25 TEX. ADMIN. CODE ANN. § 1.136 (2017).

<sup>57</sup> See, e.g., MICH. COMP. LAWS ANN. § 333.2836 (2017) (“All fetal remains resulting from abortions shall be disposed of by interment or cremation . . . or by incineration by a person other than a cemetery registered under the cemetery regulation act . . . .”); N.D. ADMIN. CODE 33-03-02-05 (2017) (“Disposal of a nonviable fetus in a humane fashion shall consist of incineration, burial, or cremation.”); S.D. CODIFIED LAWS § 34-25-32.4 (2017) (“Any hospital, clinic, or medical facility in which abortions are induced or occur spontaneously . . . shall arrange for the disposal of the remains by cremation, interment by burial, or by incineration . . . .”).

<sup>58</sup> See, e.g., CAL. HEALTH & SAFETY CODE § 7054.3 (2017) (“[A] recognizable dead human fetus of less than 20 weeks uterogestation not disposed of by interment shall be disposed of by incineration.”); MONT. CODE ANN. § 75-10-1005 (2017) (“Fetal remains or recognizable body parts other than teeth must be disposed of by incineration or interment.”); N.M. CODE R. § 20.9.8.13 (2017) (“Human fetal remains, as defined by the state medical investigator, when measured to be 500 grams or greater, shall be disposed by incineration or interment.”); UTAH ADMIN. CODE r. 315-316-5 (2017) (“Infectious waste consisting of recognizable human anatomical remains

between interment and cremation, rendering incineration unavailable for fetal remains.<sup>59</sup>

The difference between incineration and cremation is not facially apparent. According to the Cremation Association of North America, cremation is “the mechanical and/or thermal or other dissolution process that reduces human remains to bone fragments.”<sup>60</sup> Similarly, the Environmental Protection Agency defines incineration as “the process of burning hazardous materials at temperatures high enough to destroy contaminants.”<sup>61</sup> Evidenced by their respective definitions, both processes employ high temperatures to combust organic material. Cremation, however, often functions as a funeral or post-funeral rite, thereby implicating religious traditions and deeply held personal beliefs.<sup>62</sup> During the cremation process, a corpse is placed in an individual container and burned for two to three hours with identification of the remains carefully monitored throughout.<sup>63</sup> The resulting bones and fragments are pulverized in a cremulator and poured into a plastic container or urn.<sup>64</sup> Conversely, medical waste management companies incinerate medical waste in large, indiscrete quantities.<sup>65</sup> Medical incineration combustion rates vary from 75 to 6,500 pounds per hour.<sup>66</sup>

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including human fetal remains shall be disposed by incineration or interment in a location appropriate for human remains.”).

<sup>59</sup> See IND. CODE § 16-34-3-4(a) (2017); LA. STAT. ANN. § 40:1061.25 (2017); 41 Tex. Reg. 7664 (Sept. 30, 2016); see also ARK. CODE ANN. § 20-17-102 (2017) (permitting “burial, interment, cremation, removal from Arkansas, or other authorized disposition”); GA. CODE ANN. § 16-12-141.1 (2017) (permitting “cremation, interment, or other manner approved of by the commissioner of public health”).

<sup>60</sup> *What is Cremation?*, CREMATION ASS’N N. AM., <http://www.cremationassociation.org/?page=WhatIsCremation> (last visited Dec. 28, 2016).

<sup>61</sup> ENVTL. PROT. AGENCY, A CITIZEN’S GUIDE TO INCINERATION 1 (2012), [https://clu-in.org/download/Citizens/a\\_citizens\\_guide\\_to\\_incineration.pdf](https://clu-in.org/download/Citizens/a_citizens_guide_to_incineration.pdf).

<sup>62</sup> See *Our Services*, PICHA FUNERAL HOME, <http://www.pichafuneralhomes.com/ourservices.html> (last visited July 15, 2017).

<sup>63</sup> See *Crematory FAQ’s*, N.Y. DEP’T STATE, <http://www.dos.ny.gov/cmt/faq-cremation.html> (last visited Dec. 28, 2016); Michelle Kim, *How Cremation Works*, HOWSTUFFWORKS, <http://science.howstuffworks.com/cremation1.htm> (last visited July 15, 2017).

<sup>64</sup> Kim, *supra* note 63.

<sup>65</sup> See Veilla E. Matee & Samwel V. Manyele, *Performance of a Large-Scale Medical Waste Incinerator in a Referral Hospital*, 7 ENGINEERING 676, 680 (2015) (“The total waste incinerated ranged between 823 and 1018 kg/day with an average of 945 kg/day or 118.1 kg/h for daily operation of 8 hours.”).

<sup>66</sup> See ENVTL. PROT. AGENCY, AIR EMISSIONS FACTORS AND QUALIFICATIONS: MEDICAL WASTE INCINERATION 2.3-1 (1993), <https://www3.epa.gov/ttn/chief/ap42/ch02/final/c02s03.pdf>.

C. *Humane and Sanitary Disposal: City of Akron*

The Supreme Court has addressed the constitutionality of a fetal disposal law in only one instance to date: *City of Akron v. Akron Center for Reproductive Health, Inc.*<sup>67</sup> There, three abortion clinics and a physician brought suit challenging the validity of a 1978 Akron abortion ordinance.<sup>68</sup> The ordinance, in part, required abortion providers to guarantee that fetal remains were disposed of in a “humane and sanitary manner.”<sup>69</sup> The ordinance gave no further instruction as to which disposition methods met this standard.<sup>70</sup> In the lower proceedings, the physician plaintiff argued that the relevant section of the Akron ordinance was unconstitutionally vague in that it failed to give him fair notice of the criminally proscribed behavior.<sup>71</sup>

Upon review, the Supreme Court affirmed the Sixth Circuit’s invalidation of the provision, finding the phrase “humane and sanitary” to be impermissibly vague as to whether it mandated the burial of an aborted fetus.<sup>72</sup> Accordingly, the Court held that the ordinance violated the Due Process Clause of the Fourteenth Amendment because it failed to give appropriate notice to abortion providers as to whether and when their actions triggered criminal liability.<sup>73</sup> In so holding, the Court explicitly recognized a legitimate government interest in “proper disposal of fetal remains.”<sup>74</sup> The Court gave no further insight as to the contours of the state interest in proper disposition beyond its existential legitimacy.

II. FETAL DISPOSAL LAWS VIOLATE THE DUE PROCESS CLAUSE

A. *Fetal Disposal Laws Are Not Rationally Related to a Legitimate Government Interest*

In 2016, Planned Parenthood of Indiana and Kentucky (“PPINK”) challenged the constitutionality of Indiana House Enrolled Act No. 1337 (“HEA 1337”) in the Southern District of Indiana.<sup>75</sup> Prior to HEA

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<sup>67</sup> 462 U.S. 416 (1983).

<sup>68</sup> *See id.* at 421-25.

<sup>69</sup> *Id.* at 424.

<sup>70</sup> *See id.* at 451-52.

<sup>71</sup> *See City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 479 F. Supp. 1172, 1206 (N.D. Ohio 1979).

<sup>72</sup> *City of Akron*, 462 U.S. at 451.

<sup>73</sup> *Id.* at 451-52.

<sup>74</sup> *See id.* at 452 n.45.

<sup>75</sup> *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r*, 194 F. Supp. 3d 818, 822

1337, Indiana women could personally dispose of the fetal material resulting from a pregnancy less than twenty weeks post-fertilization,<sup>76</sup> or in the alternative, the medical facility could dispose of it as pathological waste.<sup>77</sup> HEA 1337 requires fetal tissue to be categorized as distinct from other types of medical waste and consequently mandates healthcare facilities to dispose of fetal remains by way of interment or cremation exclusively.<sup>78</sup> HEA 1337 also reserves the right for women to assume complete responsibility for final disposition.<sup>79</sup> In its complaint, PPINK argued that by treating the fetal tissue “differently, for purposes of disposal, than other medical material,” HEA 1337 violated its right to due process under the Fourteenth Amendment.<sup>80</sup> The Southern District of Indiana found the alleged violation to be a “close call” but ultimately awarded the preliminary injunction, finding PPINK likely to prevail on the merits of its due process claim.<sup>81</sup>

The district court in *Planned Parenthood v. Commissioner* conducted rational basis review to determine the constitutionality of Indiana’s fetal disposal law under the Due Process Clause of the Fourteenth Amendment.<sup>82</sup> Both PPINK and the State of Indiana conceded that fetal disposal laws do not impinge upon a fundamental right.<sup>83</sup> State regulation of non-fundamental rights is not subject to the heightened standard of strict scrutiny; rather, these regulations need only pass muster under rational basis review, or be rationally related to a legitimate government interest.<sup>84</sup>

The rhetoric put forth by proponents of fetal disposal laws sheds light on the likely government interest at stake. For example, upon

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(S.D. Ind. 2016).

<sup>76</sup> See H. Enrolled Act 1337, 119th Gen. Assemb., 2d Reg. Sess. (Ind. 2016); see also Complaint at 8-9, *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r*, 194 F. Supp. 3d 818 (S.D. Ind. 2016) (No. 1:16-cv-00763).

<sup>77</sup> Compare IND. CODE § 16-41-16-5 (2015), with IND. CODE § 16-41-16-5 (2016) (inserting language explicitly excluding aborted or miscarried fetuses from the definition of “pathological waste”).

<sup>78</sup> See H. Enrolled Act 1337, 119th Gen. Assemb., 2d Reg. Sess. (Ind. 2016).

<sup>79</sup> See *id.*

<sup>80</sup> Complaint at 10, *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r*, 194 F. Supp. 3d 818 (S.D. Ind. 2016) (No. 1:16-cv-00763).

<sup>81</sup> *Planned Parenthood*, 194 F. Supp. 3d at 823.

<sup>82</sup> *Id.* at 831-34.

<sup>83</sup> *Id.* at 831.

<sup>84</sup> See *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (“The Constitution also requires, however, that Washington’s assisted-suicide ban be rationally related to legitimate government interests.”).

signing what he christened a “comprehensive pro-life measure,” former Indiana Governor Mike Pence praised HEA 1337 as “ensur[ing] the dignified final treatment of the unborn.”<sup>85</sup> A spokeswoman on behalf of Texas Governor Greg Abbott struck a similar chord when stating that Texas’s “proposed rule changes affirm the value and dignity of all life.”<sup>86</sup> State Representative Robert McColley introduced Ohio House Bill 417 as “ensur[ing] that the lives of aborted infants are treated with dignity.”<sup>87</sup> Similarly, in *Planned Parenthood v. Commissioner*, the State of Indiana articulated multiple formulations of its interest in mandating interment or cremation: (1) “to treat fetal remains with the same dignity as other human remains,” (2) “promoting respect for human life by ensuring proper disposal of fetal remains,” and (3) “ensuring that fetal remains be treated with humane dignity.”<sup>88</sup>

These descriptive parallels reveal the common origin of U.S. fetal disposal laws: the Unborn Infants Dignity Act (“UIDA”).<sup>89</sup> Americans United for Life, a preeminent pro-life public interest law firm and advocacy group, drafted the model legislation to “assist states in ensuring that every mother of a deceased unborn infant is given the opportunity to ensure that her infant is treated with dignity and respect.”<sup>90</sup> Clearly at issue in the UIDA is honoring the passing of the unborn, whose innate worth necessitates that they should be treated like persons under the law. For champions of fetal disposal laws, interment or cremation are the only methods of humane disposal.<sup>91</sup>

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<sup>85</sup> Governor Pence Statement on HEA 1337, IN.GOV (Mar. 24, 2016), [http://www.in.gov/ActiveCalendar/EventList.aspx?fromdate=8/1/2016&todate=8/31/2016&display=Month&type=public&eventidn=244247&view=EventDetails&information\\_id=240077&print=print](http://www.in.gov/ActiveCalendar/EventList.aspx?fromdate=8/1/2016&todate=8/31/2016&display=Month&type=public&eventidn=244247&view=EventDetails&information_id=240077&print=print); see also Greg Margason, *Gov. Pence Signs Controversial Abortion Restriction Bill into Law*, FOX 59 (Mar. 24, 2016, 5:09 PM), <http://fox59.com/2016/03/24/gov-pence-signs-controversial-abortion-restriction-bill-into-law/>.

<sup>86</sup> See Hannah Wise, *New Texas Rules Would Require Fetal Tissue to Be Cremated or Buried*, DALL. NEWS (July 6, 2016), <http://www.dallasnews.com/news/politics/2016/07/06/new-texas-rule-require-fetal-tissue-to-be-cremated-buried>.

<sup>87</sup> Jeremy Pelzer, *Aborted Fetuses To Be Buried or Cremated Under Proposed Ohio House Legislation*, CLEVELAND.COM (Dec. 23, 2015, 3:39 PM), [http://www.cleveland.com/open/index.ssf/2015/12/aborted\\_fetuses\\_to\\_be\\_buried\\_o.html](http://www.cleveland.com/open/index.ssf/2015/12/aborted_fetuses_to_be_buried_o.html).

<sup>88</sup> *Planned Parenthood*, 194 F. Supp. 3d at 832.

<sup>89</sup> AMS. UNITED FOR LIFE, UNBORN INFANTS DIGNITY ACT (2016), <http://www.aul.org/wp-content/uploads/2015/08/AUL-Unborn-Infants-Dignity-Act-2016-LG-FINAL-8-05-16.pdf>.

<sup>90</sup> *Id.* at 2.

<sup>91</sup> *Cf. id.* at 3, 8 (including model language expressing that only interment or cremation are viable options to afford deceased “unborn infants” the same respect and

Central to the abortion debate is the extent to which a fetus constitutes a person under the Fourteenth Amendment.<sup>92</sup> Pro-choice advocates argue that categorizing the fetus as a person will lead to the prioritization of fetal rights over and against the mother's constitutional right to privacy.<sup>93</sup> Alternatively, fetal personhood, or the idea that zygotes and embryos are legal persons subject to the protections and benefits of the law, frequently serves as the ideological underpinning of anti-choice legislation.<sup>94</sup> Fetal disposal laws appear to be predicated on this very concept.<sup>95</sup>

Fourteenth Amendment jurisprudence indicates the extent to which treating the unborn as persons may constitute a legitimate governmental interest.<sup>96</sup> In its prohibition against the deprivation of life, liberty, or property, without due process of law, the Fourteenth Amendment limits protection to "persons."<sup>97</sup> Yet, the Constitution sets forth no framework for defining personhood. Nevertheless, determining what exactly is meant by the term is important because

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dignity as human beings).

<sup>92</sup> Compare Joyce Arthur, *Personhood: Is a Fetus a Human Being?*, PRO CHOICE ACTION NETWORK (Aug. 2001), <http://www.prochoiceactionnetwork-canada.org/articles/fetusperson.shtml> (analyzing the flawed reasoning behind the argument for why fetuses are persons), with Nancy Flanders, *Responding to Claims That the Unborn Are "Not Human Beings" and "Not People,"* LIVE ACTION NEWS (Aug. 14, 2012, 5:58 PM), <http://liveactionnews.org/responding-to-claims-that-the-unborn-are-not-human-beings/> (countering arguments for why a fetus is not a human being).

<sup>93</sup> See *Whose Right to Life?*, CTR. FOR REPROD. RIGHTS 2 (2014), [https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/GLP\\_RTL\\_ENG\\_Updated\\_8%2014\\_Web.pdf](https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/GLP_RTL_ENG_Updated_8%2014_Web.pdf); *What's Wrong with Fetal Rights*, ACLU, <https://www.aclu.org/other/whats-wrong-fetal-rights> (last visited July 15, 2017).

<sup>94</sup> See *Personhood*, REWIRE, <https://rewire.news/legislative-tracker/law-topic/personhood/> (last updated Jan. 6, 2017); *Personhood in the Womb: A Constitutional Question*, NPR (Nov. 21, 2013, 3:54 PM), <http://www.npr.org/2013/11/21/246534132/personhood-in-the-womb-a-constitutional-question>.

<sup>95</sup> See Matt Osborne, *'Humane' Fetus Disposal Laws: The New Attack On Abortion Rights*, BREITBART UNMASKED (Dec. 15, 2015), <http://www.breitbartunmasked.com/2015/12/15/humane-fetus-disposal-laws-the-new-attack-on-abortion-rights/> (describing fetal disposal laws as a "perfectly logical extension of the 'personhood' propaganda"); Ian Tuttle, *Pence Mockery Syndrome*, NAT'L REV. (Apr. 8, 2016, 6:14 PM), <http://www.nationalreview.com/article/433879/mike-pence-abortion-law> ("Since it's possible that the 'product of conception' might be a person, women should be discouraged from making a decision about it lightly.").

<sup>96</sup> See U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1; see also *Roe v. Wade*, 410 U.S. 113, 156-57 (1973).

<sup>97</sup> U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."); U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . .").



this categorical designation delineates what entities and which of their activities are entitled to due process under the Constitution.<sup>98</sup>

There is ample evidence to suggest that the Framers intended “person” to, at a minimum, encompass all human beings.<sup>99</sup> Various Supreme Court decisions confirm this understanding.<sup>100</sup> In *Yick Wo v. Hopkins*,<sup>101</sup> for example, the Supreme Court struck down a San Francisco ordinance that required laundries in wooden buildings to receive a permit from the city’s Board of Supervisors. Persons of Chinese descent owned over 200 laundries in the city, yet the Board of Supervisors had issued not one permit to a Chinese laundry owner.<sup>102</sup> In reasoning that the protections of the Fourteenth Amendment “are universal in their application . . . without regard to any differences of race, of color, or of nationality,” the Court found Chinese nationals to be “persons” under the Equal Protection Clause.<sup>103</sup> The Court’s Fourteenth Amendment jurisprudence has explicitly affirmed other groups within this constitutional designation: incompetent persons,<sup>104</sup> nonmarital children,<sup>105</sup> prisoners,<sup>106</sup> and undocumented schoolchildren,<sup>107</sup> to name a few.

Although all human beings likely qualify as constitutional persons, there is no jurisdiction in the United States that treats prenatal entities as persons for purposes of constitutional protection. Two states have enacted statutory language expressing that life begins at conception.<sup>108</sup> These laws, however, contain a provision rendering them subject to

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<sup>98</sup> See Imani Gandy, *Roe v. Wade and Fetal Personhood: Juridical Persons Are Not Natural Persons, and Why It Matters*, REWIRE (Jan. 3, 2013, 8:18 PM), <https://rewire.news/article/2013/01/03/fetal-personhood-laws-juridical-persons-are-not-natural-persons-and-why-it-matter/>.

<sup>99</sup> See Robert Bork & Nathan Schleuter, *Constitutional Persons: An Exchange on Abortion*, FIRST THINGS (Jan. 1, 2003), <https://www.aei.org/publication/constitutional-persons/> (explicating the “abundant evidence” from the congressional debates indicating the framers’ intention for “person” to include all human beings).

<sup>100</sup> See Kelly J. Hollowell, *Defining a Person Under the Fourteenth Amendment: A Constitutionally and Scientifically Based Analysis*, 14 REGENT U. L. REV. 67, 74-77 (2002).

<sup>101</sup> 118 U.S. 356, 374 (1886).

<sup>102</sup> *Id.* at 362.

<sup>103</sup> *Id.* at 369.

<sup>104</sup> See *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 278-79 (1990).

<sup>105</sup> See *Levy v. Louisiana*, 391 U.S. 68, 70 (1968).

<sup>106</sup> See *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974).

<sup>107</sup> See *Plyler v. Doe*, 457 U.S. 202, 210-16 (1982).

<sup>108</sup> See KAN. STAT. ANN. § 65-6732 (2017) (“The life of each human being begins at fertilization.”); MO. REV. STAT. § 1.205.1(1) (2017) (“The life of each human being begins at conception . . .”).

the Constitution and Supreme Court precedent.<sup>109</sup> Similarly, no federal act has defined a fetus as a constitutional person.<sup>110</sup> Therefore, at this time, constitutional protection does not extend to the unborn.

Despite this, the pro-life movement points to various federal and state laws that appear to be premised on the notion of fetal personhood. Some states recognize a wrongful death claim where a tortfeasor's acts cause the death of a fetus.<sup>111</sup> Others criminally prohibit fetal homicide, thereby recognizing the unborn child as a potential victim.<sup>112</sup> In 2016, Utah passed the first fetal pain bill, requiring doctors to administer anesthesia to a fetus aborted at twenty weeks of gestation.<sup>113</sup> Many consider the Unborn Victims of Violence Act of 2004 to be the first step toward federal recognition of fetal personhood.<sup>114</sup> To some extent, these laws afford fetuses the same privileges and protections as postnatal human beings. Mere analogous treatment under the law, however, does not in itself convey constitutional personhood onto fetuses.

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<sup>109</sup> See KAN. STAT. ANN. § 65-6732(b) (stating that the law is “subject only to the [C]onstitution of the United States, and decisional interpretations thereof by the United States [S]upreme [C]ourt”); MO. REV. STAT. § 1.205.2 (same).

<sup>110</sup> Cf. John A. Robertson, *Fetal Personhood and the Constitution*, BILL HEALTH (Aug. 20, 2015), <http://blogs.harvard.edu/billofhealth/2015/08/20/fetal-personhood-and-the-constitution/> (hypothesizing about what would happen should a federal personhood law ever pass).

<sup>111</sup> See, e.g., *Mack v. Carmack*, 79 So. 3d 597, 611 (Ala. 2011) (upholding cause of action under wrongful death act for death of pre-viable fetus); *Pino v. United States*, 183 P.3d 1001, 1006 (Okla. 2008) (holding that Oklahoma's wrongful death statute afforded a cause of action for the death of a fetus).

<sup>112</sup> See, e.g., ALA. CODE § 13A-6-1(a)(3) (2017) (defining person, for the purpose of criminal homicide or assault, to include an unborn child); IDAHO CODE ANN. § 18-4001 (2017) (enumerating that murder includes the unlawful killing of a human embryo or fetus under certain conditions); MICH. COMP. LAWS ANN. § 750.322 (2017) (defining the willful killing of an unborn child by any injury to the mother of the child as manslaughter); TEX. PENAL CODE ANN. § 1.07(a)(26) (2017) (defining an individual as a human being who is alive, including an unborn child at every stage of gestation); see also GA. CODE ANN. § 16-5-28(c) (2017) (assault of an unborn child); KAN. STAT. ANN. § 21-5419 (2017) (specifying that “person” and “human being” shall also mean an unborn child as used in state criminal statutes).

<sup>113</sup> UTAH CODE ANN. § 76-7-308.5 (2017); Jack Healy, *When Can Fetuses Feel Pain? Utah Abortion Law and Doctors Are at Odds*, N.Y. TIMES (May 4, 2016), <http://www.nytimes.com/2016/05/05/us/utah-abortion-law-fetal-anesthesia.html>.

<sup>114</sup> See Unborn Victims of Violence Act, 18 U.S.C. § 1841 (2012); *Does the “Unborn Victims of Violence Act” (UVVA), Protecting Fetal Rights, Threaten Abortion Rights?*, PROCON.ORG, <http://aclu.procon.org/view.answers.php?questionID=000678> (last visited Jan. 4, 2017).

Under the Supremacy Clause, the Supreme Court has final say on the matter.<sup>115</sup> In *Roe v. Wade*,<sup>116</sup> the Supreme Court rejected Texas's claim that a "fetus is a 'person' within the language and meaning of [the Constitution]." The Court acknowledged that although the Constitution provides no definition of personhood, in each of its appearances "person" denotes postnatal application.<sup>117</sup> Additionally, the Court identified inconsistencies between the premise of fetal personhood and contemporaneous abortion statutes.<sup>118</sup> In holding that the right to privacy afforded by the Due Process Clause encompasses the right to terminate a pregnancy prior to viability, the *Roe* Court declined to extend constitutional protections to the unborn.<sup>119</sup>

As fetuses are not constitutional persons, states do not have a legitimate interest in affirming the human-like dignity of the unborn. The Southern District of Indiana in *Planned Parenthood v. Commissioner* arrived at this very conclusion when considering Indiana's interest in mandating interment or cremation of fetal remains.<sup>120</sup> The district court reasoned, "if the law does not recognize a fetus as a person, there can be no legitimate state interest in treating an aborted fetus the same as a deceased human."<sup>121</sup> Moreover, the court rejected Indiana's other purported interest, showing respect for human life, because such an interest is only legitimate while the life of the fetus is still a potentiality.<sup>122</sup>

These conclusions must be reconciled with *City of Akron's* explicit affirmation of proper disposal of fetal remains as a legitimate governmental interest.<sup>123</sup> Undoubtedly, the state's ability to promote public health encompasses the ability to regulate fetal disposal akin to medical waste disposal.<sup>124</sup> Human anatomical waste, comparable to

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<sup>115</sup> See *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958) (affirming that the federal judiciary's interpretation of the Constitution is the supreme law of the land and that governmental officials must defer to its interpretation).

<sup>116</sup> 410 U.S. 113, 157 (1973).

<sup>117</sup> *Id.* at 156-58.

<sup>118</sup> See *id.*

<sup>119</sup> *Id.* at 158.

<sup>120</sup> *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r*, 194 F. Supp. 3d 818, 832 (S.D. Ind. 2016).

<sup>121</sup> *Id.*

<sup>122</sup> See *id.*

<sup>123</sup> *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 452 n.45 (1983).

<sup>124</sup> Cf. PUB. HEALTH L. CTR., STATE & LOCAL PUBLIC HEALTH: AN OVERVIEW OF REGULATORY AUTHORITY 1-2 (2015), [http://publichealthlawcenter.org/sites/default/files/resources/phlc-fs-state-local-reg-authority-publichealth-2015\\_0.pdf](http://publichealthlawcenter.org/sites/default/files/resources/phlc-fs-state-local-reg-authority-publichealth-2015_0.pdf) (positing the state

other forms of pathological waste, presents a risk of infection to those it may come into contact with during removal, transport, and disposal.<sup>125</sup> Accordingly, the government's interest lies in the minimization of this risk for patients, visitors, medical workers, transportation personnel, and the public at-large.<sup>126</sup> The constitutional problem arises when fetal disposal laws single out fetal remains and regulate their disposal differently than general pathological waste.<sup>127</sup>

Fetal disposal laws' treatment of aborted and miscarried fetal matter as distinct from other pathological waste products is irrational. The World Health Organization defines pathological waste as human tissues, organs or fluids, body parts, fetuses, and unused blood products.<sup>128</sup> Similarly, the International Committee of the Red Cross enumerates fetuses as an example of pathological waste entailing risk of infection together with tissue, placentas, removed organs and limbs, and laboratory animals.<sup>129</sup> These definitions illustrate how the medical community understands fetal remains not to be notably unique, but to be substantially similar to other forms of medical waste in terms of hazard and treatment.<sup>130</sup>

In fact, the medical community understands fetal matter to pose the same risk of contamination as other forms of pathological waste.<sup>131</sup> This shared risk is likely the reason why many states treat fetal remains as pathological or infectious waste.<sup>132</sup> Even Indiana, prior to the passage of HEA 1337, allowed fetal remains to be incinerated alongside infectious medical waste.<sup>133</sup>

Fetal disposal laws do not further the state interest in public health and safety. A disposal method "is effective if it inactivates or kills a

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power of self-governance to encompass the "essential role of protecting and promoting health through population-wide actions").

<sup>125</sup> See INT'L COMM. RED CROSS, *supra* note 39, at 16-18.

<sup>126</sup> Cf. *id.*; WORLD HEALTH ORG., *supra* note 42, at 20-30.

<sup>127</sup> See H. Enrolled Act 1337, 119th Gen. Assemb., 2nd Reg. Sess. (Ind. 2016); H.B. 815, 2016 Leg., Reg. Sess. (La. 2016); 41 Tex. Reg. 7664 (Sept. 30, 2016).

<sup>128</sup> WORLD HEALTH ORG., *supra* note 42, at 4.

<sup>129</sup> INT'L COMM. RED CROSS, *supra* note 39, at 100.

<sup>130</sup> See *id.*; WORLD HEALTH ORG., *supra* note 42, at 4.

<sup>131</sup> Cf. Smith, *supra* note 53 (explaining how most states treat fetal tissue the same as human tissue and thus "dispose of it in a manner that protects public health, such as cremation or incineration to destroy potentially infectious material, or burial in a secured environment").

<sup>132</sup> See Callahan, *supra* note 53 ("Most states treat fetal tissue from an abortion as medical waste because it's typically considered to be infectious or potentially infectious."); *id.* ("By law in most states, [fetal remains] have to be treated like hazardous medical waste, just like other human tissue."); see also Crockett, *supra* note 53.

<sup>133</sup> See 410 IND. ADMIN. CODE 35-1-3 (2017).

significant number of the microorganisms that can cause infection.”<sup>134</sup> Apart from the cultural, ethical, and aesthetic factors influencing the disposal methods permitted by a particular state, it is clear that a wide variety of methods are effective for treating pathological matter and any subset thereof.<sup>135</sup> Thus, disposal methods designated for pathological waste sufficiently eliminate the risk of infectious disease posed by fetal tissue.<sup>136</sup> To the extent fetal remains pose no greater risk than general pathological waste, fetal disposal laws fail to reasonably relate to the government’s interest in public health and thus violate the Due Process Clause of the Fourteenth Amendment.

Moreover, the irrationality of HEA 1337 goes beyond mere statutory discrimination of fetal remains. HEA 1337 allows abortion patients to assume complete responsibility for their fetal remains.<sup>137</sup> Should a woman so choose, HEA 1337 does not mandate that she then dispose of the fetal matter by way of interment or cremation.<sup>138</sup> Yet, fetal remains pose the same risk of infection regardless of whether they are within the possession of an individual woman or an abortion provider. Accordingly, any statutory distinction regarding fetal disposal in furtherance of public health must extend to whoever is providing for final disposition without exception. In carving out an exception to its mandate of interment or cremation for individual women, Indiana’s fetal disposal law fails to promote public health.

#### *B. Fetal Disposal Laws Constitute an Undue Burden on Abortion Access*

The day after the Southern District of Indiana blocked enforcement of HEA 1337, abortion providers challenged Louisiana’s fetal disposal

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<sup>134</sup> Cf. U.S. ARMY PUB. HEALTH COMMAND, RESOURCES FOR EVALUATING MEDICAL WASTE TREATMENT TECHNOLOGIES 6 (2013), [https://phc.amedd.army.mil/PHC%20Resource%20Library/TIP\\_No.37-016-0513.Evaluating.Alternative.Waste.Treatment.Technologies.pdf](https://phc.amedd.army.mil/PHC%20Resource%20Library/TIP_No.37-016-0513.Evaluating.Alternative.Waste.Treatment.Technologies.pdf) (presenting the hazard of regulated medical waste as the “risk of infection from bacteria or viruses”).

<sup>135</sup> These methods include, but are not limited to the following: incineration, cremation, interment, steam treatment technologies, chemical disinfection, alkaline digestion, aerobic composting, promession, and anaerobic digestion. See INT’L COMM. RED CROSS, *supra* note 39, at 59; WORLD HEALTH ORG., *supra* note 42, at 106-47.

<sup>136</sup> Proponents of fetal disposal laws have not put forth any evidence suggesting disposal methods “used by abortion providers to dispose of fetal tissue . . . are less safe or not optimal for public health and safety.” Alexa Ura, *Sharp Disagreements at Fetal Remains Hearing*, TEX. TRIB. (Aug. 4, 2016, 2:41 PM), <https://www.texastribune.org/2016/08/04/sharp-disagreements-fetal-remains-hearing/>.

<sup>137</sup> H. Enrolled Act 1337, 119th Gen. Assemb., 2nd Reg. Sess. (Ind. 2016).

<sup>138</sup> *Id.*

law in *June Medical Services v. Gee*.<sup>139</sup> Prior, the Louisiana Department of Health and Hospitals (“DHH”) promulgated rules regarding final disposition, exempting “fetal remains” from the statute requiring interment or cremation for “human remains.”<sup>140</sup> In practice, this exclusion permitted health facilities to dispense with the aborted material in the same manner as medical waste.<sup>141</sup> Louisiana House Bill 815 (“HB 815”), however, requires “each physician who performs or induces an abortion which does not result in a live birth” to ensure that “the remains of the child are disposed by interment or cremation.”<sup>142</sup> In their complaint, the abortion providers argued that Indiana’s mandate violates the Due Process Clause of the Fourteenth Amendment by imposing an undue burden on a woman’s right to terminate a pregnancy prior to viability.<sup>143</sup>

In affirming the central tenets of *Roe*, *Planned Parenthood v. Casey* abandoned *Roe*’s rigid trimester framework in favor of an undue burden standard.<sup>144</sup> Under *Casey*, a statute is unconstitutional if it places “a substantial obstacle in the path of a woman’s choice,” even if enacted in furtherance of a valid state interest.<sup>145</sup> That is, an unnecessary health regulation that has “the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion” imposes an undue burden on a woman’s right to privacy.<sup>146</sup> A finding of undue burden is shorthand for finding that the regulation violates the Due Process Clause of the Fourteenth Amendment.<sup>147</sup>

The Supreme Court’s most recent abortion decision clarified the application of the undue burden framework.<sup>148</sup> *Whole Woman’s Health*

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<sup>139</sup> Complaint at 2, *June Med. Servs. v. Gee*, No. 3:16-cv-00444 (M.D. La. July 1, 2016).

<sup>140</sup> See LA. STAT. ANN. § 8:652 (2017).

<sup>141</sup> See H. Con. Res. 166, 2015 Leg., Reg. Sess. (La. 2015).

<sup>142</sup> H.B. 815, 2016 Leg., Reg. Sess. (La. 2016).

<sup>143</sup> Complaint at 35-36, *June Med. Servs. v. Gee*, No. 3:16-cv-00444 (M.D. La. July 1, 2016).

<sup>144</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833, 837 (1992).

<sup>145</sup> *Id.* at 877.

<sup>146</sup> *Id.* at 878.

<sup>147</sup> See *id.* at 877 (finding the spousal notification provision to impose an undue burden and thus violate the Due Process Clause of the Fourteenth Amendment).

<sup>148</sup> See Margaret Talbot, *The Supreme Court’s Just Application of the Undue-Burden Standard for Abortion*, NEW YORKER (June 27, 2016), <http://www.newyorker.com/news/news-desk/the-supreme-courts-just-application-of-the-undue-burden-standard-for-abortion>; Mary Ziegler, *Symposium: The Court Once Again Makes the “Undue-Burden” Test a Referendum on the Facts*, SCOTUSBLOG (June 27, 2016, 2:24 PM), <http://www.scotusblog.com/2016/06/symposium-the-court-once-again-makes-the-undue-burden-test-a-referendum-on-the-facts/>.

*v. Hellerstedt* quashed the notion that traditional rational basis deference governs abortion regulations, instead interpreting the undue burden standard as necessitating a balancing test.<sup>149</sup> Simply, when analyzing the purpose or effect of an abortion regulation, *Casey* requires the weighing of medical benefits guaranteed by the regulation against the burdens on access to abortion.<sup>150</sup> The district court must closely examine the factual basis underlying the state's interest to determine the extent to which the burden on access is contextually and empirically "undue."<sup>151</sup> Furthermore, when evaluating the benefits and burdens of a regulation, a district court need not merely defer to the factual findings of the legislature nor must it conclude its analysis with a finding of substantive medical benefits.<sup>152</sup>

With regard to Louisiana's HB 815, it is unlikely that a court will determine that its intended purpose is to impede abortion access. From the face of the statute, there is no indication that the Louisiana Legislature sought to make abortion any less accessible.<sup>153</sup> Although HB 815 presents extensive findings relating to its prohibition of "post-abortion harvesting," the statute as written renders these findings inapplicable to the fetal disposal provision.<sup>154</sup> The legislative history of HB 815 is similarly unpersuasive of illicit legislative intent.<sup>155</sup> Accordingly, since HB 815 provides no facially apparent purpose or illegitimate findings, "one is left to infer that the legislature sought to further a constitutionally acceptable objective."<sup>156</sup> Here, that objective is the promotion of public health and safety, as proper disposal of fetal matter minimizes the risk of infectious disease.<sup>157</sup>

In contrast, a more fact-intensive inquiry is necessary to determine the effect of an abortion regulation. To illustrate, *Whole Woman's Health* relied heavily on the factual findings of the district court, which ultimately informed the Court's balancing of the benefits and burdens of HB 2, a 2013 Texas house bill that restricted abortion access by

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<sup>149</sup> See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2299, 2309 (2016); see also *Planned Parenthood v. Abbott (Abbott II)*, 748 F.3d 583, 590, 594 (5th Cir. 2014).

<sup>150</sup> *Whole Woman's Health*, 136 S. Ct. at 2309.

<sup>151</sup> See Linda Greenhouse & Reva B. Siegel, *Casey and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 *YALE L.J.* 1428, 1466-73 (2016).

<sup>152</sup> *Whole Woman's Health*, 136 S. Ct. at 2310.

<sup>153</sup> See H.B. 815, 2016 Leg., Reg. Sess. (La. 2016).

<sup>154</sup> See *id.*

<sup>155</sup> See *id.*

<sup>156</sup> *Whole Woman's Health*, 136 S. Ct. at 2310.

<sup>157</sup> See *supra* notes 124-26 and accompanying text.

requiring clinics to meet hospital-like facility standards.<sup>158</sup> Yet as of now, the practical consequences of the government mandate of interment or cremation remain unknown.<sup>159</sup> Therefore, it is only possible to hypothesize about the effect of fetal disposal laws and determine if they will impermissibly limit women's access to abortion.

Many predict that fetal disposal laws will lead to an increase in the cost of abortion, an already expensive procedure.<sup>160</sup> At Hope Medical Group for Women, one of a few abortion clinics remaining in Louisiana, medical and surgical abortions start at \$550.<sup>161</sup> The price increases to \$795 for a second term surgical abortion conducted sixteen weeks after the last menstrual period.<sup>162</sup> These numbers fall relatively close to the national average.<sup>163</sup> As a white Louisiana woman makes an average of \$31,586 a year, an early term abortion costs nearly one-fourth of her monthly income, with a second term abortion costing thirty percent.<sup>164</sup> In comparison, an African-American woman

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<sup>158</sup> See *Whole Woman's Health*, 136 S. Ct. at 2311-13 (examining the record evidence giving support to the district court's opinion that the admitting privileges requirement constituted an undue burden); *id.* at 2315-18 (examining the record evidence giving support to the district court's opinion that the surgical center requirement constituted an undue burden).

<sup>159</sup> In large part, this is because HEA 1337 and the Texas agency rule change have been temporarily enjoined. See *supra* note 26 and accompanying text. Additionally, parties to the suit challenging Louisiana's fetal disposal law have agreed to temporarily postpone HB 815's enforcement. See *June Medical Services v. Gee*, CTR. FOR REPROD. RIGHTS (June 13, 2017), <http://www.reproductiverights.org/case/june-medical-services-v-gee>.

<sup>160</sup> See Lydia DePillis, *The Economics of Fetus Disposal*, HOUS. CHRON. (July 8, 2016, 3:19 PM), <http://www.houstonchronicle.com/business/texanomics/article/The-economics-of-fetus-disposal-8348124.php>; Lamar Hankins, *Proposed Fetal Tissue Rules Create 'Staggering Financial Burden' for Texans*, TEX. OBSERVER (Aug. 3, 2016, 11:08 AM), <https://www.texasobserver.org/op-ed-fetal-tissue-dshs/>; Mark Reagan, *Texas Fetal Burial Proposal Would Add Thousands to the Cost of an Abortion*, SAN ANTONIO CURRENT (Aug. 5, 2016, 6:00 AM), <http://www.sacurrent.com/the-daily/archives/2016/08/05/texas-fetal-burial-proposal-would-add-thousands-to-the-cost-of-an-abortion>.

<sup>161</sup> *Appointments and Fees*, HOPE MED. GRP. FOR WOMEN, [http://www.hopemedical.com/03\\_appts\\_fees.html](http://www.hopemedical.com/03_appts_fees.html) (last visited Jan. 5, 2017).

<sup>162</sup> *Id.*

<sup>163</sup> In 2011 and 2012, the average cost of a surgical abortion at 10 weeks gestation was \$495. Jenna Jerman & Rachel K. Jones, *Secondary Measures of Access to Abortion Services in the United States, 2011 and 2012*, 24 WOMEN'S HEALTH ISSUES 419, 419 (2014).

<sup>164</sup> See NAT'L P'SHIP FOR WOMEN & FAMILIES, LOUISIANA WOMEN AND THE WAGE GAP I (Apr. 2016), <http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/4-2016-la-wage-gap.pdf>. Applying current national and state tax rates to the average income of a white Louisiana woman, I determined her yearly take-home pay to be \$27,707, or \$2,309 a month. See *id.*



in Louisiana makes an average of only \$26,400 a year.<sup>165</sup> Thus, an early term abortion costs over one-third of her monthly income, with a second term abortion costing forty percent.<sup>166</sup>

A rise in abortion price will undoubtedly make it more difficult for some women to obtain an abortion.<sup>167</sup> In particular, low-income and minority patients will be vulnerable to price fluctuations.<sup>168</sup> This is because many states restrict insurance coverage of abortion procedures in either private plans, plans offered through insurance exchanges, insurance plans for public employees, or some combination thereof.<sup>169</sup> Additionally, Congress passed the Hyde Amendment in 1976, thereby excluding federal Medicaid funding for abortions except in the case of rape and incest, or when a pregnant woman's life is threatened by a physical disorder, illness, or injury.<sup>170</sup> Without insurance coverage for abortions, patients must cover the entire expense, with the financial strain presenting an insurmountable hurdle for many women.<sup>171</sup>

Interment and cremation are considerably more expensive procedures than contracting with third party waste disposal companies to dispense with fetal matter.<sup>172</sup> Two companies who

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<sup>165</sup> See NAT'L WOMEN'S LAW CTR., WORKPLACE JUSTICE: EQUAL PAY FOR AFRICAN AMERICAN WOMEN 2 (Aug. 2016), [https://nwlc.org/wp-content/uploads/2016/08/NEW\\_Equal-Pay-for-African-American-Women.pdf](https://nwlc.org/wp-content/uploads/2016/08/NEW_Equal-Pay-for-African-American-Women.pdf).

<sup>166</sup> Applying current national and state tax rates to the average income of an African-American Louisiana woman, I determined her yearly take-home pay to be \$23,507, or \$1,959 per month. See *id.*

<sup>167</sup> See Erica Hellerstein & Tara Culp-Ressler, *Pricing American Women out of Abortion, One Restriction at a Time*, THINKPROGRESS (Feb. 25, 2015), <https://thinkprogress.org/pricing-american-women-out-of-abortion-one-restriction-at-a-time-c545c54f641f#5r8lb1njn> ("And that doesn't account for the fees that accumulate as a result of the legislative barriers to the procedure, which end up disproportionately burdening women of limited resources and economic means.").

<sup>168</sup> See *id.*

<sup>169</sup> See *Restricting Insurance Coverage of Abortion*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/restricting-insurance-coverage-abortion> (last visited Dec. 1, 2016).

<sup>170</sup> See Hyde Amendment of 1976, Pub. L. No. 94-439, 90 Stat. 1418; *Public Funding for Abortion*, ACLU, <https://www.aclu.org/other/public-funding-abortion> (last visited Dec. 29, 2016).

<sup>171</sup> Researchers at the University of California, San Francisco determined that over 4,000 women were unable to obtain an abortion in 2008 because they could not afford the cost of travel or the procedure itself before the gestational age cutoff. See Ushma D. Upadhyay et al., *Denial of Abortion Because of Provider Gestational Age Limits in the United States*, 104 AM. J. PUB. HEALTH 1687, 1692 (2014); see also Hellerstein & Culp-Ressler, *supra* note 167; Katie Klabusich, *Louisiana Becomes Latest Front in National Battle over Abortion Rights*, TRUTHOUT (July 20, 2016), <http://www.truth-out.org/news/item/36897-louisiana-becomes-latest-front-in-national-battle-over-abortion-rights>.

<sup>172</sup> See DePillis, *supra* note 160.

operate along the Gulf Coast charge \$50 to \$100 for a weekly pick up of a twenty-eight gallon box of medical waste.<sup>173</sup> In contrast, direct cremation, or cremation without a funeral or memorial service, starts at \$695 per adult body in Louisiana but can go much higher.<sup>174</sup> Interment is the pricier option of the two, with its price largely dependent on a number of factors: embalming and body preparation, grave space, cost to dig grave, headstone, funeral ceremony and viewing, and casket type.<sup>175</sup> Nevertheless, an immediate burial, or interment without a ceremony, can run over \$3,000, almost five times the price of direct cremation.<sup>176</sup>

Someone will need to absorb the increased cost resulting from government mandate of interment or cremation. At a minimum, abortion providers will have to implement new administrative and logistical procedures while continuing to contract with medical treatment companies for the remaining medical waste.<sup>177</sup> Medical facilities searching for crematory and funeral bids have found vendors unwilling to work with them, further driving up overhead expenses.<sup>178</sup> As abortion clinics already operate under slim margins, providers will likely have to increase the cost of the procedure just to stay in business.<sup>179</sup> Abortion patients paying out of pocket will experience the increase in price most dramatically.<sup>180</sup>

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<sup>173</sup> See *id.*

<sup>174</sup> See *Louisiana Cremation Services*, LEGACY FUNERAL SERVS., <http://www.legacycremationservices.com/cremation-services-costs/louisiana> (last visited Jan. 5, 2017); *Trusted Cremation Services in Louisiana*, HERITAGE CREMATION PROVIDERS, <http://www.heritagecremationprovider.com/cremation-services-costs/louisiana> (last visited Jan. 5, 2017).

<sup>175</sup> *Economics of the Funeral Industry*, PBS, <http://www.pbs.org/pov/homegoings/economics-of-the-funeral-industry/> (last visited Jan. 5, 2017).

<sup>176</sup> WALTERS FUNERAL HOME, GENERAL PRICE LIST 3 (2015), <https://s3.amazonaws.com/CFSV2/fileuploads/6356/GPL12-1-16.pdf> (providing an immediate burial costing \$3,172); see also *General Price List*, KEARNS FUNERAL SERV. 5 (2017) (providing an immediate burial costing \$3,955); *General Price List*, ROSE FAMILY FUNERAL HOME & CREMATORY (Apr. 16, 2016), <http://simivalleymortuary.com/168/General-Price-List.html> (providing an immediate burial costing \$1,495); *Plan a Funeral: General Price List*, MCKNEELY FUNERAL HOME (Nov. 1, 2015), [http://www.mckneelys.com/home/index.cfm/services/pricelist/fh\\_id/10545](http://www.mckneelys.com/home/index.cfm/services/pricelist/fh_id/10545) (providing an immediate burial costing \$3,300).

<sup>177</sup> Cf. Rebecca Grant, *The Latest Anti-Abortion Trend? Mandatory Funerals for Fetuses*, NATION (Oct. 11, 2016), <https://www.thenation.com/article/the-latest-anti-abortion-trend-mandatory-funerals-for-fetuses/> (enumerating logistics and added expenses as issues arising from fetal disposal laws); Green, *supra* note 17 (“The financial burden is going to fall on somebody.”).

<sup>178</sup> See Grant, *supra* note 177.

<sup>179</sup> See Laylan Copelin, *Abortion Debate: Will Bill Close Clinics?*, AUSTIN AM.-

How much the price of an abortion must increase to constitute a substantial obstacle to abortion access remains unclear. The *Casey* Court concluded that Pennsylvania's twenty-four hour waiting period provision did not impose an undue burden on abortion access despite increased costs and delay of abortions.<sup>181</sup> Although the Court left open the possibility that "at some point increased cost could become a substantial obstacle," many jurisdictions have found an increase in cost alone insufficient.<sup>182</sup> In *Planned Parenthood v. Miller*, for example, the District of South Dakota held that a price increase of sixty dollars per abortion did not impermissibly block access to abortion.<sup>183</sup> Similarly, in *Cincinnati Women's Services, Inc. v. Taft*, the Southern District of Ohio found that a twenty-five percent increase in the cost of an abortion did not rise to the level of an undue burden.<sup>184</sup> Few jurisdictions have come out the other way. In *Tucson Women's Clinic v. Eden*, the Ninth Circuit found that because the "individual providers [would] incur tens of thousands of dollars in expenses complying with the scheme," the abortion regulation imposed a substantial obstacle by increasing the cost of an abortion.<sup>185</sup>

Proponents of fetal disposal laws argue that any increase in abortion cost will be insignificant and thus easily absorbed by abortion providers.<sup>186</sup> Admittedly, there is little information about whether the cost of abortion increased in Arkansas or Georgia as a result of their recent enactment of fetal disposal provisions. Whether and to what extent abortion costs will increase as a result of fetal disposal laws is

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STATESMAN (July 9, 2013, 11:01 PM), <http://www.mystatesman.com/news/business/abortion-debate-will-bill-close-clinics/nYkSQ/> (reporting that five clinics in Texas had a profit margin of 3.3 percent in 2012 and lost 6.3 percent in 2011); *Economics of Abortion*, NAT'L ABORTION FED'N. (2003), [http://www.csun.edu/~mg640721/Fall%2006/swrk525/economics\\_of\\_abortion.pdf](http://www.csun.edu/~mg640721/Fall%2006/swrk525/economics_of_abortion.pdf) ("[A]bortion providers have maintained lower than average fees for their services compared with physicians in other specialties.").

<sup>180</sup> See Rhonda Fanning, *Advocates Say Rules to Bury or Cremate Fetal Tissue Burden Abortion Access 'For No Reason,'* KUT 90.5 (Aug. 4, 2016), <http://kut.org/post/advocates-say-rules-bury-or-cremate-fetal-tissue-burden-abortion-access-no-reason>; Hellerstein & Culp-Ressler, *supra* note 167 and accompanying text.

<sup>181</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 901 (1992).

<sup>182</sup> *Id.* at 901.

<sup>183</sup> *Planned Parenthood, Sioux Falls Clinic v. Miller*, 860 F. Supp. 1409, 1420 (D.S.D. 1994).

<sup>184</sup> *Cincinnati Women's Servs., Inc. v. Taft*, 466 F. Supp. 2d 934, 946 (S.D. Ohio 2005).

<sup>185</sup> *Tucson Women's Clinic v. Eden*, 379 F.3d 531, 542 (9th Cir. 2004).

<sup>186</sup> See Anna Paprocki, *Why the Abortion Industry Wants to Ban Funerals for Miscarried Babies*, FEDERALIST (Nov. 14, 2016), <http://thefederalist.com/2016/11/14/abortion-industry-wants-ban-funerals-miscarried-babies/>; Ura, *supra* note 136.

unknown. Thus, without more empirical data, it seems unlikely that the abortion providers in *June Medical Services* will be able to carry their burden of proof with regard to the undue financial burden imposed by HB 815 in Louisiana.

Even if there is little increase in abortion cost resulting from fetal disposal laws, under *Whole Woman's Health*, any burdening of abortion access must be weighed against the medical benefits guaranteed by the regulation.<sup>187</sup> As demonstrated, government mandate of interment or cremation does not offer public health benefits.<sup>188</sup> Because other, less costly disposal options effectively eliminate the possibility of the spread of infection, any burden imposed by fetal disposal laws is seemingly “undue” in light of less burdensome medical waste disposal practices.<sup>189</sup> By increasing the cost of an abortion without providing any medical benefit, government mandate of interment or cremation violates the Due Process Clause of the Fourteenth Amendment.

Notably, the plaintiffs in *June Medical Services* did not concentrate on the undue burden of increased cost; rather, they argued that Louisiana's fetal disposal law violates a woman's right to an abortion prior to viability by banning first-trimester medical abortions.<sup>190</sup> A medical abortion is a nonsurgical procedure used to terminate a pregnancy up to the first ten weeks of pregnancy.<sup>191</sup> During a medical abortion, a patient is given a first dose of an abortion-inducing drug at the clinic but must take a second dose twenty-four to forty-eight hours later at home.<sup>192</sup>

In *June Medical Services*, the plaintiffs maintained that abortion providers cannot comply with HB 815 when administering medical abortions because the “products of conception are passed at home” and then disposed of in a “similar manner as that used during menstruation.”<sup>193</sup> The aborted material resulting from medical abortion is typically collected by a sanitary pad and is physically indistinguishable from menstruation at this early of a gestational

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<sup>187</sup> *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016).

<sup>188</sup> See *supra* Part II.A.

<sup>189</sup> *Id.*

<sup>190</sup> Complaint at 29, *June Med. Servs. v. Gee*, No. 3:16-cv-00444 (M.D. La. July 1, 2016).

<sup>191</sup> See *The Abortion Pill*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/abortion/the-abortion-pill> (last visited Jan. 5, 2017).

<sup>192</sup> *Id.*

<sup>193</sup> Complaint at 16, *June Med. Servs. v. Gee*, No. 3:16-cv-00444 (M.D. La. July 1, 2016).

period.<sup>194</sup> HB 815 requires the prescribing physician to then guarantee that the patient disposes of these soiled materials by way of interment or cremation.<sup>195</sup> This is profoundly unworkable, as the doctor has no control over the disposition of the fetal remains when the patient aborts within the confines of her home. Therefore, by making proper disposal unattainable for women passing fetal material at home, HB 815 criminalizes medical abortion.

The unfeasibility of interment or cremation of medically aborted fetal remains presents another substantial obstacle to abortion access. Many women prefer medical abortion to its alternative as it is noninvasive, highly effective, and can occur within the privacy of one's own home.<sup>196</sup> In fact, medical abortion accounted for forty-three percent of all abortions performed at Planned Parenthood in 2014.<sup>197</sup> The advantages of first trimester medical abortions run deeper than mere convenience for some patients. Women with certain physical conditions complicating surgical abortion, as well as women living in highly volatile domestic violence situations, benefit from the choice of medical abortion.<sup>198</sup> Thus, to the extent that medical abortions are nearly, if not just as effective as surgical abortions, banning medical abortions is an impermissible effect of government mandate of interment or cremation.<sup>199</sup> In this way, Louisiana's fetal disposal law creates a substantial obstacle to pre-viability abortions in direct violation of the Due Process Clause of the Fourteenth Amendment.

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<sup>194</sup> See *Instructions for After Your Abortion*, TAMPA BAY ABORTION CLINIC, <http://www.tampabayabortionclinics.com/abortion-options/surgical-abortion-procedure/instructions-for-after-your-abortion/> (last visited July 12, 2017).

<sup>195</sup> H.B. 815, 2016 Leg., Reg. Sess. (La. 2016).

<sup>196</sup> See Heather D. Boonstra, *Medication Abortion Restrictions Burden Women and Providers — and Threaten U.S. Trend Toward Very Early Abortion*, 16 GUTTMACHER POL'Y REV. 18, 18 (2013); *Comparing Medical vs Surgical Abortion*, HERITAGE CLINIC FOR WOMEN, <https://www.heritageclinic.com/abortion-services/comparing-medical-vs-surgical-abortion/> (last visited July 12, 2017).

<sup>197</sup> Jessie Van Amburg, *More Women Are Seeking the Abortion Pill Instead of Surgery*, MOTTO (Oct. 31, 2016), <http://motto.time.com/4551575/abortion-pill-medical-abortions/>.

<sup>198</sup> Complaint at 7, *June Med. Servs. v. Gee*, No. 3:16-cv-00444 (M.D. La. July 1, 2016).

<sup>199</sup> Compare Mary Fjerstad et al., *Effectiveness of Medical Abortion with Mifepristone and Buccal Misoprostol Through 59 Gestational Days*, 80 CONTRACEPTION 282, 285 (2009) (finding buccal misoprostol-mifepristone regimen to be 98.3 percent effective for women with gestational ages below sixty days and oral misoprostol-mifepristone with a success rate of 96.8 percent), with *Medical Versus Surgical Abortion*, UCSF MED. CTR., [https://www.ucsfhealth.org/education/medical\\_vs\\_surgical\\_abortion/](https://www.ucsfhealth.org/education/medical_vs_surgical_abortion/) (last visited July 11, 2017) (presenting the effectiveness rate of surgical abortion as ninety-eight percent).

C. *Fetal Disposal Laws Impinge on the Constitutional Right to Privacy*

Bypassing the legislative process, the Texas Department of State Health Services (“DSHS”) quietly proposed new agency rules regarding fetal disposal in July of 2016.<sup>200</sup> Prior, DSHS enumerated seven legal means of fetal disposal.<sup>201</sup> Published without announcement in the Texas Register, the suggested change distinguishes between pathological waste and fetal tissue by mandating interment or cremation exclusively for the latter.<sup>202</sup> After a highly contentious public comment period, DSHS made no substantive revisions to the proposed rule.<sup>203</sup> Shortly before taking effect, a federal judge in the Eastern District of Texas temporarily enjoined its enforcement.<sup>204</sup> Despite the block, Texas Governor Greg Abbott signed Senate Bill 8, a reformulation of the DSHS-suggested fetal burial rule, in June of 2017.<sup>205</sup>

Fetal disposal laws raise a red flag for pro-choice advocates with regard to their potential applicability to miscarriages that occur in non-clinical settings.<sup>206</sup> As written, Texas’s mandate of interment or cremation governs all “fetal tissue,” a subcategory of “the products of spontaneous or induced human abortion.”<sup>207</sup> Thus, the rule appears to regulate both electively terminated fetal matter and spontaneously aborted fetal matter, or miscarriages.<sup>208</sup> A joint letter penned to DSHS by the Texas Medical Association and Texas Hospital Association articulates the resultant anxiety most powerfully: “Would the rules, if adopted as proposed, require a woman who experiences spontaneous miscarriage to carry the fetal tissue to a physician’s office . . . for an

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<sup>200</sup> 41 Tex. Reg. 7659 (Sept. 30, 2016).

<sup>201</sup> See *supra* note 56 and accompanying text.

<sup>202</sup> 41 Tex. Reg. 7663-64 (Sept. 30, 2016). The proposed rule permits fetal remains to be disposed of by way of: “incineration followed by interment,” “steam disinfection followed by interment,” “interment,” or “cremation.” *Id.* at 7664.

<sup>203</sup> See *id.*

<sup>204</sup> See Order at 23, *Whole Woman’s Health v. Hellerstedt*, No. 1:16-01300-SS (W.D. Tex. Jan. 27, 2017) (order granting temporary enjoinder of the proposed amendments to Texas administrative code).

<sup>205</sup> S.B. 8, 85th Leg., Reg. Sess. (Tex. 2017).

<sup>206</sup> See Anna Merlan, *Texas’ Proposed New Rules on Burying Fetal Remains Are Just Another Anti-Abortion Law in Disguise*, JEZEBEL (Aug. 5, 2016, 9:15 AM), <http://jezebel.com/texas-proposed-new-rules-on-burying-fetal-remains-are-j-1784867231>; Ura, *supra* note 136.

<sup>207</sup> 41 Tex. Reg. 7664 (Sept. 30, 2016).

<sup>208</sup> See *id.*

assessment?”<sup>209</sup> For many, this reality constitutes an extreme invasion of privacy.<sup>210</sup>

During Texas’s first public comment period, DSHS spokeswoman Carrie Williams denied this potential absurdity,<sup>211</sup> yet Supreme Court decisions indicate that the collective concern over fetal disposal laws’ applicability to miscarriages is valid. The Constitution provides no textual hook for a constitutional right to privacy.<sup>212</sup> In *Griswold v. Connecticut*, however, the Supreme Court invalidated a Connecticut statute banning contraception use by married couples on the basis of a “zone of privacy created by several fundamental constitutional guarantees.”<sup>213</sup> The Court concluded that when the Fourteenth Amendment incorporated various provisions of the Bill of Rights against the States, it also incorporated specific penumbras, including the right to privacy within marital relations.<sup>214</sup> Similarly, *Lawrence v. Texas* struck down a Texas law criminalizing homosexual relations on the premise that “liberty protects the person from unwarranted government intrusions into a dwelling or other private places.”<sup>215</sup>

The Supreme Court has found the constitutional right to privacy to encompass nearly all phases of reproduction and childrearing. Just as *Griswold* concluded that the right to privacy protects contraception use by married couples, *Roe* explicitly extended this to abortion.<sup>216</sup> Similarly, *Eisenstadt v. Baird* found the right to privacy to protect individual decisions about “whether to bear or beget a child.”<sup>217</sup> In *Meyer v. Nebraska*<sup>218</sup> and *Pierce v. Society of Sisters*,<sup>219</sup> the Supreme Court posited the right of privacy as including the parental right to

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<sup>209</sup> Letter from Shanna M. Combs, Chair of Comm. on Reprod. Women’s & Perinatal Health, Tex. Med. Ass’n, & Julie Chicoine, General Counsel, Tex. Hosp. Ass’n, to Allison Hughes, Health Facilities Rule Coordinator, Dep’t of State Health Servs. (Aug. 1, 2016), [https://www.texmed.org/uploadedFiles/Current/2016\\_Advocacy/Texas\\_Legislature/Testimony/TMA%20THA%20Comment%20Regarding%20Special%20Waste%20Disposition%20Rules.pdf](https://www.texmed.org/uploadedFiles/Current/2016_Advocacy/Texas_Legislature/Testimony/TMA%20THA%20Comment%20Regarding%20Special%20Waste%20Disposition%20Rules.pdf).

<sup>210</sup> See Reagan, *supra* note 160.

<sup>211</sup> Alexa Ura, *Texas Not Budging on Rule Requiring Burial or Cremation of Fetal Remains*, TEX. TRIBUNE (Sept. 22, 2016, 9:00 PM), <https://www.texastribune.org/2016/09/22/texas-wont-budge-rule-requiring-burial-or-crematio/>.

<sup>212</sup> See generally U.S. CONST.

<sup>213</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

<sup>214</sup> See *id.* at 486.

<sup>215</sup> *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

<sup>216</sup> *Roe v. Wade*, 410 U.S. 113, 154 (1973).

<sup>217</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

<sup>218</sup> 262 U.S. 390 (1923).

<sup>219</sup> 268 U.S. 510 (1925).

direct the upbringing and education of children. Accordingly, miscarriage, an intermediate step between conception and childbirth, would seem to fall within the purview of the constitutional right to privacy.

Like contraception use or sexual intimacy, miscarriage is profoundly personal.<sup>220</sup> According to a 2013 study by researchers at the Albert Einstein College of Medicine, the public believes that miscarriages occur in five percent or less of all pregnancies.<sup>221</sup> In reality, miscarriage is the most common pregnancy complication, occurring in ten to twenty-five percent of all clinically recognized pregnancies.<sup>222</sup> This widespread misconception about the prevalence of miscarriage may be due in part to the “shame and silence” shrouding miscarriage in the public eye.<sup>223</sup> A misplaced sense of personal responsibility and guilt lead many women to carry the burden of pregnancy loss alone.<sup>224</sup>

For most women, it is not medically necessary that a miscarriage occur in a clinical setting.<sup>225</sup> Many women choose to pass the fetal material at home and do so safely.<sup>226</sup> Furthermore, a significant number of women miscarry before they even know they are pregnant, and some do not learn of their miscarriage until a subsequent prenatal visit.<sup>227</sup> For these women, miscarrying in a clinical setting is not an option should they even want it. When a complication arises, like significant bleeding without effective passage of tissue or signs of

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<sup>220</sup> See THE COMPLETE GUIDE TO MENTAL HEALTH FOR WOMEN 134 (Lauren Slater et al. eds., 2003); Elizabeth Leis-Newman, *Miscarriage and Loss*, 43 MONITOR ON PSYCHOL. 56, 56 (2012); *Grieving a Miscarriage*, ECONDOLLENCE, <http://www.econdolence.com/learn/articles/grieving-miscarriage/> (last visited July 13, 2017).

<sup>221</sup> Jonah Bardos et al., *A National Survey on Public Perceptions of Miscarriage*, 125 OBSTETRICS & GYNECOLOGY 1313, 1313-15 (2015).

<sup>222</sup> *Miscarriage: Signs, Symptoms, Treatment and Prevention*, AM. PREGNANCY ASS'N, <http://americanpregnancy.org/pregnancy-complications/miscarriage/> (last visited July 13, 2017).

<sup>223</sup> See Bardos et al., *supra* note 221, at 1313-15.

<sup>224</sup> See Alexandra Kimball, *Unpregnant: The Silent, Secret Grief of Miscarriage*, GLOBE & MAIL, <http://www.theglobeandmail.com/life/parenting/unpregnant-the-silent-secret-grief-of-miscarriage/article27576775/> (last updated Jan. 5, 2017, 3:26 PM).

<sup>225</sup> See *Miscarriage*, HEALTHLINKBC, <https://www.healthlinkbc.ca/health-topics/hw44090> (last updated May 17, 2017).

<sup>226</sup> See *Frequently Asked Questions*, MISCARRIAGE ASS'N, <http://www.miscarriageassociation.org.uk/information/frequently-asked-questions/#home> (last visited July 13, 2017).

<sup>227</sup> See Andrea Dashiell, *Miscarriage: Causes, Signs, and What to Expect*, PARENTS <http://www.parents.com/pregnancy/complications/miscarriage/understanding-miscarriage/> (last visited July 13, 2017).



infection, doctors recommend seeking consultation.<sup>228</sup> Otherwise, miscarriages do not require any medical treatment.<sup>229</sup>

Were fetal disposal laws to apply to at-home miscarriages, a Texan woman could choose to self-inter or transfer the material to a medical provider, funeral home, or crematorium. Regardless of the choice, the woman will likely need to comply with state laws regarding final disposition of human remains. Hypothetically, she would need to file a Report of Death form with the local registrar of vital statistics within twenty-four hours.<sup>230</sup> This form requires the name, sex, and date of birth of the deceased.<sup>231</sup> Importantly, this information becomes public record after the twenty-fifth anniversary of the date of death.<sup>232</sup> Until then, the record is only available to immediate family members with proper identification.<sup>233</sup> This Report of Death would also serve as the transit permit for the miscarried fetus, allowing the woman to then transport the remains to a service provider or final disposition location of her choosing.<sup>234</sup> Within ten days of the fetal death and before final disposition, the woman would also need to file a death certificate with the local registrar.<sup>235</sup> Finally, if utilizing a funeral home for final disposition, the funeral home must keep a record of the decedent's name, the place of death, and the date of interment or disposal.<sup>236</sup>

State regulation of miscarried fetal remains offends notions of constitutional privacy as guaranteed by the Due Process Clause of the Fourteenth Amendment. By compelling women to undergo the aforementioned administrative procedures, fetal disposal laws force women to reveal this private incident to numerous state officials. This subjects women to public scrutiny as to the timing and cause of death

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<sup>228</sup> See Krissi Danielsson, *Complications After a Miscarriage*, VERYWELL, <https://www.verywell.com/possible-complications-after-a-miscarriage-2371525> (last updated July 2, 2017).

<sup>229</sup> See Antonette T. Dulay, *Miscarriage*, MERCK MANUAL CONSUMER VERSION <https://www.merckmanuals.com/home/women-s-health-issues/complications-of-pregnancy/miscarriage> (last visited July 13, 2017).

<sup>230</sup> See 25 TEX. ADMIN. CODE § 181.2 (2017); see also Jessica Gillespie, *Texas Home Funeral Laws*, NOLO, <http://www.nolo.com/legal-encyclopedia/texas-home-funeral-laws.html> (last visited July 13, 2017).

<sup>231</sup> STATE OF TEX., REPORT OF DEATH 1 (Sept. 2004), [https://www.dshs.texas.gov/vs/field/docs/vs115\(2\).pdf](https://www.dshs.texas.gov/vs/field/docs/vs115(2).pdf).

<sup>232</sup> See *Death Registration Frequently Asked Questions*, TEX. DEP'T STATE HEALTH SERVS., <http://www.dshs.texas.gov/vs/faq/death.shtm> (last visited July 13, 2017).

<sup>233</sup> *Id.*

<sup>234</sup> See 25 TEX. ADMIN. CODE § 181.2 (2017).

<sup>235</sup> See TEX. HEALTH & SAFETY CODE ANN. § 193.003 (2017).

<sup>236</sup> See *id.* § 193.009.

of the fetus, although miscarriage is natural and unpreventable.<sup>237</sup> To avoid this stigmatization, women may avoid seeking out medical advice against their best interest.<sup>238</sup> Furthermore, after twenty-five years, any person may request information regarding the death of the fetus.<sup>239</sup> Allowing miscarriage records to become public record subjects women to prolonged shame and humiliation by leaving a permanent paper trail to personal hardship.

Arguably, the Due Process Clause of the Fourteenth Amendment should afford even greater protection against unwarranted governmental regulation of miscarriage. Unlike contraceptive use or abortion, miscarriage by definition is not a choice.<sup>240</sup> In light of the constitutional right to privacy protecting decisions about whether and how to have a child, the natural and unintended consequences of such decisions should warrant similar constitutional protection. By this logic, mandating interment or cremation for miscarried fetal remains is impermissible state regulation of private matters.

### III. A CONSTITUTIONAL ALTERNATIVE: SENSITIVE DISPOSAL GUIDELINES

In failing the most forgiving level of constitutional review, government mandate of interment or cremation emerges irremediable. As demonstrated, states have no legitimate interest in regulating fetal disposal in furtherance of fetal dignity.<sup>241</sup> Furthermore, fetal disposal laws bear no rational relation to the advancement of public health.<sup>242</sup> Any statutory distinction between the disposal of fetal remains and other forms of pathological waste impinges on the constitutional protections provided by the Due Process Clause of the Fourteenth Amendment.<sup>243</sup> In light of these problematic conclusions, it is clear that current fetal disposal laws must be struck down.

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<sup>237</sup> Cf. *Miscarriage*, MEDLINE PLUS, <https://medlineplus.gov/ency/article/001488.htm> (last visited July 13, 2017) (defining miscarriage as a “naturally occurring event” that causes spontaneous loss of a fetus before the twentieth week of pregnancy).

<sup>238</sup> Cf. Sian Ferguson, *6 Loving Ways to Practice Self-Care After a Miscarriage*, EVERYDAY FEMINISM (Sept. 15, 2015), <http://everydayfeminism.com/2015/09/self-care-after-miscarriage/> (“Plenty of people avoid medical care for fear of the stigma relating to miscarriage: They’re afraid they will be shamed or judged for having a miscarriage . . .”).

<sup>239</sup> See *supra* notes 235–38 and accompanying text.

<sup>240</sup> See Kristeen Moore & Jacquelyn Cafasso, *Miscarriage*, HEALTHLINE (Dec 22, 2016), <http://www.healthline.com/health/miscarriage>.

<sup>241</sup> See *supra* pp. 13–14.

<sup>242</sup> See *supra* pp. 14–15.

<sup>243</sup> See *supra* pp. 14–23.

It is important to note that this conclusion, without more, fails to meaningfully reflect the religious and personal beliefs held by community members that led to the enactment of fetal disposal laws.<sup>244</sup> Many Americans sincerely believe that life begins at conception.<sup>245</sup> Under this view, fetuses are no different than postnatal human beings. Accordingly, disposing of fetal remains alongside “trash” diminishes the value of human life.<sup>246</sup> The pro-life movement finds current medical waste disposal practices deeply offensive.<sup>247</sup> Such persons often believe that interment and cremation, practices endowed with extensive religious and cultural importance, are the only appropriate methods of final disposition for human beings.<sup>248</sup> In acknowledging the sensitivity surrounding final disposition, some states already statutorily permit parental wishes to be reflected in the disposal of fetal remains.<sup>249</sup>

Although the government cannot mandate interment or cremation in furtherance of fetal dignity, a more equitable solution may be state guidelines regarding sensitive disposal of fetal remains. Other

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<sup>244</sup> See, e.g., Micaiah Bilger, *Abortion Activists Oppose Dignified Burials of Babies Killed in Abortions*, LIFE NEWS.COM (Oct. 11, 2016, 10:33 AM), <http://www.lifenews.com/2016/10/11/abortion-activists-oppose-dignified-burials-of-babies-killed-in-abortions/> (positing abortion activists’ outrage at fetal disposal laws as a denial of the scientific fact that “unborn babies are unique, living human beings from the moment of conception”); *Burial Shows Reverence for Miscarried Baby’s Body*, ELIZABETH MINISTRY INT’L RETREAT & RES. CTR., [http://www.elizabethministry.com/files/Burial\\_Shows\\_Reverence\\_For\\_Miscarried\\_Baby.pdf](http://www.elizabethministry.com/files/Burial_Shows_Reverence_For_Miscarried_Baby.pdf) (“The rituals, memorials, burial service and other support offered will provide families the opportunity to remember their child. Yet, few faith communities honor the unborn child, who died through miscarriage, with a proper Christian burial.”).

<sup>245</sup> See Steven Ertelt, *Poll: 66% of Americans Say Unborn Babies Are People, 52% Say Life Begins at Conception*, LIFE NEWS.COM (Apr. 8, 2015, 2:57 PM), <http://www.lifenews.com/2015/04/08/poll-66-of-americans-say-unborn-babies-are-people-52-say-life-begins-at-conception/>.

<sup>246</sup> See Courtney O’Brien, *Pro-Life Bill Exposes How Abortion Clinics Flush Aborted Babies Down Sewers*, LIFE NEWS.COM (Feb. 19, 2015, 1:54 PM), <http://www.lifenews.com/2015/02/19/pro-life-bill-exposes-how-abortion-clinics-flush-aborted-babies-down-sewers/>; see also Kevin Kukla, *How Do Abortionists Handle the Disposal of Aborted Fetuses? Would You Believe the Landfill?*, PRO LIFE 365.COM (Dec. 14, 2015), <http://prolife365.com/disposal-of-aborted-fetuses/>.

<sup>247</sup> See Paprocki, *supra* note 186.

<sup>248</sup> See Rebecca Rae Anderson, *Religious Traditions and Prenatal Genetic Counseling*, AM. J. MED. GENETICS PART C: SEMINARS MED. GENETICS, Feb. 15, 2009, at 13-14.

<sup>249</sup> See, e.g., 210 ILL. COMP. STAT. 85/11.4 (2017) (requiring hospitals to inform mother that she has the right to arrange for burial or cremation); MO. REV. STAT. § 194.378 (2017) (allowing mother the right to determine method of final disposition); H.B. 635, 84th Leg., Reg. Sess. (Tex. 2015) (permitting parents to elect to bury stillborns).

countries recommend sensitive management of fetal tissue. For example, the Human Tissue Authority (“HTA”), an executive agency within the United Kingdom’s Department of Health, provides guidance as to the minimum standard expected for sensitive “disposal of pregnancy remains resulting from pregnancy loss or termination of pregnancy in a clinical setting.”<sup>250</sup> These guidelines recognize that the disposal needs of patients vary and therefore recommend flexibility with regard to the performance of the patient’s individual disposal wishes.<sup>251</sup> Furthermore, the HTA’s recommendations limit the imposition of significant administrative or logistic burdens on abortion providers as to not create an undue burden impeding abortion access. Sensitive disposal may take a variety of forms; however, the HTA’s guidelines illustrate several options that would allow states to affirm the dignity of the unborn without infringing on women’s constitutional rights.

Under the HTA’s recommendations, a woman who decides to electively terminate a pregnancy should know that she has the right to designate the disposal method of the remains within reasonable limit.<sup>252</sup> At a minimum, a woman should be informed that there are legal options available for the final disposition of the fetus.<sup>253</sup> Upon request, the abortion provider should provide information regarding how the facility will dispose of the remains under state law and that the woman may designate an alternative method that aligns with her cultural, religious, or personal beliefs.<sup>254</sup> Nevertheless, many women do not care to be informed about available disposal methods and should be permitted to decline this offer of information.<sup>255</sup> In this way, women who are interested in exercising their disposal rights are able to opt in without interfering with the rights of other women who prefer to refrain from making disposal decisions.

State law should always allow for interment and cremation in addition to the state-approved methods of pathological waste disposal.<sup>256</sup> In doing so, state law will not impermissibly distinguish between fetal remains and pathological waste, but rather permit

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<sup>250</sup> HUMAN TISSUE AUTH., GUIDANCE ON THE DISPOSAL OF PREGNANCY REMAINS FOLLOWING PREGNANCY LOSS OR TERMINATION 2 (2015), [https://www.hta.gov.uk/sites/default/files/Guidance\\_on\\_the\\_disposal\\_of\\_pregnancy\\_remains.pdf](https://www.hta.gov.uk/sites/default/files/Guidance_on_the_disposal_of_pregnancy_remains.pdf).

<sup>251</sup> *See id.* at 2-3.

<sup>252</sup> *See id.*

<sup>253</sup> *See id.* at 3.

<sup>254</sup> *See id.*

<sup>255</sup> *See id.*

<sup>256</sup> *See id.* at 5-6.

additional disposal methods over the constitutional floor. Interment and cremation, however, must be available only at an additional cost to the individual patient, thereby alleviating the possibility of imposing an undue burden on abortion access by raising the provider's overall disposal costs. Should a provider be unable to arrange for the requested disposition method, it should allow the woman the opportunity to make her own arrangements pursuant to state law.<sup>257</sup>

Another HTA recommendation is for "pregnancy remains [to] be subject to a different process from clinical waste."<sup>258</sup> To the extent that fetal remains are indistinguishable from pathological waste in terms of infectious risk, this assertion is irrational and its implementation would thus likely constitute an undue burden.<sup>259</sup> Yet, separate storage of fetal remains until final disposition would recognize the legitimacy of conflicting points of view about the nature of fetal material without imposing substantial financial burden on abortion providers. In this way, separate storage could serve as a compromise that respects that statutory distinctions are impermissible but is also sympathetic to the concerns of many women. For abortion providers, separate storage would merely entail placing all aborted material in a single receptacle as is done now. On the other hand, hospitals would face a more substantial obstacle by having to sort general pathological matter and fetal remains into separate bags. This procedural burden would be optional, however, as the hospital has the ultimate choice as to whether or not to comply with the state recommendations of sensitive disposal.

Due to the private nature of non-clinical, spontaneous pregnancy loss, miscarriage is best understood as beyond government regulation.<sup>260</sup> With the consult of her doctor, a woman experiencing a miscarriage should dispose of the fetal material practically and in accordance with her personal wishes. The state has no place extending its reach into her home to regulate this disposal, whether by way of sensitive disposal guidelines or by mandate.<sup>261</sup> To do so is to violate a woman's constitutional right to privacy regarding matters profoundly personal.<sup>262</sup>

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<sup>257</sup> *See id.* at 5.

<sup>258</sup> *Id.* at 7.

<sup>259</sup> *See supra* pp. 14-15, 20.

<sup>260</sup> *See supra* pp. 24-25.

<sup>261</sup> *See id.*

<sup>262</sup> *See id.*

## CONCLUSION

In light of the current political climate, pro-choice advocates are preparing for the worst.<sup>263</sup> Their fears are not completely unfounded; during his 2016 campaign, President Donald Trump swore to overturn *Roe* and return abortion regulation to the states.<sup>264</sup> As Governor of Indiana, Vice President Mike Pence slashed funding for Planned Parenthood while banning women from obtaining an abortion because of the race, gender, or disability of the fetus.<sup>265</sup> Thousands of women rushed to get intrauterine devices after Election Day, concerned that executive order would overturn the provision of the Affordable Care Act that requires insurers to provide contraceptive coverage within Trump's first 100 days.<sup>266</sup> Furthermore, historically anti-choice Republicans now control a record sixty-eight percent of the ninety-eight partisan state legislative chambers in the nation, in addition to holding the majority in both the House and the Senate.<sup>267</sup> For these reasons, the future of access to low-cost reproductive healthcare is uncertain.

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<sup>263</sup> See Becca Andrews, *Trump Can't Overturn Roe, but He Will Still Be a Nightmare for Abortion Rights*, MOTHER JONES (Nov. 21, 2016, 7:58 PM), <http://www.motherjones.com/politics/2016/11/abortion-rights-trump-repeal-roe-heres-damage-he-can-do>; Willie Parker, *'We Must Take Action': An Abortion Doctor in the South on the Future Under Trump*, BROADLY (Nov. 23, 2016, 11:15 AM), [https://broadly.vice.com/en\\_us/article/we-must-take-action-an-abortion-doctor-in-the-south-on-the-future-under-trump](https://broadly.vice.com/en_us/article/we-must-take-action-an-abortion-doctor-in-the-south-on-the-future-under-trump).

<sup>264</sup> See Chris Riotta, *What Happens to Abortion Access Under President Donald Trump After Election Day*, INT'L BUS. TIMES (Nov. 9, 2016, 2:33 AM), <http://www.ibtimes.com/what-happens-abortion-access-under-president-donald-trump-after-election-day-2442888>.

<sup>265</sup> See Hannah Levintova, *Mike Pence Has Led a Crusade Against Abortion Access and LGBT Rights*, MOTHER JONES (July 14, 2016, 5:04 PM), <http://www.motherjones.com/politics/2016/07/donald-trump-mike-pence-vice-president-abortion-gay>.

<sup>266</sup> See Soumya Karlamangla, *Women Rush to the Doctor for Birth Control, Fearing Trump Will Limit Access to Contraception. But Will He?*, L.A. TIMES (Nov. 15, 2016, 5:00 AM), <http://www.latimes.com/local/california/la-me-contraception-trump-20161115-story.html>; Erin Ross, *Women Rush To Get Long-Acting Birth Control After Trump Wins*, NPR (Nov. 11, 2016, 5:00 AM), <http://www.npr.org/sections/health-shots/2016/11/11/501611813/women-rush-to-get-long-acting-birth-control-after-trump-wins>.

<sup>267</sup> See Karoun Demirjian, *Republicans Keep Control of Congress After Decisive Senate Wins in Missouri, Pennsylvania, Indiana, Wisconsin and N.C.*, WASH. POST (Nov. 9, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/11/08/senate-house-majorities-hang-in-the-balance-on-election-day/>; Barbara Hollingsworth, *Republicans Now Control Record Number of State Legislative Chambers*, CNS NEWS (Nov. 16, 2016, 4:47 PM), <http://www.cnsnews.com/news/article/barbara-hollingsworth/after-winning-7-more-seats-gop-dominance-state-legislatures-all>.

It is improbable, however, that the Trump administration will be able to overturn forty-three-year-old precedent hastily, if at all.<sup>268</sup> While *Roe* remains in force, the Constitution guarantees practical access to abortion prior to viability.<sup>269</sup> Without significant shifting of the political ideologies of the current Supreme Court justices, the lower courts will continue to apply *Casey*'s undue burden framework when determining the constitutionality of abortion regulations.<sup>270</sup> Moreover, pro-choice advocates stand ready to defend meaningful access to reproductive healthcare.<sup>271</sup>

Pro-choice advocates can attack the fallibility of government mandate of interment or cremation on three distinct bases in the coming months. Without sufficient evidence that current disposal practices fail to eliminate the biohazard presented by fetal remains, the government cannot single out such material by legislating onerous disposal methods.<sup>272</sup> Any imposition of additional costs and

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<sup>268</sup> See Lisa Ryan, *Could a Trump Administration Overturn Roe v. Wade?*, N.Y. MAG (Nov. 14, 2016, 4:27 PM), <http://nymag.com/thecut/2016/11/could-a-trump-administration-overturn-roe-v-wade.html>.

<sup>269</sup> See *Roe v. Wade*, 410 U.S. 113, 163 (1973).

<sup>270</sup> Cf. Emily Crockett, *Roe v. Wade Isn't Doomed Under Trump. But It's Not Safe, Either.*, VOX (Nov. 11, 2016, 10:46 AM), <http://www.vox.com/policy-and-politics/2016/11/10/13579630/trump-abortion-supreme-court-overturn-roe-v-wade> (contending that even with the appointment of an ultraconservative justice, there exists a five person majority that would not vote to overturn *Roe*); Mark Joseph Stern, *Is Roe v. Wade Really Doomed by Donald Trump?*, SLATE (Dec. 8, 2016, 8:15 AM), [http://www.slate.com/blogs/xx\\_factor/2016/12/08/is\\_roe\\_v\\_wade\\_really\\_doomed\\_by\\_donald\\_trump.html](http://www.slate.com/blogs/xx_factor/2016/12/08/is_roe_v_wade_really_doomed_by_donald_trump.html) (arguing that it is unlikely that any liberal justice will retire or die in the next four years). *But see, e.g.*, Erwin Chemerinsky, *So Long Roe vs. Wade? President Trump's Most Lasting Legacy Could Be Radical Change at the Supreme Court*, L.A. TIMES (Nov. 9, 2016, 11:03 PM), <http://www.latimes.com/opinion/op-ed/la-oe-chemerinsky-trump-effect-on-supreme-court-20161109-story.html> (maintaining that if one liberal justice leaves the Court, "[t]here almost certainly will be a majority to overrule *Roe vs. Wade* and allow states to prohibit abortions").

<sup>271</sup> See, e.g., Katie Klabusich, *Reproductive Rights Defenders Promise 'Good Trouble' in 2017*, REWIRE (Jan. 6, 2017, 10:00 AM), <https://rewire.news/article/2017/01/06/reproductive-rights-defenders-good-trouble-2017/> (describing activist efforts to overturn the Hyde Amendment); Hannah Levintova, *As Trump Presidency Nears, Pro-Choicers Mount Lawsuits Against Anti-Abortion Laws*, MOTHER JONES (Dec. 1, 2016, 7:11 PM), <http://www.motherjones.com/politics/2016/11/reproductive-rights-groups-launch-wave-lawsuits-challenging-abortion-laws> (discussing the three lawsuits filed in North Carolina, Alaska, and Missouri challenging restrictive abortion laws); Elizabeth Strassner, *7 Politicians Fighting Tooth and Nail for Your Reproductive Rights in 2017*, BUSTLE (Dec. 27, 2016), <https://www.bustle.com/articles/200588-7-politicians-fighting-tooth-and-nail-for-your-reproductive-rights-in-2017> (enumerating politicians that will fight to protect access to reproductive healthcare).

<sup>272</sup> See *supra* Part II.A.

administrative burdens is unjustified, as fetal disposal laws provide no demonstrated medical benefit to women.<sup>273</sup> Furthermore, fetal disposal laws impermissibly reach into the home to police miscarried fetal remains and thus breach constitutional notions of privacy.<sup>274</sup> Government mandate of interment or cremation will not survive judicial review.

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<sup>273</sup> See *supra* Part II.B.

<sup>274</sup> See *supra* Part II.C.